

**Part C – Decision Under Appeal**

Under appeal is a decision of the Ministry of Social Development and Poverty Reduction (the “Ministry”) dated November 9, 2023 (the “*Reconsideration Decision*”) denying the Appellant’s application for Persons with Disabilities (“PWD”) designation.

**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”):

Section 2

(Text of the above is attached at the end of the decision)

**Part E – Summary of Facts**

The hearing was held before a Panel with the Appellant appearing in person with a parent (as witness and support person), and the Ministry representative appearing by telephone.

In July 2022 the Appellant suffered a tibial fracture, received immediate surgery with internal fixation. During recovery and extended failure of bones to knit he has experienced physical limitations affecting his life. The failure to knit resulted in scheduled surgery with a different surgeon (the “Surgeon”).

On August 16, 2023 the Appellant applied for PWD. The designation was denied almost a month later (September 14, 2023). The Appellant requested reconsideration. The *Reconsideration Decision* was issued November 9, 2023.

The documents the Ministry had as evidence at the time of the *Reconsideration Decision* included:

- Appellant’s Application for PWD filed August 16, 2023.
- Medical Report and Assessor Report completed by the Appellant’s GP (the “GP”), dated June 14, 2023.
- Letter from the Surgeon, dated September 25, 2023.
- Letter from a physiotherapist (the “PT”), dated September 29, 2023.
- Appellant’s self-report entitled “PWD stuff” (undated).
- A “Lower Extremity Functional Scale” self-report questionnaire (undated).

On November 9, 2023 the Appellant appealed the *Reconsideration Decision* to this tribunal.

In the *Reconsideration Decision* the Ministry found that the Appellant had not met all of the legislated criteria to receive PWD designation. Expressed as a checklist in a table the Ministry found only 2 of the 5 were met as follows:

Criterion	Yes	No	
#1	<input checked="" type="checkbox"/>		Age
#2		<input checked="" type="checkbox"/>	Duration
#3	<input checked="" type="checkbox"/>		Severe impairment
#4		<input checked="" type="checkbox"/>	Directly and significantly restricted daily living activities
#5		<input checked="" type="checkbox"/>	Assistance required with daily living activities as a result of significant restrictions

The matters in dispute are those marked as “No” above, and it is those that are examined in this decision by the Panel.

### **Appellant Submissions**

The Appellant provided with the filing of the appeal:

#### Reasons for Appeal

- I have a Non union fracture.
- No one can give a clear idea of time frame.
- [The GP] was wrong to say 3-6 months.
- It has been a year and half already.
- May be healed in a year possibly but, there is all the strengthening that then has to take place once it is healed and you can put full weight on it.
- Could easily be 2 years from “today” before able to get back to work.
- I wasn’t given information on severity of fracture at onset. Thought I’d be up and about in a few months.
- Will need physio for indefinite period of time.
- Many unknowns.
- Have lost so much strength because of the length of time unable to bear full weight because it is a non-union fracture.

At the hearing the Appellant spoke of the severity of his injury and that the GP was not accurate on the healing time and not fully aware of the impact on the Appellant’s daily living activities (“DLAs”). The Appellant explained needing referral to the Surgeon for a second surgery to correct a bent internal fixation and gap between the bones that was preventing healing. The Appellant described the Surgeon as more aware but stated that nobody has been able to say how long it will take for him be “back to normal”.

The Appellant stated that the severity of the injury and current non-union of the fracture is linked to the duration of the physical impairment. He stated that he was at the 18-month mark now and only recently out of a boot ‘air-cast’ and graduated to a forearm crutch but still not full weight-bearing. His ability to carry things is still restricted due to the crutch. The weight-bearing is only partial because the bones are not knit yet and dependant on internal fixation.

The Appellant described the pain of the injury and the loss of strength causing difficulty in supporting his body and doing tasks.

He described requiring family or friends to assist with grocery shopping, meal preparation, laundry and housekeeping (like vacuuming), and that he uses assistive devices listed as: grab bar in tub, shower chair, raised toilet seat, crutch, and formerly an air-cast.

The Appellant stated that he had to move to a home without stairs and still finds them difficult.

### **Ministry Submissions**

The Ministry acknowledges the injury was severe and that it, and subsequent surgeries, greatly impacted the Appellant's physical functioning, but that 3 of the 5 required criteria were not met, as discussed in the *Reconsideration Decision* (see the table above). The Ministry reiterated the *Reconsideration Decision* citing the evidence and the terms of the legislation that were applied.

Describing Criterion #2 (duration of the impairment) the Ministry cited the statements of both physicians (the GP and Surgeon) that indicated that the physical impairment was, in their opinions, not going to last long enough to qualify. The GP said "3-6 months" (the 6 month mark just passing [the day before the hearing]). The Surgeon said (on Sept 25, 2023) approximately "1 year from the second surgery on March 14, 2023". The Ministry cited section 2(2)(a) of the *Act* as requiring that the Minister be satisfied that "in the opinion of a medical practitioner or nurse practitioner [the physical impairment] is likely to continue for at least 2 years.

The Ministry also described the information considered in Criterion #4 to decide whether the impairment directly and significantly restricts DLAs activities continuously or periodically for extended periods. The Ministry cited quotes and information from the physicians in the *Reconsideration Decision*. The GP was cited as indicating progression of healing with adaptation stating in the Assessment that the Appellant "is managing ADL's" [sic] and was independent in all DLAs although receiving parental help carrying groceries or free store delivery. In the Medical Report the GP stated (regarding the degree of restrictions) that the Appellant has "made do" using crutches.

The Ministry identified that the Surgeon described limitations stating:

He is not able to carry anything or use hands when ambulating and requires assistance for activities such as grocery shopping, looking after pets, and cleaning the home. Patient uses shower aids to bathe (shower chair and grab bar).

That was limitation was supported by the letter from the PT but the Ministry determined that the different responses did not provide information that the Appellant's condition was worsening since the application. It stated that the Ministry makes its decision based on the information provided by the medical practitioners (the GP and Surgeon) and found that:

... there is not enough evidence to confirm that you have a severe impairment that significantly restricts your ability to perform your daily living activities continuously or periodically for extended periods. Therefore, the legislative criteria have not been met.

Criterion #5, that the Ministry also found was not met, was whether the information established that, to perform any directly and significantly restricted DLAs the Appellant requires:

- an assistive device,
- the significant help of another person, or
- the services of an assistance animal.

The Ministry identified that because Criterion #4 was not met this Criterion #5 was also, automatically, not met. It stated that:

As it has not been established that daily living activities are significantly restricted (criterion 4), it cannot be determined that significant help is required.

### **Admissibility of New Evidence**

Under section 22(4) of the *Act*, the Panel may admit evidence that is reasonably required for a full and fair disclosure of all matters related to the decision under appeal. The Panel may admit written submissions (including stated "Reasons for Appeal") and statements from the Appellant and Ministry (representative) made at the hearing.

The Panel admitted the "Reasons for Appeal" and the testimony of the Appellant and parent.

Where a certain statement is relevant, and given weight that might affect findings, it is specifically mentioned in the Panel's reasons below.

**Part F – Reasons for Panel Decision**

The purpose of the Panel, here, is not to redo the *Reconsideration Decision* under appeal. It is to assess whether it satisfied a benchmark, even if the Panel might disagree with the outcome. The benchmark, or standard applied is whether the applicable laws were reasonably applied and whether the evidence was also reasonably applied in the circumstances. Notably however, the evidence considered here is not just the evidence that was known at the *Reconsideration Decision*. It is to include any new evidence the Panel may admit and consider. That means this decision also considers new relevant evidence as if it were available for the *Reconsideration Decision* and which might mean that a benchmark was not met and the outcome changed.

The 3 issues here concern Criterion #2, #4, and #5 (respectively: duration, significance of restrictions on DLAs, and help needed for significant restrictions).

The Appellant stated that his recovery is slow, and that no physician has, or can, state when he will be sufficiently recovered. Although no dates have been provided the medical practitioner (the GP and Surgeon), each provided an opinion on the duration of impairment as shown below, from which have been calculated the resultant end dates also shown:

	Duration	Start Date	End Date
Application		August 16, 2023	2 years = August 15, 2025
GP	3-6 months	June 14, 2023	December 13, 2023
Surgeon	1 year from surgery	March 14, 2023 (Per Sept 25, 2023 letter)	March 13, 2024
PT	Not stated		

The Ministry determined that it was not satisfied that a professional prescribed by the *Act* was of the opinion that the severe physical impairment would last for 2 years or longer. (The *Act* requires an opinion from a medical practitioner or nurse practitioner, which are defined terms which do not include a physiotherapist, and thus not the PT.) The longest was projected by the Surgeon as effectively, March 2024. A date affected by and projected from the second surgery. While the Appellant is not yet healed to the point of no longer suffering substantial physical impairment, the longest projected end-date has not been exceeded nor has the duration of 2 years or longer, as prescribed by the *Act*.

The Panel finds the evidence reasonably supports the Ministry's determination on "duration" as discussed in the *Reconsideration Decision*. In terms of the outcome of the denial of PWD, that decides the matter. However, the Panel also considers the other 2 criteria that the *Reconsideration Decision* found were not met.

Regarding the evidence that applies to Criterion #4, the 2 physicians differ and provided information at different times. The first, the GP assessed the Appellant as independent, without any significant restrictions of DLAs. However, recovery was delayed, and the Surgeon needed to perform a second surgery. The Surgeon identified an inability to carry things while ambulating (seemingly due to use of crutches) and requiring assistance for household duties and use of supports such as shower aids. The FT letter was similar and supports the opinion of that medical practitioner.

Reconciliation of these points is possible, considering that the Surgeon was commenting while aware of the post-surgical restrictions. However, the Surgeon did not mention any timeframe to suggest that the inability to carry things would extend beyond when crutches were no longer needed or to beyond the projected one year recovery. There is no expression to indicate that either opinion or the differences stemmed from a perceived deterioration of the Appellant's condition. The Panel may entertain the notion that the second surgery represented a degradation, by restarting the healing process, or correcting bad or degraded bone position and fixation. Nevertheless, there is no evidence to suggest that restrictions were enduring, either continuous or periodic for extended periods.

The Ministry sought to be satisfied that the opinion of a prescribed professional was that the requirements of section 2(2)(b) of the Act were met; but the Ministry found that there was:

not enough evidence to confirm that [the Appellant] had a severe impairment that significantly restricts ... ability to perform ... daily living activities continuously or periodically for extended periods.

The Panel finds that it was reasonable for the Ministry to be unsatisfied that the medical practitioners (and no nurse practitioner) had opinions meeting the criteria, or any with supporting evidence that the criteria was met.

The finding above automatically applies to Criterion #5, which focuses on the "Assistance required" to perform DLAs. According to Section 2(1)(b)(ii) of the *Act*, there must be a "result of those restrictions" indicating that the Appellant needs help to perform these activities. The Panel finds that the evidence reasonably supports that the absence of such

a result, help cannot be shown to be required. The Ministry reasonably applied the law and applied the evidence to come to that conclusion.

While the interpretation of the applicable enactments was not contested, the Panel considered the Ministry's interpretation and application of the legislation. The Panel finds that it was reasonable as was the application of the evidence in the circumstances.

**Decision**

The Appellant is not successful on appeal, the Panel having found that the *Reconsideration Decision* is:

1. reasonably supported by the evidence, and
2. a reasonable application of the applicable enactment in the circumstances of the person appealing the decision.

Accordingly, the Panel confirms the *Reconsideration Decision*.



## Appendix – Relevant Legislation

### *Employment and Assistance for Persons with Disabilities Act*

#### **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).

***EMPLOYMENT AND ASSISTANCE FOR PERSONS WITH DISABILITIES REGULATION***

**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, 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.

APPEAL NUMBER 2023-0366

**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

Kent Ashby

Signature of Chair

Date (Year/Month/Day)

2023/12/18

Print Name

Don Stedeford

Signature of Member

Date (Year/Month/Day)

2023/12/20

Print Name

Bob Fenske

Signature of Member

Date (Year/Month/Day)

2023/12/19