

Part C – Decision Under Appeal

The decision under appeal is the Ministry of Social Development and Poverty Reduction (“Ministry”) decision dated July 31, 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 and 72

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 Advocate.

The Advocate had sent additional evidence to the Tribunal the day before the hearing, but that evidence was not received. The additional evidence was a letter from the Doctor, a letter from the Advocate, and a series of screenshots of texts between the Advocate and the Appellant. At the hearing, the Appellant was able to re-send the letters, but was not able to send the screenshots of texts. The Advocate stated that the letters captured the content of the texts, so she and the Appellant confirmed that they wanted to proceed with the hearing with only the letters as additional evidence. After a 15 minute adjournment to review the documents, the Ministry confirmed they were satisfied they had enough time to consider the letters from the Doctor and the Advocate and the Ministry was ready to proceed.

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
- Appellant's Self Report
- Letter from a Social Worker
- Appellant's statement in their Request for Reconsideration.

Medical Report:

The Doctor states that the Appellant has been their patient since 2015, and they have seen the Appellant between two and ten times in the past twelve months.

Diagnosis:

The Doctor provides diagnoses of Cerebellar Astrocytoma (onset December 2011) and Anxiety (onset November 2021).

Health History:

The Doctor states that, since the Astrocytoma excision in 2011, the Appellant "struggles with behavior and impulse control" which affect their relationships and work. Anxiety also has an effect on the Appellant's concentration and memory. The Appellant also has longstanding gender dysphoria and is undergoing treatment. The Appellant takes medication for anxiety.

Functional Skills:

The Doctor indicates that the Appellant can walk 4+ blocks unaided on a flat surface and climb 5+ stairs unaided.

The Doctor indicates that the Appellant has significant deficits with cognitive and emotional function, in the areas of executive function, memory and emotional disturbance. They state: "Quick to mental fatigue + overwhelm with anxiety and secondary [illegible] focus/memory and organization."

Assessor Report:

Mental or Physical Impairment:

The Doctor states that the Appellant's mental or physical impairments that impact their ability to manage daily living activities are anxiety and primary right-sided fatigue.

Ability to Communicate:

The Doctor indicates that the Appellant has good ability to communicate, except that the Appellant has difficulty communicating if they become anxious.

Mobility and Physical Ability:

The Doctor indicates that the Appellant is independent in all areas of mobility and physical ability listed on the form.

Cognitive and Emotional Functioning:

The Doctor indicates that the Appellant's mental impairment has moderate impact on daily functioning in the areas of emotion, insight and judgment and attention/concentration. They indicate minimal impact on daily functioning in the areas of impulse control, executive function, memory, and motivation.

Daily Living Activities:

The Doctor indicates that the Appellant is independent in daily living activities, except that the Appellant needs periodic assistance from another person for:

- Grooming and bathing (Appellant needs reminders or will "forget" or have low motivation)
- Basic housekeeping (Appellant needs reminders to keep clean and remove garbage)
- Paying rent and bills (Appellant is "currently in a financial pickle due to [their] poor management"; Doctor notes "impulsive spending")

Under Social Functioning, the Doctor indicates that the Appellant needs periodic support or supervision to interact appropriately with others (“feels a little ‘clueless’ with others’ thoughts”) and dealing appropriately with unexpected demands (“difficult for [them] if on [their] own”).

Assistance Provided for Applicant:

The Doctor states that help required for daily living activities is provided by father, siblings and “online friends”.

Self Report:

The Appellant states:

- Lingering effects of the brain tumour include frequent headaches, fatigue, difficulty with memory and concentration, and effect on executive function
- The right side of their body is weaker
- Their balance is affected, their hand shakes, and standing for prolonged periods of time (3+ hours) is very hard
- Hand/eye coordination has never recovered
- Writing causes their arm to get fatigued very quickly
- They must limit their physical activity and allow more rest time to manage fatigue
- They need memory aids like their phone calendar and reminders to remember important tasks and appointments
- They have difficulty taking medication as prescribed and following a diet
- Their brain tumour makes it difficult to manage impulsivity and finances
- They are unable to work more than about twenty hours a week without burning out.

Letter from the Social Worker:

The Social Worker states that they have met with the Appellant “a few times” and spoken with their support worker who has known the Appellant “for some time”. The Social Worker states that their observations are based on the Appellant’s “worst day.”

- *Severity of Impairment:*
 - The Social Worker states that Medical and Assessor Reports were not prepared with the Appellant’s worst day in mind.
 - On the Appellant’s worst days:
 - Their ability to communicate is poor, they have difficulty speaking and shut themselves away
 - They have no desire to do anything
 - High anxiety makes them shut down mentally, and when that happens, speaking, reading, and writing are either poor or the Appellant is unable to do those things

- Hygiene and sleep are very poor due to anxiety
- They cannot perform any activities of daily living: they cannot plan, organize or problem-solve
- Memory is poor, motivation is non-existent
- They struggle with new situations and new learning, and as a result cannot keep jobs long term
- They struggle with budgeting due to brain damage at a young age; compulsive spending is a side effect of the brain damage.
- *Daily Living Activities:*
 - On the Appellants worst days:
 - “Mobility and physical ability is [sic] very poor and they need continuous assistance from another person as walking either indoors or outdoors becomes impossible. They tend to just curl up on the bed and not get out at all.”
 - They cannot lift, carry, or hold due to one-sided weakness and body pain
 - “Daily living activities such as showers, change of clothes, eating is non existant [sic] [due to inability] to do anything.”
- *Help Required with Daily Living Activities:*
 - The Appellant is supported by a worker who helps them with most of their daily living activities such as looking for rental accommodation, budgeting and advocacy.
 - The Appellant’s landlord makes sure the Appellant manages activities of daily living such as eating and paying bills.

Request for Reconsideration:

The Appellant states:

- The application did not capture their ability on their worst days
- They have severe pain and weakness on one side of their body that prevents them from doing anything except curl up on their bed until they feel better
- As a result, they have lost jobs in the past
- Due to severe anxiety, they struggle with talking with people and doing things they are not familiar with, which prevents them from holding a job long term
- They have a poor memory
- They suffer from severe depression and have had thoughts of self harm in the past.

Additional Evidence:Letter from the Doctor:

The Doctor states:

- They would not change any of their responses in the Medical Report or the Assessor Report, but “in the interpretation that the impairment of daily living activities is significant and severe for prolonged periods of time. [The Appellant] really requires continuous support to undertake basic activities...”

Letter from the Advocate:

- The Advocate is a director of a not-for-profit organization supporting people with a mental health diagnosis
- They have worked with the Appellant for “a short time”
- The Appellant:
 - needs daily reminders for many activities of daily living, such as hygiene, nutrition, and connection with others
 - needs reminders for appointments, they need support to make appointments, and often need the Advocate to attend appointments with them, to meet new service providers
 - struggles with personal connection and prefers to communicate by text, as the least overwhelming option
 - needs help to organize finances and struggles to make good financial decisions without support; for example, the Advocate recently helped the Appellant apply for rental assistance
 - struggles with employment due to anxiety, often needing to leave work early or take sick days
 - cannot do multiple appointments in a day, and needs a day of rest between appointments
 - has had an initial appointment with a psychiatrist
 - has not lived independently and would struggle to do so.

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

- The Appellant has tracked his “worst days” over the past month and recorded that fourteen or more days were “bad or really bad”. The rest of the days were “good or acceptable.”
- The Appellant’s landlord provides room and board and provides unpaid support for the Appellant. In particular, they:
 - Ensure the Appellant has clean laundry
 - Remind the Appellant to shower and eat

- Drive the Appellant to appointments or other destinations
- The Appellant went four months without taking necessary medication because they could not afford it
- The Appellant enjoys their part-time job, but if they have a long day at work, they may need two or three days to recover.

Admissibility of Additional Evidence:

The Ministry did not object to the admissibility of the additional written and oral evidence.

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 they meet all five criteria for PWD designation. They maintain that anxiety and the continuing effects from the brain tumour are severe mental and physical impairments. They say that, as a result, they are significantly restricted in all daily living activities, and on their worst days, they cannot function at all. They require the support of other people to manage personal hygiene, eat regular meals, manage finances, take medication, and attend medical appointments.

The Appellant also says that the Ministry's reconsideration process was unfair to the Appellant. The Ministry gave them one extension but refused a second extension, which would have allowed them time to get a letter from the psychiatrist the Appellant had just started seeing. They point out that they have no control over the length of time it takes to get an appointment with a medical practitioner, which takes years.

Ministry Position:***Position at Reconsideration:***

At reconsideration, the Ministry was not satisfied that the Appellant had a severe physical impairment, based on the information provided by the Doctor. They also determined that there was insufficient evidence to conclude that the Appellant had a severe mental impairment. While the Doctor indicated restrictions in some daily living activities, the Ministry determined that there was no information about how often or for how long the Appellant was restricted, and therefore the Ministry could not confirm a significant overall restriction periodically for extended periods of time. As it was not established that the Appellant's ability to perform daily living activities was significantly restricted, the Ministry maintained that it could not determine that the Appellant needed significant help with restricted activities.

Position at the Hearing:

At the hearing, after reviewing the additional evidence, the Ministry stated that, while there was insufficient evidence of impairment at reconsideration, it now considers that the Appellant meets all five criteria for PWD designation. The Ministry says that the Appellant has severe mental and physical impairments, is significantly restricted in all daily living activities, and receives significant help from others to perform daily living activities.

Fairness of Ministry Process at Reconsideration:

In answer to the Advocate's argument about unfair process, the Ministry says that, under section 72 of the Regulation, the Ministry must give a reconsideration decision within ten business days of receiving the request for reconsideration. The Ministry is only permitted to give one ten-day extension of time. When the Ministry gave the Appellant one ten-day extension and refused the Appellant's request for a further extension, the Ministry was following the requirements of the legislation. Therefore, the Ministry says that the reconsideration process was not unfair to the Appellant.

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 applicants 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.

- *Physical Impairment:*

The Panel finds that, considering the additional evidence, the Ministry’s determination that the Appellant does not have a severe physical impairment is no longer reasonably supported by the evidence.

At reconsideration, while the Ministry acknowledged that the Appellant had limitations on physical function, mobility, and abilities on their worst days, as reported by the Social Worker and the Appellant, there was no information about how often those worst days happened. Therefore, as the Doctor had not reported any limitations in physical functioning, mobility, or physical abilities, other than primary right-sided fatigue, the Ministry determined that the Appellant did not have a severe physical impairment.

The Social Worker stated that the Doctor’s reports were not prepared with the Appellant’s worst days in mind. At the hearing, the Advocate advised that the Appellant had been tracking their worst days over the past month and confirmed that at least half of the days are “worst days.” On those days, the Social Worker states that the Appellant needs continuous assistance from another person to walk indoors or outdoors. They report that the Appellant cannot lift, carry, or hold due to one-sided weakness and body pain. The Appellant says that, on those days, they have severe pain and weakness on one side of their body that prevents them from doing anything except curl up on their bed until they feel better. The information from the Social Worker and the Appellant is consistent with the Doctor’s diagnosis of primary right-sided fatigue.

The Panel finds that the physical impairment on the Appellant’s worst days, which happen at least half the days in a month, as reported by the Social Worker and the Appellant, is a severe physical impairment. Therefore, the Panel finds that the Ministry’s determination that the Appellant does not have a severe physical impairment is not reasonably supported by the evidence.

- *Mental Impairment:*

Considering the additional evidence, the Panel also finds that the Ministry's determination that the Appellant does not have a severe mental impairment is no longer reasonably supported by the evidence.

At reconsideration, the Ministry acknowledged that the Appellant has limitations to cognitive and emotional functioning due to anxiety and the effects of the Astrocytoma excision, particularly when anxiety was at its peak. However, as there was no information about how often the Appellant experienced high levels of anxiety, the Ministry determined that there was insufficient evidence to show a severe level of mental impairment.

The Advocate and the Appellant have confirmed that the Appellant's worst days are also the days when their anxiety is high and they struggle to function at all. The Social Worker reports that the Appellant's ability to communicate on those days is poor, and they "shut down mentally". They cannot perform any activities of daily living due to severe anxiety and would not be able to live on their own. They depend on support from family and a sympathetic landlord who oversees basic needs, making sure the Appellant eats meals and has clean laundry.

With the additional information, explaining that the Appellant's worst days are about half the month, the Panel finds that the Appellant has a severe mental impairment. Therefore, the Panel finds that the Ministry was not 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 finds that the information provided by the Social Worker, supplemented by the evidence of the Advocate and the Appellant, confirms direct and significant restrictions to the Appellant's ability to perform Activities. The Panel finds that the Appellant has direct and significant restrictions in the following Activities, periodically for extended periods, on the Appellant's worst days, which are about half the days of the month:

- Prepare own meals: Appellant needs supervision to make sure they eat
- Manage personal finances: they struggle with budgeting due to effects of the excision of the brain tumour, which causes impulsive and compulsive spending; they need supervision to make sure they pay bills
- Perform personal hygiene and self care: they need supervision and reminders to shower and wear clean clothes

- Manage personal medication: they need supervision and reminders to take medication; they did not take prescribed medication for four months because they had spent the money needed to buy it
- Make decisions about personal activities, care, or finances: effects of the excision of the brain tumour result in impulsivity; they need support from others to make necessary appointments and manage finances, and have ended up with significant debt as a result
- Relate to, communicate, or interact with others effectively: they struggle with personal connection and prefer to communicate by text because it is the least overwhelming option; they often need the Advocate to attend appointments with them, when meeting new service providers.

In addition, the Panel finds that, on the Appellant's worst days, they are not able to perform any Activities, as they isolate due to anxiety and pain.

As the Panel has found that the Appellant's ability to perform at least two Activities is directly and significantly restricted periodically for extended periods, the Panel finds that the Ministry was not reasonable in its determination that there was not enough evidence of a significant restriction in the Appellant's ability to perform 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.

At reconsideration, the Ministry acknowledged that the Doctor reports that the Appellant receives assistance from family and online friends. The Social Worker reports that the Appellant has a support worker who helps with activities such as finding housing, budgeting, and advocacy. The landlord makes sure the Appellant eats and pays bills. The Ministry stated that, as it had not been established that Activities are significantly restricted, it could not determine that significant help was required to perform Activities.

As the Panel has found that the Appellant's ability to perform Activities is significantly restricted, the Panel also finds that the Appellant needs significant help from other people to perform restricted Activities.

Fairness of Ministry Process on Reconsideration:

The Panel finds that the Ministry reasonably applied section 72 of the Regulation when the Appellant asked for a second adjournment of their PWD application. Under section 72, the Ministry must reconsider a decision and mail a written determination on the reconsideration within ten business days of receiving the request. If the Ministry considers it necessary, and the Appellant consents, the Ministry may extend that period by another ten days. At the Appellant's request, the Ministry gave one ten-day extension, which is the most that is permitted under the Regulation.

The Panel recognizes that it can be difficult for an Appellant to get evidence from medical practitioners, who are busy and have long wait times for appointments. On appeal, Appellants can present additional evidence, and the Tribunal may consider requests for adjournments or extensions of time to prepare for hearings in some instances. However, as the Ministry followed the requirements of the legislation when it considered the Appellant's request for an extension of the time to provide additional evidence on reconsideration, the Panel finds that the Ministry's reconsideration process was fair.

Conclusion:

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

Time limit for reconsidering decision

s. 72 The minister must reconsider a decision referred to in section 16 (1) of the Act, and mail a written determination on the reconsideration to the person who delivered the request under section 71 (1) [*how a request to reconsider a decision is made*],

(a) within 10 business days after receiving the request, or

(b) if the minister considers it necessary in the circumstances and the person consents, within 20 business days after receiving the request.

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.

APPEAL NUMBER 2023-0244

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)
2023/09/06

Print Name
Robert Kelly

Signature of Member

Date (Year/Month/Day)
2023/09/06

Print Name
John Pickford

Signature of Member

Date (Year/Month/Day)
2023/09/06