

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

The decision under appeal is the Ministry of Social Development and Poverty Reduction (the Ministry) reconsideration decision dated August 10, 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 in person. The Appellant attended with an interpreter and an Advocate. The Ministry attended by telephone.

Evidence Before the Ministry at Reconsideration:

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

- Medical Report and Assessor Report dated April 19, 2023, completed by a Doctor
- Appellant's Self Report
- X-ray Reports dated February 24, 2020, January 28, 2023, and March 1, 2023.

Medical Report:

The Doctor states that the Appellant has been their patient since 2019, and they have seen the Appellant between two and ten times in the past twelve months.

Diagnosis:

The Doctor provides diagnoses of degenerative joint disease in the lumbar spine (onset January 2019) and poliomyelitis (onset 1966). They state that the Appellant has chronic pain and mobility limitation.

Health History:

The Doctor states that the Appellant has back and knee pain, and one leg is shorter due to poliomyelitis. They indicate that the Appellant does not require any prostheses or aids for his impairment.

Functional Skills:

The Doctor indicates that the Appellant can walk 1 to 2 blocks unaided on a flat surface and climb 2 to 5 steps unaided. They indicate that the Appellant is limited to lifting 2 to 7 kilograms and can remain seated for 2 to 3 hours. They state that the Appellant's ability is limited "due to chronic pain and leg length."

Assessor Report:Mental or Physical Impairment:

The Doctor states that the impairments that impact the Appellant's ability to manage daily living activities are chronic pain, arthritis, and poliomyelitis complications.

Mobility and Physical Ability:

The Doctor indicates that the Appellant is independent in walking indoors. They indicate that the Appellant is independent, and also takes significantly longer than typical, for

walking outdoors, climbing stairs, standing, lifting, carrying, and holding. For all areas of mobility and physical activity except walking indoors, the Doctor states: "Needs frequent breaks. Can only do short distance in short period of time."

*Daily Living Activities:*

The Doctor indicates that the Appellant is independent and also takes significantly longer than typical for:

- Personal Care: dressing, grooming, bathing, toileting, feeding self, regulating diet, transfers in/out of bed and on/off chair
- Shopping: going to and from stores, reading prices and labels, making appropriate choices, paying for purchases, carrying purchases home.

The Doctor indicates that the Appellant requires periodic assistance from another person and takes significantly longer than typical for:

- Laundry
- Basic housekeeping.

The Doctor comments that the Appellant is independent but due to chronic pain it takes longer to do those activities.

The Doctor indicates that the Appellant is independent but takes significantly longer than typical, noting "chronic pain, arthritis, poliomyelitis complications," for:

- Meals: food preparation and cooking
- Transportation: getting in and out of a vehicle, using public transit, using transit schedules, and arranging transportation.

The Doctor comments: "He is independent."

*Assistance Provided for Applicant:*

The Doctor indicates that friends provide the help required for daily living activities. They state that the Appellant needs help with housekeeping, grocery shopping and meal preparation, but no help is available.

*X-Ray Reports:*

X-Ray reports indicate:

- Minimal arthritis in the medial compartment of the right knee
- Diffuse vertebral spurring throughout the lumbar spine
- History of left knee pain, "Pellegrini-Stieda lesion, in keeping with prior [medial collateral ligament] injury"
- Mild osteoarthritis at the [acromioclavicular] joint
- Mild loss of disc height in cervical spine

- No joint effusion detected in the right knee.
- No fracture or malalignment and no significant soft tissue swelling in the left knee
- No significant knee joint effusion and no concerning bone lesions in the left knee.

Self Report:

The Appellant's friend completed the Self Report, stating:

- The Appellant's left leg is half the size of his right leg.
- Standing is very tiresome.
- He has had "a lot more spills."
- His condition has gotten worse with age.

Request for Reconsideration:

In the Request for Reconsideration, the Appellant says that he can no longer perform job duties consistently.

Additional Evidence:

Appellant:

At the hearing, the Appellant provided an MRI Requisition dated September 27, 2023, that asks for an MRI of his lumbar spine and x-rays to assess for leg radiculopathy. The Appellant also showed the Panel a prescription medication bottle indicating that he has been prescribed 100 mg. of Gabapentin twice a day.

At the hearing, the Appellant said:

- His left leg is shorter and thinner than his right leg, because he had polio when he was 1 year old. By age 10, his left leg was not growing as it should, and as he has aged, he has had more severe problems as a result.
- As he tries to lessen the pressure on his left leg, he puts more weight on his right leg, which caused the problem with his right leg, and he is in constant pain.
- The X-ray requisition is for his right leg.
- The Doctor says that the nerves on his right leg and foot are damaged severely.
- He has fallen many times (six or seven times in the past year) and cannot stand for long.
- Because he has fallen many times, some bones have grown under his left knee, and he is waiting for his doctor to schedule surgery.
- In the past three or four months the pain has gotten worse, and he has been falling more, so he started using a cane; if he had money he would use a wheelchair, but he cannot afford one.

- Gabapentin makes him dizzy; he cannot walk and has to lie down for about an hour after he takes the medication, but the Doctor says he must take it.
- He also has issues with his ear and his heart, and he is on a wait list for an angiogram.
- When he showers, he has to sit on a bench in the tub.
- If it normally takes someone 15 minutes to shower, it takes him half an hour.
- It takes him 15 minutes to get out of the shower, put a towel on the floor, sit and put on his pants afterwards.
- It takes him a long time to make meals and when he does dishes, he has to hold the edge of the sink.
- There are times when he cannot do house chores.
- Two friends come every other day and help with shopping, vacuuming, doing dishes, cooking and laundry.
- He does not go out much, but when he does, his friends come with him to watch him in case he falls.
- He uses a high chair in the kitchen and on the couch, he sits with his leg stretched out.
- He does not tell the Doctor everything about his condition, or how much his friends help him; if he did, the Doctor would not listen or do anything for him.

Admissibility of Additional Evidence:

The Ministry did not object to the admissibility of the MRI Requisition, the information on the prescription bottle, or 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 he meets all five criteria for PWD designation. He maintains that the pain and mobility restrictions caused by complications from polio, and arthritis in his spine and legs, are a severe physical impairment.

He argues that the Ministry is not reasonable in its determination that the Appellant does not have a severe physical impairment. He says that the Ministry is not reasonable in its interpretation of the medical evidence. He points out that the Ministry accepts the Doctor's statements that the Appellant is independent in mobility, function and almost all daily living activities, and appears to base its determination on that evidence. However, the Appellant says that the Ministry does not give enough weight to the Doctor's indication that the Appellant takes significantly longer to complete those same activities. He questions why the Ministry would accept one part of the Doctor's statement and not the other. He says that, while he may be physically able to complete an activity, if he must take significantly longer, then he meets the criteria in the legislation for severe impairment and significant restriction in the ability to perform daily living activities.

The Appellant says that he is significantly restricted in his ability to prepare meals, do dishes, shop, vacuum, do laundry and bathe. He says he needs help to perform those activities because he uses a cane and would use a wheelchair if he could afford one. He also uses a bench in the shower, and his friends help with laundry, vacuuming and shopping. Therefore, he says he uses assistive devices and needs help from others to do daily living activities.

Ministry Position:

The Ministry maintains that the Appellant does not have a severe physical impairment. While the Ministry recognizes that the Appellant has limitations in mobility due to medical

conditions and chronic pain, they say that he is independent in all mobility and physical abilities. While the Doctor also says the Appellant takes longer for all tasks, the Ministry says that, when the Doctor does not report how much additional time is needed, the Ministry cannot determine if the additional time indicates a severe impairment of function. Where, as in the Appellant's case, the Doctor does not give much narrative or description of the severity of the impairment, the Ministry relies on the information the Doctor gives about functional skills.

The Ministry says that there is no diagnosis of a mental health condition to indicate a severe mental impairment.

The Ministry also says that the information provided does not indicate direct and significant restrictions in daily living activities. The Doctor has indicated that the Appellant is independent in performing daily living activities. Again, while they say the Appellant takes significantly longer to do those activities, they have not said how much longer, so the Ministry cannot determine if the restriction is significant.

The Ministry says that, if they cannot determine that the Appellant is not significantly restricted in daily living activities, then the Ministry cannot determine that the Appellant needs significant help to perform restricted activities. The Ministry also points out that the Doctor has not said that the Appellant needs a cane or bath stool.

#### 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 and x-ray reports is not sufficient to show that the Appellant has a severe physical impairment.

It is possible for person to be independent in physical functioning, in the sense that they do not need an assistive device or help from another person, and yet also have a severe physical impairment, for example if they take significantly longer than typical to manage in an area of functioning. However, how much time is "significant" can be a subjective assessment. When a prescribed professional ticks the box on the form to indicate that an applicant takes "significantly longer than typical" to perform an activity, it is reasonable for the Ministry to look for more information, such as how much longer the person takes to perform that activity.

In the Appellant's case, while the Doctor ticked the box to indicate that the Appellant takes significantly longer to do almost all activities, the Doctor did not provide details about how much longer the Appellant takes. Nor did the Doctor give a narrative description of the effect of the Appellant's physical impairment on his mobility and functional skills.

At the hearing, the Appellant said he takes longer, but did not give clear evidence of how much longer he takes to do specific activities. The Panel finds that the examples he gave, taking half an hour instead of 15 minutes to bathe and get out of the tub, or taking 15 minutes to put down a towel, get out of the tub and get dressed, are not sufficient to show

a severe physical impairment. Other than those examples, the Appellant only said he “takes longer”.

Without more details, therefore, the Panel finds that the Ministry was reasonable in deciding that, based on the information provided, it could not determine that the additional time the Appellant needs to perform the activities showed a severe physical impairment.

## *2. Mental Impairment:*

The Doctor did not indicate a mental impairment, and the Appellant did not maintain that he has 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.

### *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 Doctor indicates that the Appellant takes significantly longer than typical for activities listed on the form that correspond with the following Activities in the legislation:

- Prepare own meals
- Shop for personal needs
- Use public or personal transportation facilities
- Perform housework
- Perform personal hygiene and self care.

However, the Doctor has not indicated how much longer the Appellant takes to perform those Activities. The Doctor also indicates that the Appellant is independent in performing those Activities, at the same time indicating that the Appellant needs periodic assistance to perform laundry and basic housekeeping, without further description.

The Panel agrees with the Appellant that those indications are not contradictory. A person may be significantly restricted in their ability to perform an Activity, and also be independent in performing that Activity, in the sense that they are eventually able to complete the Activity without assistance from another person or an assistive device. However, the Panel finds that it is reasonable for the Ministry to ask for additional information to explain how much longer the Appellant takes to perform the Activities, so that the Ministry can determine if the additional time amounts to a significant restriction in the Appellant's ability to perform the Activities.

The Panel finds that the Ministry was reasonable in its determination that the information provided by the Doctor was not sufficient to confirm direct and significant restrictions to 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.

Since the Doctor completed the Medical and Assessor Reports, the Appellant has started using a cane to walk. He also describes using a bath stool in the shower. The Doctor has not confirmed that the Appellant needs or uses these assistive devices, which is required under the legislation. The Doctor has indicated that the Appellant needs help for housekeeping, grocery shopping, and meal preparation, and receives help from friends.

However, as the Panel has found that the Ministry was reasonable in determining that the Appellant was not directly and significantly restricted in his 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.

APPEAL NUMBER 2023-0263

**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)  
2023/10/16

Print Name  
Julie Iuvancigh

Signature of Member

Date (Year/Month/Day)  
2023/10/16

Print Name  
Diane O'Connor

Signature of Member

Date (Year/Month/Day)  
2023-10-16