

Part C – Decision Under Appeal

The decision under appeal is the Ministry of Social Development and Poverty Reduction (the Ministry) decision dated June 5, 2023, denying persons with disabilities (PWD) designation.

The Ministry found the Appellant met the age (over 18) requirement. However, the Ministry found the Appellant did not meet the requirements for:

- severe mental or physical impairment
- duration (impairment likely to last more than two years)
- 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 in person, with the Ministry joining by telephone.

Evidence Before the Ministry at Reconsideration:

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

- Medical Report completed by a Physician, dated February 3, 2022
- Assessor Report completed by the same Physician, dated February 3, 2023
- Surgical Operation Note from a Plastic Surgeon, dated March 4, 2023
- Consultation Reports from the Plastic Surgeon, dated August 23, 2022 and April 14, 2023
- Physiotherapy Clinical Note dated May 5, 2023
- Hospital Emergency Department Patient Discharge Summary dated May 18, 2023
- Appellant’s written statement in Request for Reconsideration.

Medical Report:

The Physician states that they have seen the Appellant between two and ten times in the previous twelve months.

Diagnosis:

The Physician provides diagnoses of carpal tunnel syndrome (onset June 2021), cervical spine neural foraminal narrowing (onset June 2021) and major depressive disorder (onset January 2022).

Health History:

The Physician states that the Appellant has:

- persistent pain in the left and right wrist, with surgery for carpal tunnel syndrome scheduled for February 24, 2023
- neck pain with radiation to both hands, and associated numbness and tingling
- depressed mood with decreased motivation, attention, memory, sleep, appetite, and energy levels
- social withdrawal from friends and family, and no immediate supports available.

Functional Skills:

The Physician indicates that the Appellant can:

- walk 4+ blocks unaided on a flat surface
- climb 5+ steps unaided
- remain seated with no limitation.

The Physician indicates that the Appellant can do no lifting. They also indicate that the Appellant has significant deficits with cognitive and emotional functioning in the areas of:

- memory
- emotional disturbance
- motivation
- attention or sustained concentration.

Assessor Report:

The same Physician completed the Assessor Report, one year later, indicating that they have seen the Appellant between two and ten times in the previous twelve months.

Mental or Physical Impairment:

The Physician states that the Appellant has:

- persistent pain in both wrists
- difficulty lifting
- neck pain
- pain radiation to bilateral hands
- depression and social withdrawal.

Mobility and Physical Ability:

The Physician indicates that the Appellant is independent walking indoors and outdoors, climbing stairs and standing. They indicate that the Appellant needs continuous assistance from another person, or is unable, to lift, carry and hold items.

Cognitive and Emotional Functioning:

The Physician indicates that the Appellant's mental impairment has a major impact on emotion. They indicate that the mental impairment has a moderate impact on bodily functions, attention/concentration, memory, and motivation.

Daily Living Activities:

The Physician indicates that the Appellant is independent in all daily living activities listed on the form, except shopping and social functioning. They indicate that she takes significantly longer than typical to carry purchases home from shopping and state that she takes one to two hours for grocery shopping.

Social Functioning:

The Physician indicates that the Appellant needs continuous support/supervision to develop and maintain relationships, stating that she has withdrawn from family and friends due to depression. The Physician indicates that the Appellant has very disrupted functioning with her immediate and extended social networks.

Assistance Provided for Applicant:

The Physician states, "patient is not receiving any help" and "social work services may be beneficial."

Self Report:

The Appellant did not complete the Self Report section of the Application.

Surgical Note and Consultation Reports:

The Plastic Surgeon confirms that the Appellant had surgery for carpal tunnel syndrome on her left wrist on February 24, 2023, and is going to have the same surgery on her right wrist in the future.

In the August 23, 2022 Consultation Report the Plastic Surgeon states that the Appellant has:

- numbness and tingling in her fingers that wakes her two or three times a night
- persistent numbness in her thumb, index, long finger, and ring fingers
- severe pain in her hands
- stiffness in the joints in the morning, and swelling in the fingers and hands
- numbness and tingling when holding a telephone, holding a book to read, doing her hair, writing, sewing, holding tools, eating, and gripping objects
- occasionally dropped objects
- injured or burned herself due to lack of sensation in her fingers.

The April 14, 2023 Consultation Report is identical in wording, except that it refers to symptoms in the right hand only. The report indicates “left carpal tunnel syndrome”, which the Panel takes to be an error, as the report states that the Plastic Surgeon has submitted a request for surgery on the right wrist.

Physiotherapy Note:

The Appellant has had physiotherapy treatment for bilateral shoulder and low back pain.

Emergency Discharge Summary:

The Appellant attended the Emergency Department on May 18, 2023, for symptoms related to calcific tendonitis in her right shoulder.

Additional Evidence:

Appellant:

In the Request for Reconsideration, the Appellant states:

- she struggles with pain, numbness and tingling even after the surgery
- she is waiting for surgery on her right hand, and in the meantime has no grip strength in that hand
- she expects it will be another two years before the next surgery
- her condition affects her daily living and she is unable to work.

At the hearing, in answer to questions from the Panel, the Appellant said:

- she did not complete the Self Report because an Advocate filled out the Application form for her;
- by the date of the Assessor Report she had seen the Physician close to ten times;
- she performs daily living activities independently because she has no one to help her;
- she needs help all the time but she does not want to ask for help, and does not have anyone she can ask;
- she tries to be independent, even though she has pain;

- her left hand is not 100% better, but it is better than before the surgery, although she still has pain sometimes;
- she can carry her groceries home with a wheeled cart, and she only buys the items she can carry;
- she is not having any treatment for depression and does not want to go to a psychiatrist;
- the Physician did not want to get involved in this application and got mad at her when she asked him to fill out the form, even though she begged him.

Admissibility of Additional Evidence:

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

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) requirement. However, the Ministry found the Appellant did not meet the requirements for:

- severe mental or physical impairment
- duration (likely to last more than two years)
- 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 is applying for PWD designation because the money she receives from the Ministry is not enough, and she is not able to work while she waits for surgery. She needs additional money to buy healthy food and supplements. She also needs to move from her current transition housing in a neighbourhood with serious social problems, for her mental health.

Although her left wrist is better since the surgery, and the numbness and burning feelings are gone, she still has pain in that wrist. She continues to have pain in her right wrist, and is awaiting surgery, with no date scheduled yet. She also has pain in her shoulder. She says that she needs help all the time, but she tries to be independent despite the pain because she has no one she can ask for help.

She says she is not able to get new evidence for the hearing because it takes a long time to get an appointment with her doctor, and then the time is very limited. Her doctor also does not want to be involved in the application or complete the forms.

Ministry Position:***Physical Impairment:***

The Ministry is not satisfied that the Appellant has a severe physical impairment. While the Physician indicates that the Appellant cannot lift anything, the Ministry notes that the Physician indicates that the Appellant is independent in daily living activities that require lifting, such as personal care, laundry, and housekeeping. The Ministry also says that the Appellant has had successful surgery on her left wrist, which would result in less restriction.

Mental Impairment:

The Ministry argues that the Appellant does not have a severe mental impairment. They note that the Physician indicates major impact on only one area of cognitive and emotional functioning listed in the Assessor Report. Further, the Ministry says that, as the Appellant is independent in daily living activities such as personal care, making appropriate choices when shopping, managing finances and medication and taking public transportation, the Appellant does not have a severe mental impairment.

Duration:

The Ministry maintains that the Physician has not indicated that the Appellant's impairment is likely to continue for two years.

Daily Living Activities:

The Ministry says that, according to the Physician, the Appellant is independent in all daily living activities except that she takes one to two hours for grocery shopping. While the Physician has indicated that the Appellant needs continuous support to develop and maintain relationships, they indicate that she is independent in all other areas of social functioning. Although the Physician says that the Appellant has extremely disrupted functioning with social networks, the Ministry maintains that it is unclear why she is so disrupted, when the Physician also says that she does not need support or supervision for other aspects of social functioning. Therefore, the Ministry says that there is not enough evidence to confirm that, in the opinion of a prescribed professional, the Appellant is directly and significantly restricted in her ability to perform daily living activities.

Help Required:

The Ministry says that, as it has not been established that daily living activities are significantly restricted, 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. If the inability to work is the major reason for applying for PWD designation, the Panel encourages the applicant to speak to the Ministry about other potential programs such as Persons with Persistent Multiple Barriers to Employment (PPMB) or explore federal government programs such as Canada Pension Plan disability benefits.

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.

1. Physical Impairment:

The Panel finds that the Ministry was reasonable in its determination that, based on the medical information, the Appellant does not have a severe physical impairment.

The Appellant is in the process of receiving treatment for carpal tunnel syndrome. While the Physician indicates that the Appellant is unable to lift, and needs continuous assistance to lift, carry or hold items, the Panel notes that the Medical and Assessor Reports were completed before the Appellant's first surgery on her left wrist. The Plastic Surgeon confirms that numbness and tingling on the left resolved after the surgery. While the Appellant is still limited in her ability to lift, carry, and hold items with her right hand, she now has greater ability to use her left hand.

The Panel also notes significant inconsistencies in the Medical and Assessor Reports. While the Physician states that the Appellant can do no lifting, they also indicate that she is independent in activities that would involve lifting, such as housekeeping, laundry and shopping. It may be that the Physician indicates the Appellant is independent in those activities because she has no one to help her. However, it is reasonable for the Ministry to require clear and unambiguous evidence that an impairment is severe.

The Panel also notes that, in the Consultation Reports, the Plastic Surgeon states that the Appellant has intermittent paresthesia that causes her to drop objects and burn herself. They list many daily activities, such as doing her hair, eating, and holding tools, that cause numbness and tingling. The Panel finds that the Ministry's statement in the reconsideration decision that the additional medical evidence does not "speak to limitations/restrictions in [the Appellant's] ability to perform daily living activities" is not accurate. However, the Panel also finds that the degree of impairment described by the Plastic Surgeon is moderate, rather than severe, as the Appellant agrees that she manages to function without assistance day-to-day.

Both the Physician who completed the Medical and Assessor Reports and the Emergency Physician who completed the Emergency Discharge Summary confirm that the Appellant has pain related to calcific tendonitis, but they do not identify impairment of physical function resulting from that condition.

Therefore, the Panel finds that the Ministry's determination that, based on the medical information, the Appellant's physical impairment is not severe, is reasonable.

2. Mental Impairment:

The Panel finds that the Ministry was reasonable in its determination that, based on the medical information, it was not satisfied that the Appellant has a severe mental impairment.

Again, the Panel notes material inconsistencies in the Medical and Assessor Reports. The Physician identifies significant deficits in cognitive and emotional functioning, with major impact on emotion and moderate impact on bodily function, attention/concentration, memory, and motivation. The Physician also indicates very disrupted functioning with immediate and extended social networks. At the same time, the Physician indicates that the Appellant is independent in all areas of social functioning, except that she has withdrawn from family and friends due to depression. On the other hand, the Appellant says that she does talk to her family, and has no problem talking with other people, although she admits to crying sometimes because she is alone and has problems.

The Panel would place greater weight on the evidence of the Physician about the Appellant's mental functioning but finds that the Physician's statements do not consistently identify a severe mental impairment. Therefore, the Panel finds that the Ministry was reasonable in its determination that the information provided does not indicate a severe mental impairment.

Duration of Impairment – at least two years

The legislation requires a medical or nurse practitioner to provide an opinion that the applicant's impairment is likely to continue for at least two years.

In the section of the Medical Report that asks about expected duration of the impairment, the Physician did not indicate "yes" or "no" to the question "Is the impairment was likely to continue for two years or more from today?" They add the explanation "unknown" and "patient's condition to be reassessed." The Physician may be intending to indicate an impairment of indefinite duration. However, the Panel finds that it is reasonable for the Ministry to require a clear statement that the impairment will continue for at least two years, to determine that the criterion for duration has been met.

The Panel finds that the Ministry was reasonable in its determination that the information provided by the Physician does not confirm that the Appellant's impairment will continue for at least two years.

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 finds that the information provided by the Physician does not confirm direct and significant restrictions to the Appellant's ability to perform two or more Activities. The Physician indicates only one restriction in shopping for personal needs, indicating that the Appellant takes one to two hours for grocery shopping. The Plastic Surgeon indicates that the Appellant has dropped objects occasionally and burned herself due to lack of sensation in the fingers, which could indicate some restrictions in meal preparation. However, the Physician indicates the Appellant is independent in cooking and food preparation, and the Panel finds that the occasional difficulties the Plastic Surgeon describes are not a significant restriction.

The Physician's statements about social functioning in the Medical and Assessor Reports are inconsistent. Very disrupted functioning in immediate and extended social networks can be a significant restriction in Activities. However, the Physician also indicates that the Appellant is independent, and does not require support or supervision, for all aspects of social functioning listed in the Assessor Report. With no further explanation available, and the Appellant's evidence that she is able to communicate with others and is in contact with her family, the Panel finds that the Ministry was reasonable in its determination that the medical information does not establish a significant restriction in Activities related to social functioning.

The Panel finds that the Ministry was reasonable in its determination that the limitations described in the Medical and Assessor Reports and the additional medical information did not indicate a significant overall restriction in the Appellant's ability to perform two or more 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 reasonable in determining that the Appellant was not directly and significantly restricted in her ability to perform Activities, the Panel finds that the Ministry was also reasonable in determining that it could not find that the Appellant needs help to perform those Activities.

Conclusion:

The Panel finds that the Ministry's decision to deny the Appellant PWD designation was reasonably supported by the evidence. The Panel confirms the reconsideration decision. The Appellant is not 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)
2023/07/10

Print Name
Peter Mennie

Signature of Member

Date (Year/Month/Day)
2023/07/10

Print Name
Diane O'Connor

Signature of Member

Date (Year/Month/Day)
2023/07/10