

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

The decision under appeal is the Ministry of Social Development and Poverty Reduction (the Ministry) decision dated April 25, 2023, denying persons with disability (PWD) designation.

The Ministry found the Appellant met the age (over 18) and duration (likely to last more than two years) requirements. However, the Ministry found the Appellant did not meet the requirements for:

- severe mental or physical impairment
- significant restriction on the ability to perform daily living activities
- needing significant help to perform daily living activities.

The Ministry found the Appellant was not one of the prescribed classes of persons eligible for PWD on alternative grounds. As there was no information or argument on this point, the Panel considers it not to be an issue in this appeal.

### **Part D – Relevant Legislation**

*Employment and Assistance for Persons with Disabilities Act (Act), s. 2*  
*Employment and Assistance for Persons with Disabilities Regulation (Regulation), s. 2*  
*Employment and Assistance Act (EAA), s. 22(4)*

Full text of the Legislation is in the Schedule of Legislation at the end of the Reasons.

**Part E – Summary of Facts**

The Hearing took place by teleconference on May 17, 2023. In an email to the Tribunal dated May 4, 2023, the Appellant indicated that he had an appointment with a cardiologist on May 12, 2023, and intended to submit a report from that specialist. He also stated in the email that, if there was not enough time to review the document, he wanted to proceed with the hearing as scheduled. The report was not available by the time of the hearing, and at the hearing the Appellant confirmed that he wanted to proceed without a report from the cardiologist.

**Evidence Before the Ministry at Reconsideration:**

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

- Medical and Assessor Reports completed by the Appellant's Doctor, with Outpatient Kidney Clinic Consultation Reports from a Specialist in Internal Medicine and Nephrology attached
- Appellant's Self-report
- Appellant's statement in the Request for Reconsideration

**Medical Report:**

The Doctor states that the Appellant has been their patient for thirty years, and they have seen the Appellant once in the last twelve months.

**Diagnosis:**

The Doctor indicates diagnoses of chronic kidney disease (stage 5), anemia and diabetes.

**Health History:**

The Doctor states that the Appellant has chronic renal failure and is close to needing dialysis. He has had an AV fistula inserted in preparation for that treatment. His condition causes him to be fatigued and short of breath on exertion. He is "unable to walk far" and has been unable to continue working. They note "Hemoglobin 83" and refer the reader to the Specialist's reports and most recent lab results.

The Doctor indicates that the Appellant has not been prescribed any medications or treatments that interfere with his ability to perform daily living activities, but states that, when he starts dialysis, treatments will take place in hospital three days per week.

**Functional Skills:**

The Doctor indicates that the Appellant can:

- walk 1 to 2 blocks unaided on a flat surface
- climb 5+stairs unaided
- remain seated with no limitation.

They indicate that any limitations in lifting are unknown, and there are no significant deficits with cognitive or emotional functioning.

**Assessor Report:**

The Doctor indicates that the Appellant lives with family, friends, or caregiver. They also state that the Appellant is seen regularly by the Specialist, and as the Appellant's family doctor, they see him occasionally for minor complaints.

***Mental or Physical Impairment:***

The Doctor states that the Appellant's impairments are: "dialysis, kidney disease, diabetic."

***Mobility and Physical Ability:***

The Doctor indicates that the Appellant is independent in all aspects of mobility and physical ability listed on the form, except walking outdoors and climbing stairs. The Doctor indicates that the Appellant "takes significantly longer than typical" to walk outdoors and climb stairs, with the explanation "no assistive device – gets fatigued & short of breath."

***Cognitive and Emotional Functioning:***

The Doctor indicates that the Appellant's mental impairment or brain injury restricts or impacts his functioning as follows:

- Minimal impact on consciousness, emotion, attention/concentration, and executive function;
- Moderate impact on motivation.

***Daily Living Activities:***

The Doctor indicates that the Appellant is independent in all daily living activities listed on the form, except:

- Shopping: the Appellant takes significantly longer than typical to carry purchases home due to fatigue and shortness of breath;
- Meals: the Appellant has periodic assistance from another person for cooking, with the explanation that his mother cooks for him because he is fatigued;
- Pay Rent and Bills: the Appellant has periodic assistance from another person for budgeting and paying rent and bills due to lack of income.

***Assistance Provided for Applicant:***

The Doctor indicates that family provides the help the Appellant requires for daily living activities.

**Specialist Consultation Reports:**

The Specialist states:

- November 15, 2022:
  - The Appellant has stage 4/5 chronic kidney disease, anemia, type 2 diabetes and gout.
  - The Appellant may need hemodialysis in the future.
- January 18, 2023:
  - The Appellant "seems to feel fatigued" and "does have a variety of aches and pains. Sometimes they are in his toes and knees and sometimes they are more

in his back and his shoulder. He does take Prednisone when this occurs. He does have some shortness of breath on exertion, especially when he is climbing stairs.”

- The Appellant has received IV iron for anemia;
- The Appellant may have “an element of emphysema”
- They repeat that the Appellant may need dialysis in the future.

Blood test results are attached to the reports.

- April 3, 2023 (letter addressed “To Whom It May Concern”):
  - The Appellant has been their patient since 2013, when he was diagnosed with chronic kidney disease;
  - The Appellant is in End Stage Renal Failure and will likely need hemodialysis within the next six months, when he will be going to hospital for treatment three times a week.

Self Report:

The Appellant states:

- He has stage 4 kidney disease and will be going on dialysis if his kidney function decreases;
- His kidney function has been dropping in the past five years;
- He has swelling and painful inflammation in his body, lower energy level, fatigue, and dizziness;
- As a result, he has lost work because of absence due to not feeling well;
- He tries to do his job as best he can, but his “time is cut short because [he is] not able to do the job efficiently”;
- He will need to start dialysis soon, and the treatment is three days a week, 4 hours each visit;
- When he starts dialysis, he will be limited in what he can do, for as long as he has to take the treatment, including maintaining a job and having a social life;
- He understands that dialysis will have significant side effects, including increased tiredness.

Request for Reconsideration:

In his Request for Reconsideration the Appellant repeats some of the information in his Self-report, and states in addition:

- The Doctor completed the Medical Report based on a telephone conversation, and is not as familiar with his situation as the Specialist, whom he sees four times a year;
- He has stage 4 and 5 kidney disease;
- He has constant discomfort because of pain in his body, and for which he takes medication;
- He will be on dialysis until he can have a kidney transplant from a deceased donor;
- He is anxious about going on dialysis, which affects his mental health;

- He cannot walk more than one block or climb a flight of stairs before he becomes extremely short of breath; then it takes him ten minutes to catch his breath to resume walking;
- He often wakes up with body pain in his “feet, knees, back, joints, etc.”
- Gout affects his mobility, and he takes prescription medication for it;
- His appetite is decreased and he has lost 35 pounds in the last six months.

Additional Evidence:

The Appellant provided the following additional evidence:

- Sleep apnea assessment dated August 29, 2018, reviewed by an Ear, Nose and Throat Specialist, indicating a diagnosis of Severe Obstructive Apnea/Hypopnea
- Medical Imaging Consultation dated December 20, 2020 stating:
  - The Appellant had an MRI of his left knee due to “persistent recurring effusion and worsening ambulatory status post-injury while climbing into a truck”
  - MRI indicates:
    - “diffuse tricompartmental degenerative changes with advanced chondral wear most pronounced in the medial femorotibial compartment with bone on bone contact
    - Underlying chronic [anterior cruciate ligament] complete tear
    - Previous [posterior cruciate ligament] sprain
    - Previous [medial collateral ligament] partial tear and [lateral collateral ligament] sprain
    - Popliteus strain
    - Complex lateral meniscus tear
    - Complex medial meniscus tear with peripheral extrusion
    - Osteochondral fragment arising from the medial femoral condyle displaced into the anterior intercondylar notch
    - Moderate joint effusion with chronic synovitis.
- Letter from the Doctor dated April 5, 2023, stating:
  - The Appellant has a very large mass/swelling over the right shoulder with very limited range of motion;
  - The Appellant injured his right shoulder in 2020, and then in the past six months has not been able to raise his right arm and can hardly move it.
- List of prescribed medications.

At the hearing, the Appellant stated:

- He has significant damage to his right shoulder, has minimal use of his right arm, and cannot raise it above his abdomen;
- He is right-handed, but cannot lift, carry, or hold anything with his right hand;
- His shoulder injury limits his daily living activities and shows no sign of improving;
- Daytime sleepiness due to sleep apnea affects his daily living activities;
- Hypertension, diabetes, and renal dysfunction are significant risks to his health if not treated;

- He could have a heart attack due to lack of oxygen if he does not use the CPAP machine;
- He cannot say exactly how long it takes him to climb stairs, but he can only take one step at a time, and needs to use a handrail to go up and down stairs;
- It is tiring and painful for him to walk;
- He wears a brace to stabilize his left knee, which can buckle without warning;

In answer to a question from the Ministry, the Appellant stated that he told the Doctor about his previous injuries after the Medical Report was completed, and the Doctor suggested that he bring it up in the Appeal.

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

- He needs help with anything that has to be done with two hands: carrying groceries, getting dishes from a higher cupboard, or lifting anything higher than his waist;
- Everything is more complicated because he cannot use his right arm; for example, he can only use his left hand when he drives;
- His mother has always done the cooking in their family; the Appellant did not tell the Doctor that she did the cooking for him because of his fatigue;
- He cleans his own room, but with only one hand.

Admissibility of Additional Evidence:

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

The Panel finds that the additional evidence provides further information about the Appellant's medical conditions and treatment, and therefore is reasonably required for the full and fair disclosure of all matters in the appeal. 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 maintains that he meets the criteria for PWD designation. He says that his serious medical conditions are a severe physical impairment. He points out that he cannot walk more than a block and then takes ten minutes to catch his breath. He has daily fatigue and pain in his joints. If he did not use the CPAP machine his daily living activities would be significantly affected, and his other health conditions would worsen. As it is, his right shoulder injury means that he cannot use his right arm, and as he is right-handed, his daily living activities are restricted. He lives with his parents, who help him with all the activities he cannot do. His doctors confirm that he will need dialysis soon, and his daily living activities will be greatly affected when he starts that treatment.

**Ministry Position:**

The Ministry is not satisfied that the information provided establishes a severe impairment of physical or mental functioning. The Ministry maintains that neither the Doctor nor the Specialist has provided an assessment of basic physical functioning or mobility that establishes a severe physical impairment. The Ministry acknowledges that the Doctor indicates the Appellant takes significantly longer than typical to walk outdoors and climb stairs, and that the Appellant says they need to rest for ten minutes after walking a block or climbing stairs. However, the Ministry maintains that amount of extra time does not represent a severe impairment of overall physical functioning.

The Ministry says that the Doctor has not provided a diagnosis of a mental condition or brain injury and indicates no significant deficits with cognitive or emotional functioning. Therefore, the Ministry maintains that the information provided does not establish that the Appellant has a severe impairment of mental functioning.

The Ministry also says that the information provided does not indicate direct and significant restrictions in daily living activities. The Appellant has corrected the Doctor's statement that the Appellant's mother does the cooking for him because he is fatigued. The Doctor indicates the Appellant is restricted in carrying groceries home because he takes significantly longer than typical due to fatigue and shortness of breath, but the Doctor does not say how much longer. Therefore, the Ministry says that it cannot determine that the extra time is a significant restriction on the Appellant's ability to carry purchases home. The Ministry says that, as it cannot

determine that there is a significant restriction in daily living activities, it also cannot determine that the Appellant needs significant help with restricted activities.

Panel Decision:

*PWD Designation – Generally*

The legislation provides the Ministry with the discretion to designate someone as a PWD if the requirements are met. In the Panel’s view, PWD designation is for persons who have significant difficulty in performing regular self-care activities. If the inability to work is the major reason for applying for PWD designation, the Panel encourages the applicant to speak to the Ministry about other potential programs such as Persons with Persistent Multiple Barriers to Employment (PPMB) or explore federal government programs such as Canada Pension Plan disability benefits.

Some requirements for PWD designation must have an opinion from a professional, and it is reasonable to place significant weight on these opinions. The application form includes a Self Report. It is also appropriate to place significant weight on the Self Report and evidence from the Appellant, unless there is a legitimate reason not to do so.

The Panel will review the reasonableness of the Minister’s determinations and exercise of discretion.

*Severe Mental or Physical Impairment*

“Severe” and “impairment” are not defined in the legislation. The Ministry considers the extent of any impact on daily functioning as shown by limitations with or restrictions on physical abilities and/or mental functions. The Panel finds that an assessment of severity based on physical and mental functioning including any restrictions is a reasonable application of the legislation.

A medical practitioner’s description of a condition as “severe” is not determinative. The Minister must make this determination considering the relevant evidence and legal principles.

*1. Physical Impairment:*

The Doctor and Specialist confirm that the Appellant has serious medical conditions. He has Stage 4/5 kidney disease with end stage renal failure, diabetes, and severe sleep apnea. However, under the legislation, the Ministry must be satisfied that the serious medical conditions result in severe physical impairment.

The Doctor indicates that the Appellant can walk 1 – 2 blocks and climb 5+ stairs, though he takes significantly longer than typical and becomes fatigued and short of breath. Neither the Doctor nor the Appellant has indicated how much longer than typical the Appellant takes. The Appellant says it can take ten minutes for him to catch his breath. Otherwise, the Doctor indicates that the Appellant is independent in his physical functioning.



The Appellant has provided reports about the investigation of symptoms relating to his right shoulder and explained that he cannot use his right hand or raise his right arm above his abdomen. He also described symptoms relating to his left knee, and the use of a brace to prevent his knee from buckling. However, in the Medical and Assessor Reports, the Doctor does not address those conditions. In their letter of April 5, 2023, the Doctor states that the Appellant has limited range of motion of his right arm but does not confirm that the impairment will last at least two years, or indicate any change in their opinion about the Appellant's physical functioning as set out in the Medical and Assessor Reports.

The Appellant has serious medical conditions, some of which have been classified as severe by the medical professionals. However, considering all of the information in the Doctor's and Specialist's reports about the Appellant's physical functioning with those conditions, the Panel finds that the Ministry was reasonable in its determination that the information does not establish that the Appellant has a severe physical impairment.

**2. *Mental Impairment:***

The Doctor has not diagnosed a mental condition or brain injury. In the Medical Report they indicate no significant deficits with cognitive or emotional functioning. In the Assessor Report they indicate minimal impact on consciousness, emotion, executive function, attention/concentration and executive function, and moderate impact on motivation. The Appellant has indicated that he is anxious about starting dialysis.

The Panel acknowledges that the Appellant's serious medical conditions affect his mental wellbeing. However, the Panel finds that Ministry was reasonable in its determination that the information in the medical reports 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. 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.

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 inability to work and financial need are not listed as Activities and are only relevant to the extent that they impact listed Activities.

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 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 Appellant has confirmed that his mother does the cooking in their household, not because of his fatigue, but because that is something she has always done. The Doctor indicates that the Appellant needs periodic assistance with budgeting and paying rent and bills due to lack of income, not due to physical or mental impairment. The only other restriction in an Activity that the Doctor indicates is that the Appellant takes significantly longer than typical to carry purchases home, which is only one aspect of shopping for personal needs.

The Appellant argues that, if he did not use the CPAP machine, his daily living activities would be significantly restricted, and his other health conditions would be worsened. He also points out that, when he starts dialysis, he will be unable to perform daily living activities for extended periods of time, as he will need to be in hospital three times a week for four hours each time.

While the Appellant's situation will change when he starts dialysis, the Ministry, and the Panel, must determine the Appellant's ability to perform Activities now, not in the future. The Panel finds that the information provided by the Doctor does not confirm direct and significant restrictions to the Appellant's ability to perform two or more Activities at present. Therefore, the Panel finds that the Ministry was reasonable in its determination that there is insufficient evidence to establish that the Appellant's ability to manage Activities is directly and significantly restricted either continuously or periodically for significant periods of time.

Help Required:

A prescribed professional must provide an opinion that the person needs help to perform the restricted Activities. Help means using an assistive device, the significant help or supervision of another person, or using an assistance animal to perform the restricted Activities. An assistive device is something designed to let the person perform restricted Activities.

As the Panel has found that the Ministry was reasonable in determining that the Appellant was not directly and significantly restricted in 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.

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**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)  
2023/05/22

Print Name  
Mimi Chang

Signature of Member

Date (Year/Month/Day)  
2023/05/22

Print Name  
Bill Farr

Signature of Member

Date (Year/Month/Day)  
2023/05/22