

Part C – Decision Under Appeal

The decision under appeal is the Ministry of Social Development and Poverty Reduction (the Ministry) decision dated June 16, 2023, denying persons with disabilities (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 the hearing by telephone from a separate location.

Evidence Before the Ministry at Reconsideration:

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

- Medical Report and Assessor Report completed by a Doctor
- Consult Report from a Neurologist
- Diagnostic Imaging Report of the right shoulder

Medical Report:

The Doctor states that the Appellant has been their patient since 2017, and they have seen her between 2 and 10 times in the past 12 months.

Diagnosis:

The Doctor provides diagnoses of epilepsy (onset 1993), bilateral carpal tunnel syndrome (CTS) (onset not stated) and right shoulder tendon tear (onset not stated).

Health History:

The Doctor states that the Appellant:

- Takes anti-seizure medication to control epilepsy, and reports side effects of dizziness and blurry vision
- Has tingling, numbness and pain due to bilateral CTS
- Has ongoing right shoulder pain due to tendon tear and inflammation.

The Doctor says that medications interfere with the Appellant's ability to perform daily living activities: in addition to anti-seizure medication, with side effects stated above, the Appellant takes gabapentin for pain, which causes drowsiness. She will need to take anti-seizure medication for the rest of her life, and pain medication as needed.

Functional Skills:

The Doctor indicates that the Appellant can:

- Walk 4+ blocks unaided on a flat surface
- Climb 5+ stairs unaided
- Remain seated with no limitation.

They indicate that the Appellant is limited to lifting under 2 kilograms. They state that, "due to right shoulder and bilateral CTS, she is very limited in her ability to carry weight." They also indicate that the appellant has a significant deficit in attention or sustained concentration, explaining that she "has lack of concentration and understanding (due to her seizure disorder) (occasionally)."

Assessor Report:

The same Doctor completed the Assessor Report.

Mental or Physical Impairment:

The Doctor describes the Appellant's mental or physical impairments as:

- Recurrent dizziness and decreased concentration
- Right shoulder and bilateral arms/hands pain.

Mobility and Physical Ability:

The Doctor indicates that the Appellant is independent walking indoors and outdoors, climbing stairs and standing. They indicate that the Appellant needs continuous help from another person or is unable to lift, carry and hold, and takes significantly longer than typical for those activities, "due to right shoulder & CTS."

Cognitive and Emotional Functioning:

The Doctor indicates that the Appellant's mental impairment has a moderate impact on bodily functions, consciousness and attention/concentration, and minimal impact on emotion "due to seizure disorder and shoulder & arms/hands pain."

Daily Living Activities:

The Doctor indicates restrictions as follows:

- Personal Care: Appellant takes significantly longer than typical for dressing, grooming, bathing, feeding self and regulating diet
- Basic Housekeeping: Appellant takes significantly longer than typical for laundry and basic housekeeping
- Shopping: Appellant need continuous assistance from another person or is unable to carry purchases home and takes significantly longer than typical to do so
- Meals: Appellant takes significantly longer than typical for food preparation, cooking and safe storage of food.

The Doctor adds the explanation that restrictions are "due to shoulder condition and CTS" and the Appellant's family helps "as needed and when possible."

Social Functioning:

The Doctor indicates that the Appellant needs periodic support or supervision to develop and maintain relationships, because of lack of concentration due to epilepsy. Again, the Doctor indicates that family helps when needed.

Assistance Provided for Applicant:

The Doctor indicates that family and friends provide help required for daily living activities. They also indicate that the Appellant uses wrist splints for CTS.

Neurologist Consult Report:

The Neurologist states:

- The Appellant reports intermittent numbness in the fingers of both hands, which interferes with sleep, and occurs when lifting heavy bags or doing cleaning work.
- She notices loss of right hand grip strength and has difficulty opening jars.
- She has right-sided neck, shoulder and elbow pain triggered by carrying heavy grocery bags.
- She has epilepsy, with the last seizure in 2004.

- Clinical symptoms are consistent with bilateral CTS, worse on the right; nerve conduction studies indicate mild right CTS.
- They advise the Appellant to “avoid any aggravating activities resulting in repetitive flexion/extension at the wrists.”
- Similarly, they advise the Appellant to avoid activities that aggravate right-sided neck, shoulder, and elbow pain, which is musculoskeletal in etiology.

Diagnostic Imaging Report:

Medical imaging confirms tendinosis and minimal partial thickness tearing of the right shoulder tendon, and minimal bursitis.

Additional Evidence:

Appellant:

At the hearing, the Appellant said:

- Seizures are a major disability for her; she gets seizures during the day, but does not say that is what is happening, rather she just says she is not feeling well.
- When she is having seizures, she cannot go outside.
- She cannot work because of longstanding, serious problems with her hands that prevent her from working.
- Due to pain in her hands, she cannot do simple things around the house, and she cannot sleep.
- Side effects of medication prevent her from doing simple things at home.
- During the hearing she is having to stop every few seconds to switch her phone from one hand to the other, because of serious pain in her hands.
- She could not apply for a driver’s licence because of her seizures.
- She cannot take care of her elderly mother anymore, and instead has to ask her mother for help.

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

- She has seizures between one and three times a month.
- She cleans her house every two weeks and tries to keep the tasks as simple as possible.
- She wears wrist splints every night.
- It takes her a long time to bathe or shower because she has to keep switching hands to wash.
- She washes dishes very slowly, one at a time, taking many breaks in between. She cannot put the dishes up in the cabinet, and it is hard to manage even putting them away at her level.

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 meets the criteria for PWD designation. She says that epilepsy and pain in her shoulder and hands are severe impairments that prevent her from doing daily living activities. She is unable to work, and pain in her hands makes it hard to sleep. Side effects of medication make her drowsy and dizzy. Her Doctor has confirmed that she takes significantly longer than typical to perform personal care, basic housekeeping, and meal preparation, and that she needs continuous assistance to carry purchases home from shopping, because of pain in her shoulder and hands. Her family and friends help her with these activities when they can.

Ministry Position:

The Ministry maintains that, although the Appellant is limited in lifting heavy weights, the evidence does not show a severe impairment of physical functioning. They note the Appellant's ability to walk and climb steps unaided and remain seated without limitation, and say that restrictions in lifting, carrying, and holding alone are not sufficient to meet the criteria in the legislation. They argue that the Appellant can perform all daily living activities without assistance, except carrying purchases home from the store. While the Doctor indicates that the Appellant takes significantly longer than typical to perform some activities, they have not stated how much longer the Appellant takes.

The Ministry says that there is a discrepancy in the Doctor's statements in the Assessor Report. They argue that the Doctor says the Appellant needs continuous assistance and takes significantly longer than typical for lifting, carrying and holding, but then says that the Appellant is independent in daily living activities that would require her to lift weights.

The Ministry also maintains that a severe impairment of mental functioning has not been established. They note that the Doctor notes moderate impacts to only three areas of cognitive and emotional functioning, and no major impacts. While the Doctor states that the Appellant needs periodic support or supervision to develop and maintain relationships, they do not describe the frequency of support or supervision needed. They also note that the Appellant has good functioning with immediate and extended social networks, and there are no safety issues identified.

The Ministry also says that the information provided does not indicate direct and significant restrictions in daily living activities. The Ministry notes the restrictions indicated by the Doctor but says that the Doctor does not say how much longer than typical the Appellant takes to perform the daily living activities listed in the Assessor Report. They also say that the Appellant needs assistance from another person only to carry purchases home from shopping, which does not indicate a significant restriction.

The Ministry says that, as the Neurologist only diagnoses CTS of the right hand, and the Doctor says that the Appellant can walk, climb stairs, stand, and remain seated, the Appellant “has a level of ability which would be expected to allow independence across various areas of daily living activities.”

The Ministry says that, as it has not been established that daily living activities are significantly restricted, it cannot be determined that significant help is required to perform those 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 the information in the Doctor's reports does not establish a severe physical impairment.

The Panel accepts that the Appellant has pain and numbness in both arms and hands, and right-sided pain in her neck, shoulder, and elbow. Both the Doctor and the Neurologist accept that she has symptoms in both hands, worse on the right, although the Neurologist confirms CTS only in the right hand. While it does not appear that pain in the right hand is due to CTS, the Neurologist has advised her to wear splints on both wrists, and there is no suggestion from either physician that she does not have the symptoms she reports on both wrists and hands.

The Appellant says that, despite taking anti-seizure medication, she has epileptic seizures one to three times a month. However, in the Consult Report the Neurologist says that the Appellant last had a seizure in 2004. The Doctor only describes side effects of the medication and does not indicate that the Appellant continues to have seizures, or how often they occur, how long they last, or how long it takes the Appellant to recover from a seizure. The Panel finds that it is reasonable for the Ministry to consider only medical conditions and impairments that are confirmed by the Doctor or the Neurologist. The Doctors have not confirmed that the Appellant continues to have seizures, and therefore it is reasonable for the Ministry to consider only the side effects of anti-seizure medication, in determining mental and physical impairment.

In the Reconsideration Decision, the Ministry also noted the Appellant's ability to walk, climb steps and remain seated, and stated that "is not considered indicative of a severe impairment of physical functioning." At the hearing, the Ministry repeated that restrictions in lifting, carrying, and holding, without other physical impairment, for example in walking, sitting, and standing, could not meet the criteria for PWD designation under the legislation. The Panel finds that it is not reasonable for the Ministry to state that there cannot be a severe physical impairment based on restrictions only in lifting, carrying, and holding, without restrictions in other aspects of physical functioning.

However, in the Appellant's case, the Panel finds that the information in the Medical and Assessor Reports does not confirm a severe physical impairment. The Doctor indicates that the Appellant can lift less than 2 kilograms and takes significantly longer to do a number of activities related to personal care, basic housekeeping, shopping, and meal preparation, due to CTS and right shoulder tendon tear and inflammation. However, the Doctor does not say how much longer the Appellant takes to do these things, which makes it difficult to determine the severity of the impairment. The Doctor does not indicate impairment of function due to epilepsy, other than stating that the Appellant has dizziness, drowsiness and difficulty concentrating, due to side effects of medication. Therefore, the Panel finds that the Ministry was reasonable in determining that the information provided did not establish a severe physical impairment.

2. Mental Impairment:

The Doctor states that the Appellant has recurrent dizziness, drowsiness, and decreased concentration due to side effects of medication. Those side effects do not appear to be severe, as the Doctor indicates only moderate impact on bodily functions, consciousness and attention/concentration, and minimal impact on emotion. The Doctor says that the Appellant

needs periodic support to develop and maintain relationships because of “lack of concentration due to epilepsy,” but they do not indicate the degree and duration of support required. At the same time, the Doctor reports that the Appellant has good functioning with immediate and extended social networks.

The Panel finds that the information provided by the Doctor does not indicate a severe mental impairment. Therefore, the Panel finds that the Ministry was reasonable in its determination that a severe mental impairment has not been established.

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 determine 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 Doctor does not confirm direct and significant restrictions to the Appellant's ability to perform Activities periodically or for extended periods.

At the hearing, the Ministry said that there was a discrepancy in the Doctor's statements in the Medical Report and the Assessor Report. They pointed out that the Doctor indicates that the Appellant needs continuous assistance and takes significantly longer than typical for lifting, carrying, and holding, but then says that the Appellant is independent in daily living activities that would require her to lift weights. When asked for examples of those activities, the Ministry claimed that the Doctor had indicated that the Appellant was independent in all daily living activities listed on the form, except carrying purchases home.

The Panel finds that there is no discrepancy in the Doctor's statements. On the Assessor Report form, the Doctor did not select "independent" for dressing, grooming, bathing, feeding self, regulating diet, laundry, basic housekeeping, food preparation, cooking and safe storage of food. The Doctor has stated that the Appellant takes significantly longer than typical for all those activities, due to shoulder and CTS impairments. In the Medical Report the Doctor indicates that the Appellant can lift under 2 kilograms and needs continuous help from others to lift, carry and hold. The Panel finds that it is not reasonable for the Ministry to assume, without any further information, that the Activities listed on the form would require the Appellant to lift more weight than the Doctor indicates in the Medical Report, or that she should be considered "independent" in doing them, when the Doctor has stated that the Appellant takes significantly longer than typical to perform those Activities.

However, the Panel finds that there is not enough information in the Medical Report and the Assessor Report to show that the Appellant has a significant restriction in two or more Activities. The Doctor has indicated restrictions in preparing meals, shopping for personal needs, performing housework and shopping for personal needs, stating that the Appellant takes significantly longer than typical. However, the Doctor does not explain how much longer the Appellant takes to perform the Activities or what help is provided by family "as needed and when possible." The Appellant says that she is able to clean her house every two weeks. While she says she does other Activities, such as washing dishes or bathing, very slowly, it is not clear how much longer she takes, to be able to determine if she is significantly restricted in performing those Activities.

Therefore, the Panel finds that the Ministry was reasonable in its determination that there was not enough evidence to confirm that the Appellant's ability to perform Activities is directly and 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.

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)

Print Name

Julie Iuvancigh

Signature of Member

Date (Year/Month/Day)

August 1, 2023

Print Name

Peter Mennie

Signature of Member

Date (Year/Month/Day)