

Part C – Decision Under Appeal

The decision under appeal is the Ministry of Social Development and Poverty Reduction (the Ministry) decision dated August 29, 2023 (the Decision) denying the Appellant persons with disabilities (PWD) designation.

The Ministry found that the Appellant met the age (over 18) and duration (impairment to last 2 years) requirements.

However, the Ministry found:

- The Appellant did not have a severe physical or mental impairment;
- The Appellant's daily living activities aren't directly and significantly restricted; and,
- The Appellant doesn't need the significant help to do daily living activities because of significant restrictions.

The Ministry found the Appellant was not one of the prescribed classes of persons eligible for PWD on alternative grounds. As there was no evidence or argument about alternative grounds for eligibility, the Panel considers it not to be at issue on appeal

Part D – Relevant Legislation

Employment and Assistance for Persons with Disabilities Act (the Act), section 2

Employment and Assistance for Persons with Disabilities Regulation (the Regulation), sections 2 and 2.1

Employment and Assistance Act, section 22(4)

The legislation is in the Appendix at the end of this decision.

Part E – Summary of Facts

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

- The Medical Report, dated March 23, 2023, completed by the Appellant's Doctor (the Doctor);
- The Assessor Report, dated April 6, 2023, completed by a Registered Nurse (the Nurse);
- The Self Report, dated April 6, 2023, completed by the Appellant, and as transcribed by the Nurse;
- The Appellant's request for reconsideration (the Reconsideration Request), dated July 26, 2023, in which the Appellant says he would like an extension of the deadline to submit additional information because he has been unable to contact his advocate and is awaiting x-Rays; and,
- A hand-written, undated twelve-page document in the name of the Appellant titled "Personal Impact Statement" (the Impact Statement).

Relevant information provided in the Medical Report, the Assessor Report, the Self Report and the Impact Statement is summarized in the appropriate sections of the discussion below.

Diagnoses

In the Medical Report, the Doctor says the Appellant has musculoskeletal back and shoulder pain with a date of onset of 2018 and recurrent arrhythmias, also with date of onset of 2018.

Physical Impairment

In the Medical Report, the Doctor says the Appellant has struggled with paroxysmal atrial fibrillation (AF) and back pain, adding "*He has had failed ablation therapy and medial management is suboptimal. He struggles with chronic fatigue, chest pain, shortness of breath, reduced mobility as a result.*"

The Doctor says the Appellant can:

- Walk two to four blocks on a flat surface without help;
- Climb five or more steps unaided; and
- Is not limited in the length of time he can remain seated.

The Doctor also says they do not know if the Appellant has any limitations in lifting.

In the section of the Medical Report where the prescribed professional is asked to provide any other relevant information, the Doctor writes "*(The Appellant) has poor controlled paroxysmal AF. He has episodes where his heartrate is uncontrolled ... He has been admitted to hospital as a result of his illness.*"

In the Assessor Report, the Nurse says (with comments in *italics*), that the Appellant takes significantly longer than typical with all listed mobility and physical activities:

- Walking indoors (*noticeable for past six years. Needs to hold rails*);
- Walking outdoors (*goes very slow/unable to go on vacation due to being outdoors*);
- Standing (*very slow needs to use railings*);
- Climbing stairs (*constant movement to prevent spasm*);
- Lifting (*pulled shoulder Oct. 2022 can't use right*), and
- Carrying and holding (*unable to carry far/uses cart/short trips only/unable to carry over 5 lbs.*).

In the comments section of this part of the Assessor Report the Nurse has written "*The Appellant has chronic pain with other co-morbidities: heart arrhythmia; uncontrollable blood pressure*".

In the Self Report the Appellant writes "*I have suffered with a back injury for about 2 years. I am getting steroid injections ... The next step will be surgery. The radiologist explained to me, the disc is hanging out so far the steroid injection has not been beneficial to me, there has been no changes. The lower back pain is chronic and severe ... It's severely challenging for me to remain standing upright and walking due to the pain. I have caused injury to my shoulder because I struggle to lift anything with my back pain. I was trying to drag an item and it became caught up on something and caused me to tear something in my shoulder. I was going to physio to try to help but I no longer can afford the cost to continue. The pain has now further progressed. ... Often the pain is so severe that I have to ... just go to bed and rest ... I suffer with extremely high blood pressure. I go into AF often. I have to wear a halter monitor often so that the Doctor can monitor my heart. I monitor my blood pressure a minimum of two times a day ... Walking, standing, and climbing stairs is extremely challenging for me due to the combination of my physical pain and heart health. I am only able to walk a short distance, maybe a block, before having to stop for a rest. I can stand upright for a few moments because pain sets in and I would not be able to walk up any steps without the use of a railing for support.*"

In the Impact Statement, the Appellant says that he had a medical procedure known as an ablation "*to correct (supraventricular) tachycardia/racing heart*" approximately fifteen years ago. He said his heartbeat was recorded at 300 beats per minute (BPM), and that his condition affects one in 1 million people. He also said the procedure didn't last and he had to have it done again two years later, which affects one in 10 million people.

The Appellant says he also has "*high blood pressure, confusion, (is) lethargic and (has) immense muscle pain*", and that the Doctor told him he had fibromyalgia. He mentions that he has seen several specialists and has been told that his high blood pressure "*should have caused me a stroke*." The Appellant also says that a cardiologist eventually provided him with "*a cocktail of prescription drugs*" that were only partially successful, and that side effects include extreme

fatigue. He says that the medications are "*for quality of life*" and there are no cures for his condition.

The Appellant also describes several occasions over the past years where he has been hospitalized as a result of his atrial AF, and that he "*now (goes) into AF on a regular basis*". He says that on these occasions "*my fatigue level goes to maximum and I must lay down. Next for no apparent reason my blood pressure would drop to well below average 60/30 BPM 89 near comatose.*"

The Appellant says he injured his back putting out a fire three years ago, and when he woke up the next morning he was unable to walk. He went to the hospital and the magnetic resonance imaging (MRI) revealed three fractures and a bulging disc. Since the back injury, the Appellant's feet and fingers have been numb and his shoes "*feel like they're full of sand.*" He also says he has recently purchased a personal electrocardiogram (EKG) device that connects to his phone.

Mental Impairment

In the Medical Report, the Doctor says the Appellant has no significant deficits with cognitive and emotional function.

In the Assessor Report, the Nurse says the Appellant's speaking and writing skills are satisfactory, but that his reading, and hearing abilities are poor (adding the comments "*unable to concentrate*" and "*was told he needed hearing aid*", respectively).

In the cognitive and emotional functioning section of the Assessor Report, the Nurse says the Appellant's mental impairment has a major impact on bodily functions, consciousness, emotion, memory and motor activity; a moderate impact on attention/concentration and motivation; and a minimal impact on impulse control, insight and judgment, language, psychotic symptoms and other emotional and mental problems. The Nurse also provides the following related comments:

- *Able to sleep, but wakes up and unable to sleep through night*
- *Due to (illegible) unable to be as active as once was. Somnolence/fatigue*
- *↓ mood, lack of motivation, unable to find joy in activities*
- *Concentration poor – unable to focus due to pain*
- *Memory has been very poor – trouble with loss of memory where he has been*
- *Some loss of language recently when talking to parents*

In the Self Report the Appellant says he suffers with severe anxiety because of his poor physical health, adding "*I have many fears surrounding the state of my health because I live alone and if something was to happen to me with my heart, it could take days for anyone to find me*". He also says he struggles with his memory and has to write everything down.

Restrictions in the Ability to Perform Daily Living Activities

In the Medical Report, the Doctor indicates that the Appellant is restricted in personal self care and mobility both inside and outside the home. In providing more information about the degree of restriction, the Doctor writes "*(The Appellant's) fatigue limits his mobility. He needs to walk holding on to supports. He says he is unable to walk when in the shower.*"

In describing the adverse effects of the Appellant's medication on his ability to do daily living activities, the Doctor writes "*(The Appellant) reports the side effects of his medications are profound and worsen his fatigue. He is on beta-blockers and antihypertensives which can increase fatigue.*"

In the Assessor Report, the Nurse says that the Appellant has the following abilities with daily living activities (*with comments in italics*):

- **Perform personal hygiene and self care** – Takes significantly longer than typical with dressing (*difficulty bending, putting on clothes, short of breath*), bathing (*has to sit down to shower*), toileting (*due to chronic pain difficulty cleaning self*), transfers in and out of bed (*sometimes unable to get out of bed*), and transfers on and off chair (*pain/difficulty getting up after sitting long periods*);
- **Perform housework to maintain the person's place of residence in acceptable sanitary condition** - Requires periodic assistance with basic housekeeping (*has difficulty bending/doing dishes – back pain*) and takes significantly longer than typical with laundry (*has laundry service to help*);
- **Shop for personal needs** – Takes significantly longer than typical with going to and from stores (*needs to hang on to the cart – will need extra time to rest*) and carrying purchases home (*needs to carry one bag at a time – shortness of breath*);
- **Prepare own meals** - Takes significantly longer than typical with food preparation (*can't stand long periods*) and cooking (*fatigue with ↑ back pain*);
- **Use public or personal transportation facilities** – Takes significantly longer than typical with getting in and out of a vehicle (*problematic, bending low – need to use supports to get into vehicle*);
- **Move about indoors and outdoors** – See Nurse's comments in the "Physical Impairment" section above;
- **Make decisions about personal activities, care, or finances (only applies to an applicant who has a severe mental impairment)** – Independent with all listed activities;
- **Relate to, communicate or interact with others effectively (only applies to an applicant who has a severe mental impairment)** – Needs periodic support or supervision in developing and maintaining relationships (*with increased illness less socialization*), and ability to deal appropriately with unexpected demands (*will raise*

anxiety, will result in being up all night). Good functioning with immediate and extended social networks (*good interpersonal skills. Has no problem getting or asking for help*).

The Nurse also provides the following general comments: "*(The Appellant) loves to cook and has faced significant impairment – has ↓ his ability to enjoy or do as often ... has loved his yearly hunting trip and is now physically and mentally unable to participate ... (his) chronic pain and anxiety regarding heart health and recurring back/shoulder pain causes frustration and distress ... chronic fatigue occurs after doing basic daily living activities*). The Nurse also says that on many days of the month the Appellant can't go out without being fatigued. The Nurse also says the Appellant falls asleep without warning due to severe pain, fatigue, shortness of breath, low blood pressure, chronic pain, severe blood pressure shifts, and orthostatic hypertension.

In the Self Report the Appellant writes "*I struggle with dressing myself. Bending to put on pants, socks, and shoes is extremely challenging for me due to severe pain ... I have to sit down while showering as I worry about falling ... I enjoy preparing meals and cooking but I struggle to do this now as it is extremely difficult for me to stand long enough to cook and I require many rest breaks. It now takes me at least twice as long as it used to ... All activities cause me severe shortness of breath that becomes debilitating. I am able to drive (only) short distances because (of) having to stop for a rest. I am fearful of driving because I worry about my blood pressure. I self-isolate and prefer to be alone at home.*"

In the Impact Statement, the Appellant says that on many occasions he has been unable to carry out daily living activities that he set out to do.

Need for Help

In the Medical Report the Doctor says the Appellant does not use any prostheses or aides for his impairment. Where asked what assistance the Appellant needs with daily living activities, the Doctor writes "*He needs help from another person. He needs to sit to have a shower due to his fatigue.*"

In the Assessor Report, the Nurse says the Appellant lives alone but has some family supports, gets help with daily living activities from family and friends, and gets help from a "*laundry service*" with his laundry. The Nurse also writes "*neighbours check on him and offer help (with chores)*" but that additional help would be useful. The Nurse also says the Appellant would benefit from more complex supports from medical team specializing in cardiac health.

In the Self Report, the Appellant says he must use a cart to lean on for support when he goes shopping, and that he would benefit from having help getting dressed.

In the Impact Statement, the Appellant writes "*I live alone and have no one to cook, clean, shop etc.*"

Additional Information Submitted after Reconsideration

Section 22(4) of the *Employment and Assistance Act* says that a panel can consider evidence that is not part of the record when the Ministry made the Decision. But first the panel must decide the new information is relevant. Once a panel has determined if any new evidence can be admitted, it must decide if the Decision was reasonable considering the new evidence.

The Appellant made an eight-page submission on September 20, 2023 (the First Submission). The First Submission comprised the following:

- A photograph of a graph time stamped 18:01 on August 16, 2023. The photograph displays a line graph recorded by an electronic device with a heartbeat of 102 BPM;
- A photograph of the readout from a blood pressure machine. The readout shows systolic pressure of 76 mmHg, diastolic pressure of 54 mmHg, and a pulse rate of 96 BPM;
- A photograph of an undated screen titled "Blood Pressure Check" showing systolic pressure of 188 mmHg, diastolic pressure of 112 mmHg, and a pulse rate of 113 BPM. The screen also says "*This result is in the high range*";
- A photograph of a graph time stamped 8:50 PM on August 11, 2023. The photograph displays a line graph recorded by a mobile device with a heartbeat of 86 BPM and includes the message "*Atrial fibrillation was not detected and your EKG does not fall under the algorithmic calculations of Normal, Bradycardia, or Tachycardia. This may be caused by other arrhythmias, unusually fast or slow heartrates, or poor quality recordings.*";
- A photograph of part of an undated, untitled screen of an electronic device showing what is likely systolic pressure of 201 mmHg, diastolic pressure of 90 mmHg, and a pulse rate of 88;
- A photograph of an undated screen of a digital blood pressure monitor showing systolic pressure of 87 mmHg, diastolic pressure of 54 mmHg, and a pulse rate of 87 BPM;
- A photograph of part of an undated, untitled screen of an electronic device showing what is likely systolic pressure of 173 mmHg, diastolic pressure of 88 mmHg, and a pulse rate of 89; and,
- A photograph of an undated screen of a digital blood pressure monitor showing systolic pressure of 89 mmHg, diastolic pressure of 63 mmHg, and a pulse rate of 87 BPM.

The Appellant also made a one-page submission on October 31, 2023 (the Second Submission). The Second Submission is a copy of a letter dated October 20, 2023 signed by the Doctor and referring to the Appellant. The letter says that the Appellant has been under the Doctor's care for six years. The letter also provides a summary of the Appellant's current physical health as set out in the Appellant's PWD application, and which also says, in part:

"(The Appellant) has post prandial hypotension where he reports excess fatigue and sweats and inability to do anything. His backpain has been investigated extensively and he has periods where he is able to do certain things but when he has a flair it is crippling and has put him in hospital at least twice for pain control. Due to the unpredictable nature of his illness, and having

seen firsthand how he actually is when unwell, I support his decision to appeal his claim refusal, and would urge you to reconsider."

Evidence Presented at the Hearing

The Appellant was joined by an Advocate at the hearing (the Advocate).

At the hearing, the Appellant said he had provided an additional four photographs of blood pressure and pulse rate monitor readouts in a third submission to the Employment and Assistance Appeal Tribunal (the Tribunal) on November 1, 2023, the day before the hearing. The Advocate said she had received copies of the photographs at 11:34 AM on November 1, 2023. Because these photographs were not provided to the Panel or the Ministry before the hearing, the Panel considered whether to admit this new evidence as evidence presented at the hearing. The Ministry said it would not object to having the photographs described if the evidence was admitted by the Panel. The Panel's decision on admissibility is contained in the following section.

At the hearing, the Appellant said he believes his PWD application was denied because of "*a lack of comprehension*". He said that he suffered his most recent AF episode (an Episode) and was taken to the hospital by ambulance on October 28, 2023. He said his blood pressure reading was 219/101 and that he was given nitroglycerin spray three times in the ambulance on the way to the hospital. Prior to that hospital visit, the Appellant said his most recent previous hospital visit was following an Episode that occurred two weeks ago. The Appellant explained that he is not kept long in the hospital following an Episode and typically returns home the same day.

In response to a question from the Panel, the Appellant said he is temporarily unable to do any daily living activities after an Episode because he is so tired he has to sleep. He said on a bad day he will have three Episodes, and the "*best he can expect*" is to go three days without one. Typically he will have an Episode every day or every second day, but he doesn't keep a journal of when they occur.

Regarding daily living activities, the Appellant said he goes to the store for groceries about once a week, but often has to sleep for a while in his car, either before he goes into the store or after he leaves it, due to fatigue. He said getting in and out of a vehicle takes a lot of time and is very difficult. He also said that after his October 28, 2023 hospital visit it took him four days before he could finish washing the dishes from the day of his hospital visit.

In response to another question from the Panel, the Appellant said his backpain is less of a severe impairment than his AF, but he has backpain every day and the pain is worse when he's bedridden. Sometimes he must spend the day in bed, as his medications leave him severely fatigued. He said that he gets back spasms "*which come and go*", but even if he isn't experiencing a back spasm, his back "*still bothers him*" when walking.

Regarding help with daily living activities, the Appellant said that while he would definitely benefit from having someone around to help him, he lives by himself and often has to manage

the housework by himself. Sometimes he can arrange for a friend or neighbour to come by and help him, but anything he has to do for himself takes at least twice as long. He said he had an accident that resulted in a right shoulder injury, and as a result he can only lift with his left arm. He can lift up to five pounds, and sometimes he is able to lift a bit more if, for example, he's taking something off the back of his truck, because he can rest the object on his hip to carry for short distances. He said he lives in a trailer, and when he needs to haul water to refill his water tank he has to have his neighbour help him, or he has to transfer smaller quantities of water to the water tank in a smaller container.

In response to another question from the Panel, the Appellant said that his depression and anxiety was the result of his physical impairments and the financial insecurity he has experienced as a result. He said he has no problem with his immediate and extended social networks and gets along well with everyone.

In response to another question from the Panel, the Appellant said he was present when both the Doctor and the Nurse completed the Medical Report and the Assessor Report respectively. The Appellant said that even though his Doctor has known him for six years, the Doctor had to ask the Appellant to answer many of the questions in the Medical Report. This was also the case with the Nurse when they completed the Assessor Report. He confirmed that neither prescribed professional had directly observed the Appellant trying to do daily living activities, or friends and neighbours providing help.

In response to another question from the Panel, the Appellant said he has not applied for a Canada Pension Plan (CPP) disability pension as no one at the Ministry had suggested he do so. He said he had been self-employed and has in the past made self-employed contributions to the CPP. In response to a question from the Panel, the Ministry said that if a PWD applicant is receiving a CPP Disability Pension, they will automatically qualify for the PWD designation. The Ministry said they sometimes suggest that PWD applicants apply for CPP disability pension if it appears they might be eligible for one, but the Ministry cannot know what other programs an applicant might be eligible for because there are so many provincial and federal assistance programs.

The Ministry relied on the Decision, which was summarized at the hearing.

With reference to a statement that appears in the Assessor Report instructions ("*The Assessor Report is intended to be completed by a prescribed professional having a history of contact and recent experience with the applicant and is to be based on knowledge of the applicant, observations, clinical data and experience.*"), and in response to a question from the Panel, the Ministry said that the legislation does not specify how long the prescribed professional who completes the Assessor Report has to have known the PWD applicant or on what basis the prescribed professional makes their assessment.

In response to another question from the Panel about how many times as long as typical an applicant has to take to do a daily living activity for it to be considered evidence of a significant

restriction, the Ministry said that there was no specific "*benchmark*" but the Ministry would usually "*look at three times or more*" as evidence of a significant restriction in daily living activities.

Admissibility of New Evidence

There is no new evidence in the notice of appeal.

New evidence in the First Submission and presented by the Appellant at the hearing is the information about the Appellant's blood pressure and pulse rates from photographs of device readouts taken at different times. The Panel admits this new information but assigns it no weight for the following reasons:

- Several of the readings are not dated; and,
- The readings have not been interpreted by a medical practitioner or a nurse practitioner, and without that interpretation the Panel lacks the expertise to know what the readings mean.

New evidence in the Second Submission comprises the following medical opinions:

- An additional diagnosis of post prandial hypotension "*where he reports excess fatigue and sweats and inability to do anything*";
- The Appellant's back pain leaves him with "*periods where he is unable to do certain things but when he has a flare it is crippling and has put him in the hospital at least twice for pain control*"; and,
- "*Due to the unpredictable nature of (the Appellant's) illness, and having seen firsthand how he actually is when unwell, I support his decision to appeal (the Decision)*".

The Panel admits the new evidence contained in the Second submission because it is relevant and reasonably required for a full and fair disclosure of all matters related to the decision under appeal. Because the new evidence in the Second Submission is provided by the Doctor, the Panel gives it full weight.

The Ministry did not object to the Panel considering any of the new evidence.

Part F – Reasons for Panel Decision

The issue in the appeal is whether the Decision was reasonable based on all the evidence or whether the legislation was reasonably applied in this case. In other words, was it reasonable for the Ministry to determine that:

- The Appellant doesn't have a severe mental or physical impairment;
- The Appellant's daily living activities aren't directly and significantly restricted either continuously or periodically for extended periods due to the severe impairment; and,
- It couldn't be determined that the Appellant needs help to do daily living activities because of significant restrictions.

ANALYSIS

Severity of Impairment

In determining PWD eligibility, the Ministry must consider all relevant evidence, which includes the Appellant's evidence. That said, the legislation requires that the Ministry make its decision based largely on the opinion of a prescribed professional, which includes a medical practitioner for the Medical Report and a registered nurse for the Assessor Report.

In this appeal, the Ministry has determined that both the duration of the impairment criterion and the Appellant's age criterion have been met, so they are not at issue in this appeal.

Physical Impairment

The Appellant's Position

The Appellant's position is that he obviously has a severe physical impairment and that the Decision shows a lack of comprehension on the part of the Ministry.

The Ministry's Position

The Ministry's position is that the Appellant's functional skills, mobility and physical abilities do not suggest a severe degree of physical impairment, and while the Nurse indicates the Appellant takes longer for all tasks, they do not say how much longer it takes. In addition, the Appellant says it takes him twice as long, which the Ministry has determined that taking two times longer while maintaining independence does not suggest a severe degree of physical impairment.

Panel Decision

The legislation requires that the Ministry determine whether it thinks an impairment is severe. Clearly this assessment must be made in light of the evidence. The evidence of severity is contained in an applicant's PWD application, together with any relevant new evidence admitted by the Panel under section 22(4) of the *Employment and Assistance Act*. While the information

in the Self Report should also be taken into account, the legislation requires that the Ministry rely primarily on an assessment of the severity of an applicant's impairment as expressed by prescribed professionals. The Ministry has created the Medical Report and the Assessor Report for this purpose.

The Panel notes that the legislation provides no guidance on how prescribed professionals are to form their opinions. However, prescribed professionals should be reasonably expected to provide fair and honest opinions of the severity of an applicant's impairments. These opinions might be the result of direct observation, medical tests, or other similar measures. They might also be, in part, as a result of the applicant's response to questions posed by the prescribed professional, if detailed empirical evidence is not otherwise available. In the latter case, the prescribed professional is duty-bound by their professional standards to express doubt in what an applicant says if, in their professional opinion, it is not consistent with the known symptoms of a diagnosed illness.

The Doctor has diagnosed two physical impairments. In the Medical Report, the Doctor describes the Appellant's back pain as causing the Appellant chronic fatigue, chest pain, shortness of breath, and reduced mobility. In the Second Submission, the Doctor says the Appellant has periods where his impairment is "*crippling*". At the hearing, the Appellant said he has an average of one or two AF Episodes a day, and he has been taken by ambulance to the hospital twice within the past three weeks as a result.

Based on the available evidence, the Panel finds that the Ministry's determination that the Appellant does not have a severe physical impairment is not reasonable.

Mental Functioning

In the Medical Report, the prescribed professional is asked if the applicant has any significant deficits in their cognitive and emotional functioning, and if so, in what areas. In the Assessor Report, if the applicant has a mental impairment, the prescribed professional is asked to indicate whether any impairment to the applicant's cognitive and emotional deficits are considered to have a mild, moderate, or major impacts on their mental functioning. The legislation doesn't define what mild, moderate or major impacts are.

If the applicant has an identified mental impairment, the prescribed professional is also asked in the Assessor Report to indicate whether the applicant requires support or supervision in several areas of social functioning.

The Appellant's Position

The Appellant's position is that he suffers from anxiety and depression as a result of his physical impairments and their impact on his financial situation, but prior to the onset of his physical impairments he did not have any problems with his mental functioning.

The Ministry's Position

The Ministry's position is that it is difficult to gain a full picture of the Appellant's mental health because, while the Nurse highlights some difficulties with his cognitive and emotional functioning and communication, these challenges have not been identified by the Doctor. And because the Doctor has not provided a diagnosis of a severe mental impairment, nor identified deficits in the Appellant's cognitive and emotional function or difficulty with communication, a severe mental impairment cannot be established.

Panel Decision

The legislation doesn't define what mild, moderate or severe cognitive deficits are. In the Medical Report and the Assessor Report, prescribed professionals are asked to say how mental skills are affected by a mental impairment to help the Ministry assess the applicant's severity.

As explained in the Decision, the Nurse has indicated in the Assessor Report that the Appellant has several major and moderate impacts in a number of areas of cognitive and emotional functioning. On the other hand, the Doctor does not identify any significant cognitive or emotional deficits in the Medical Report. At the hearing, the Appellant said that his anxiety and depression were the result of his physical impairments, and as indicated by the Nurse in the Assessor Report, he has good functioning with both his immediate and extended social contacts.

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

Restrictions in the Ability to Perform Daily Living Activities

The Appellant's Position

The Appellant's position is that, following his frequent AF Episodes and backpain flares, he really struggles with several daily living activities, in particular, with personal hygiene, housekeeping, and going to and from stores.

The Ministry's Position

The Ministry's position is that the Nurse has only met with the Appellant once, and because the Doctor has known the Appellant for six years, the Ministry places more emphasis on the assessments provided by the Doctor. In addition, while the Doctor has indicated in the Medical Report that the Appellant requires periodic assistance with basic housework, it is not clear what assistance is needed, nor how often or for how long assistance is needed. Regarding the other daily activities for which the Nurse says the Appellant is restricted (personal self-care and hygiene, some aspects of basic housekeeping and getting in and out of a vehicle), the Doctor reports no significant restrictions and the Nurse does not provide enough information for the Ministry to confirm any significant restrictions. In addition, the Appellant is able to do most of his daily living activities independently.

Panel Decision

After assessing the severity of an impairment, the Ministry must consider how long a severe impairment is likely to last, and how much the applicant's ability to do daily living activities is restricted.

The legislation says the Ministry must be satisfied that a prescribed professional has said that an applicant's severe impairment *directly and significantly* restricts their daily living activities, either *continuously or periodically for extended periods*. Daily living activities appears in the Act in the plural ("*daily living activities*"), so at least two of the daily living activities must be significantly restricted.

"*Directly*" means that a severe impairment must itself be the cause of any daily living activities restrictions. A direct restriction must also be significant and either continuous or periodic. If periodic, it must be for extended periods.

In the Decision, the Ministry said it puts greater reliance on the assessment of the Doctor than the assessment of the Nurse because the Doctor has known the Appellant for longer. The Panel notes that there is nothing in the legislation that suggest that the reliability of a prescribed professional's opinion should be influenced by how long that professional has known the applicant. In both case the information provided in the Medical Report and the Assessor Report regarding the Appellant's difficulties with daily living activities are based largely on information provided to the Doctor and the Nurse by the Appellant, who was present when those sections of the application were completed. Neither the Doctor nor the Nurse has questioned the reliability of the information provided to them by the Appellant, and the information reported in the Appellant's application by the prescribed professionals is generally consistent. The Panel finds that it was not reasonable for the Ministry to assign more weight to the Doctor's assessments in determining the Appellant's restrictions in doing daily living activities.

In the Decision, the Ministry acknowledges that the Doctor says that the Appellant has been prescribed medications that can increase his fatigue. The Ministry also acknowledges that the Doctor says the Appellant is restricted in personal self care and mobility inside and outside the home and that the Appellant requires help from another person with some daily living activities. However, the Ministry concludes that some of the Appellant's conditions are episodic, and it is not clear that he is restricted in these activities continuously or periodically for extended periods.

The Panel notes that the Nurse also reports restrictions with the same daily activities. At the hearing, the Appellant provided additional information about the frequency and duration of his physical impairments. For example, fatigue limits his mobility outside the home to the point where he has to sleep in his car when going to or from the store, and following his most recent trip to the hospital, it took him four days to do his dishes. The Appellant explained that his backpain flares occur regularly, and his AF Episodes happen every day or two. In the Second Submission, the Doctor says that the fatigue the Appellant experiences following post prandial hypotension leave him with the "*inability to do anything*".

The Ministry also determined that the Appellant takes twice as long as typical to complete some daily living activities. The Panel notes that the Appellant said that it takes him *at least* twice as long, so some activities take more than twice as long to complete. At the hearing, the Ministry said that it might consider an activity that takes three times as long as typical to complete to be evidence of a significant restriction in a person's ability to do daily living activities.

Based on all the available evidence, the Panel finds that the Ministry was not reasonable in determining that the Appellant is not directly and significantly restricted in his ability to do daily living activities as a result of his physical impairment.

Help with Daily Living Activities

The Appellant's Position

The Appellant's position is that he gets help with his laundry from a laundry service, and that family, friends and neighbours check in on him and offer help with daily living activities from time-to-time. However, additional help would be useful, particularly following an AF Episode or a backpain flare, where every daily living activity takes him at least twice as long to complete if he has to do it himself.

The Ministry's Position

The Ministry's position is it cannot be determined that the Appellant requires significant help is required from other persons or an assistive device because it has not been established that daily living activities are significantly restricted.

Panel Decision

Help in relation to a daily living activity is defined in the legislation as the need for:

- An assistive device;
- The significant help or supervision of another person; or,
- The services of an assistance animal.

The legislation also says that a person must need help to do daily living activities *as a result of direct and significant restrictions in their ability to perform daily living activities*. So direct and significant daily living activities restrictions must be the cause of the need for help.

Because the Panel has found that the Ministry was not reasonable in determining that it has not been established that daily living activities are significantly restricted, the Panel must look to the available evidence to see whether the need for help criterion has reasonably been met. The Panel notes that the legislation does not require that help with daily living activities *be provided*, just that it *is needed*.

In the Medical Report, the Doctor says the Appellant needs help from another person. In the Assessor Report, the Nurse says the Appellant has some family supports, gets help with daily living activities from family and friends, and gets help from a "laundry service" with his laundry.

The Nurse also says that neighbours check on him and offer help, and that additional help would be useful. For example, the Nurse says Appellant would benefit from more complex supports from medical team specializing in cardiac health.

In the Self Report, the Appellant says he would benefit from having help getting dressed. At the hearing the Appellant described some of the help he gets from his neighbour with housekeeping.

Based on the available evidence, the Panel finds that the Ministry was not reasonable in determining that the Appellant did not need help with daily living activities.

Conclusion

Based on all the evidence and legislation, the Panel finds that the Decision was not reasonably supported by the evidence and was not a reasonable application of the legislation and therefore rescinds the Decision. The Appellant's appeal, therefore, is successful.

APPENDIX
RELEVANT LEGISLATION

The criteria for being designated as a PWD are set out in Section 2 of the *Act* as follows:

Persons with disabilities

2 (1) In this section:

"assistive device" means a device designed to enable a person to perform a daily living activity that, because of a severe mental or physical impairment, the person is unable to perform;

"daily living activity" has the prescribed meaning;

"prescribed professional" has the prescribed meaning.

(2) The minister may designate a person who has reached 18 years of age as a person with disabilities for the purposes of this Act if the minister is satisfied that the person is in a prescribed class of persons or that the person has a severe mental or physical impairment that

(a) in the opinion of a medical practitioner or nurse practitioner is likely to continue for at least 2 years, and

(b) in the opinion of a prescribed professional

(i) directly and significantly restricts the person's ability to perform daily living activities either

(A) continuously, or

(B) periodically for extended periods, and

(ii) as a result of those restrictions, the person requires help to perform those activities.

(3) For the purposes of subsection (2),

(a) a person who has a severe mental impairment includes a person with a mental disorder, and

(b) a person requires help in relation to a daily living activity if, in order to perform it, the person requires

(i) an assistive device,

(ii) the significant help or supervision of another person, or

(iii) the services of an assistance animal.

(4) The minister may rescind a designation under subsection (2).

The Regulation provides as follows:

Definitions for Act

2 (1) For the purposes of the Act and this regulation, "**daily living activities**",

(a) in relation to a person who has a severe physical impairment or a severe mental impairment, means the following

activities:

(i) prepare own meals;

(ii) manage personal finances;

(iii) shop for personal needs;

(iv) use public or personal transportation facilities;

(v) perform housework to maintain the person's place of residence in acceptable sanitary condition;

(vi) move about indoors and outdoors;

(vii) perform personal hygiene and self care;

(viii) manage personal medication, and

(b) in relation to a person who has a severe mental impairment, includes the following activities:

(i) make decisions about personal activities, care or finances;

(ii) relate to, communicate or interact with others effectively.

(2) For the purposes of the Act, "**prescribed professional**" means a person who is

(a) authorized under an enactment to practise the profession of

(i) medical practitioner,

(ii) registered psychologist,

(iii) registered nurse or registered psychiatric nurse,

(iv) occupational therapist,

(v) physical therapist,

(vi) social worker,

(vii) chiropractor, or

(viii) nurse practitioner ...

Alternative grounds for designation under section 2 of Act

2.1 The following classes of persons are prescribed for the purposes of section 2 (2) [*persons with disabilities*] of the Act: ...

(e) a person who is considered to be disabled under section 42 (2) of the *Canada Pension Plan* (Canada).

The *Employment and Assistance Act* provides as follows:

Panels of the tribunal to conduct appeals

22(4) A panel may consider evidence that is not part of the record as the panel considers is reasonably required for a full and fair disclosure of all matters related to the decision under appeal.

APPEAL NUMBER 2023-0273

Part G – Order

The panel decision is: (Check one) Unanimous By Majority

The Panel Confirms the Ministry Decision Rescinds the Ministry Decision

If the ministry decision is rescinded, is the panel decision referred back
to the Minister for a decision as to amount? Yes No

Legislative Authority for the Decision:

Employment and Assistance Act

Section 24(1)(a) or Section 24(1)(b)
Section 24(2)(a) or Section 24(2)(b)

Part H – Signatures

Print Name

Simon Clews

Signature of Chair

Date (Year/Month/Day)

2023/11/06

Print Name

Kulwant Bal

Signature of Member

Date (Year/Month/Day)

2023/11/06

Print Name

Bill Farr

Signature of Member

Date (Year/Month/Day)

2023/11/06