

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

The decision under appeal is the Ministry of Social Development and Poverty Reduction (the Ministry) decision dated November 6, 2023, denying persons with disabilities (PWD) designation.

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

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

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

### **Part D – Relevant Legislation**

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

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

**Part E – Summary of Facts**Evidence Before the Ministry at Reconsideration:

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

- Medical Report and Assessor Report completed by a Doctor, dated February 13, 2023
- Appellant's Self Report, dated December 1, 2022
- Letter from the Doctor, dated October 13, 2023
- Letter from the Appellant, dated October 16, 2023.

The Medical Report and the Assessor Report are completed in the handwriting of both the Appellant and the Doctor, with some changes and corrections initialled by the Doctor. It is possible to identify which parts are written by the Appellant and which by the Doctor, by the different handwriting and the darker ink for the Doctor's additions. At the hearing, the Appellant stated that the Doctor told him to fill out the Medical Report and the Assessor Report, then the Doctor reviewed and signed the forms. The Appellant said that he did not add or change anything on the forms after the Doctor signed them. The Panel accepts the Appellant's evidence about the way the forms were completed, and finds that, as the Doctor signed the forms after the Appellant wrote on them, the Doctor has endorsed the statements and information that the Appellant wrote. Although there are inconsistencies in the written comments, which the Panel will address in the Reasons, the Panel accepts the Medical and Assessor Reports as the Doctor's reports and sets out all the information in the Medical and Assessor Reports as the Doctor's report, whether it is in the handwriting of the Doctor or the Appellant.

*Medical Report:*

The Appellant has been a patient of the Doctor for less than one year and has seen them between 2 and 10 times in past 12 months.

*Diagnosis:*

The Doctor provides a diagnosis of osteoarthritis of the hip, onset January 2021.

*Health History:*

The Doctor states that left hip pain secondary to osteoarthritis limits independent activities of daily living. They report that the Appellant states that intraarticular injections were not helpful. The Appellant has been prescribed a medication that causes fatigue. Pain medication caused side effects and is no longer used. The Appellant uses a cane.

*Degree and Course of Impairment:*

The Doctor indicates that the Appellant is awaiting surgery, which will be more than 2 years from now.

*Functional Skills:*

The Doctor indicates that the Appellant can:

- Walk 1 to 2 blocks unaided on a flat surface
- Climb 2 to 5 stairs unaided
- Lift 2 to 7 kg.
- Remain seated less than 1 hour.

They identify anxiety as a significant deficit in cognitive and emotional functioning.

*Daily Living Activities:*

The Doctor indicates that the impairment directly and periodically restricts the Appellant's mobility inside and outside the home. They comment "waxes and wanes depending on length of activity" and "extreme discomfort & pain" but indicate that the degree of restriction is "mild." They repeat that the Appellant needs to use a cane.

*Additional Comments:*

They state: "lack of sleep, continuous pain, mobility issues."

*Assessor Report:*

The Appellant lives alone in supportive housing.

*Mental or Physical Impairment:*

They state that the Appellant's impairment is "mobility and continues [sic – query "continuous"?] pain".

*Mobility and Physical Ability:*

They state that the Appellant takes significantly longer than typical for:

- Walking indoors and outdoors (2 times longer)
- Climbing stairs (2 times longer)
- Standing, lifting, carrying and holding ("limited").

*Daily Living Activities:*

The Doctor indicates that the Appellant is independent for all listed areas of the following Daily Living Activities:

- Personal Care, except that dressing and transfers in and out of bed and on and off a chair also take twice as long as typical
- Basic Housekeeping, except that the Appellant also uses an assistive device for laundry
- Meals
- Pay Rent and Bills

- Medications.

For Shopping, they indicate that the Appellant uses an assistive device and takes 5 times longer than typical to go to and from stores and carry purchases home, with the comment "use of Handy Dart".

For Transportation, they indicate that the Appellant takes twice as long to get in and out of a vehicle, and 5 times as long to use public transit.

Pages 19 (impacts to cognitive and emotional functioning) and 22 (social functioning) are missing from the Daily Living Activities section of the Assessor Report.

*Assistance Provided for Applicant:*

The Doctor indicates that family, friends, health authority professionals and volunteers provide the help required for daily living activities. They also indicate that the Appellant routinely uses a cane to help compensate for his impairment.

*Additional Information:*

They state that the disability has caused financial hardship for the Appellant, which makes it hard to take care of his physical health, which in turn causes "emotional hardship."

*Self Report:*

The Appellant states:

- He needs a left hip replacement
- Surgery has been delayed for two years because of Covid restrictions, and as a result his condition has become severe
- His disability causes sleep deprivation because he wakes up every hour in severe pain
- He has mobility issues when walking, sitting, or standing.

*Letter from the Doctor, dated October 13, 2023:*

The Doctor states:

*Per pt. request, I am reiterating subjective accounts of [the Appellant's] bilateral hip pain as indicated in a prior disability application.*

*[The Appellant] can only walk two blocks without significant pain and limps while doing so.*

*[The Appellant] has difficulty walking up flights of stairs due to significant pain.*

*Unfortunately, non-steroidal oral anti inflammatories [sic] and intraarticular corticosteroid injections have been of no benefit.*

Letter from the Appellant, dated October 16, 2023:

The Appellant sent a letter to the Ministry's Reconsideration Branch, most of which is argument, in which he also says that, in a telephone call with a staff person in that department, he was told that "the only thing needed at this time to have this decision overturned is a letter from my doctor confirming the pain and effect of that pain has on my ability to maintain or achieve my daily living activities." He also says that there was an "unreasonable delay" in sending him the reconsideration package, although the dates of the request and delivery are not included in the letter.

Additional Evidence:

Appellant:

At the hearing, the Appellant said:

- It took the Ministry four months to send him the reconsideration package.
- The Doctor told him to fill out the Medical Report and the Assessor Report, and then the Doctor would sign them.
- He can walk two blocks unaided but he is in extreme pain.
- He cannot walk more than two blocks in a day.
- He has continuous pain from his ankle to his hip "24/7" and he spends his whole day trying to relieve the pain.
- He does not take medication, except two Tylenols to sleep.
- It takes him one hour to put on his socks and he cannot do up his shoes.
- He cannot work because of the pain.
- He wakes up from the pain every two hours, and lack of sleep affects his health.
- He cannot stand for more than five minutes.
- It hurts to sit, and he cannot sit at a desk.
- He does cook for himself, but sometimes he does not eat because he is in too much pain. Sometimes his friends also cook meals for him or invite him over for a meal.
- His friends shop for him – for example, he needed an item from a local store but could not walk two block to get it, so a friend brought it to him.
- Housework "doesn't get done."

In answer to a question from the Ministry, the Appellant said:

- He no longer takes prescribed pain medication due to side effects.

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

- He did not add anything to the Medical and Assessor Reports after the Doctor signed them.
- The help he receives from health authority professionals is physiotherapy.

Admissibility of Additional Evidence:

The Ministry did not object to the additional oral evidence of the Appellant. The Panel finds that the additional evidence is reasonably required for the full and fair disclosure of all matters in the appeal. Therefore, the Panel finds that the additional evidence is admissible under the Act, 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 the Ministry has not considered the severity of his pain in determining whether he has a severe physical impairment. He argues that his doctor is the best qualified to determine the severity of his disability, and the doctor has confirmed that the Appellant has significant pain. He says that, if the Doctor says he has a severe impairment, that statement should be conclusive, and it is not reasonable for the Ministry to override the Doctor's opinion. He also says that, if the Ministry had any questions about the severity of his disability, they should have phoned the Doctor, or the Appellant, for more information.

The Appellant also argues that he has a disability as defined in the Canadian Human Rights Act: a physical or mental condition that is permanent, ongoing, episodic or of some persistence, and is a substantial or significant limit on an individual's ability to carry out some of life's important functions or activities, such as employment. He says the Ministry's determination that he does not meet the criteria for PWD designation ignores the definition in the Canadian Human Rights Act and discriminates against him.

The Appellant also argues that he has been denied procedural fairness because:

- there was an unreasonable delay in sending him the reconsideration package; and
- the Ministry has an interest in the outcome; therefore, the Ministry is biased and is not an independent decision maker.

He says that the Charter of Rights and Freedoms guarantees him procedural fairness, which he did not receive in this instance.

Ministry Position:*Medical and Assessor Reports:*

The Ministry noted the Appellant's handwritten statements within the Medical and Assessor Reports, and the Doctor's additions and corrections. They say that, where the Doctor has initialled a statement written by the Appellant, the Doctor has endorsed the statement. However, they maintain that uninitialed statements written by the Appellant are a form of Self Report, and they have not considered them as statements of the Doctor.

*Canadian Human Rights Act:*

The Ministry says that the only legislation applicable to an application for PWD designation is the Act, and the definition of disability in the Canadian Human Rights Act is not relevant to this appeal.

*Physical Impairment:*

The Ministry maintains that the Appellant's physical impairment is moderate, rather than severe. They say that the ability to walk 1 to 2 blocks unaided, climb 2 to 5 stairs unaided and lift 5 to 15 lbs. indicates a moderate rather than a severe impairment of physical functioning. They say that taking twice as long to perform a daily living activity indicates a moderate rather than severe impairment in daily function. The Ministry argues that the information in the additional letter from the Doctor does not establish a severe impairment because the Doctor says that he is only repeating the Appellant's subjective account of his impairment.

The Ministry says that employability is not a consideration in determining PWD designation. The question is whether the information in the application meets the criteria in the Act. While the Ministry does sometimes contact a doctor to clarify information in a PWD application, the Ministry is not required to contact the doctor. Given the volume of applications, it is not possible for the Ministry to contact every doctor or applicant.

*Mental Impairment:*

They argue that there is no diagnosis of a mental health condition to indicate a severe mental impairment.

*Daily Living Activities:*

The Ministry also says that the information provided does not indicate direct and significant restrictions in daily living activities.

*Help Required:*

Therefore, the Ministry says it also cannot determine that the Appellant needs significant help with restricted activities.

Panel Decision:



*Constitutional and Charter Rights:*

The Panel has no jurisdiction to consider the Appellant's argument about violation of his constitutional and Charter rights. Section 19.1 of the Employment and Assistance Act provides that section 44 of the Administrative Tribunals Act applies to the Employment and Assistance Appeal Tribunal. Section 44 of the Administrative Tribunals Act states that the tribunal is without jurisdiction over constitutional questions. The panel confirms that it has no jurisdiction to consider the Appellant's argument about violation of his constitutional and Charter rights.

*PWD Designation – Generally*

PWD designation is governed by the Act and the Regulation. Definitions of disability in other legislation, including the Canadian Human Rights Act, cited by the Appellant, are not relevant to a determination of PWD designation.

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

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

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

*Severe Mental or Physical Impairment*

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

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

*1. Physical Impairment:*

The Panel finds that the Ministry was not reasonable in its determination that, based on the information in the Doctor's reports, the Appellant's physical impairment is moderate rather than severe.

The Panel finds that it is reasonable for the Ministry to make its determination based on the information provided by an applicant, and it would not be reasonable to expect the Ministry to contact either the prescribed professional or the applicant whenever the information provided is not sufficient.

The way the Doctor completed the Medical and Assessor Reports is not ideal, with most of the Reports in the Appellant's handwriting, and no clear indication that the Doctor reviewed what the Appellant wrote before they signed the Reports. It is reasonable for the Ministry to have concerns about which portions are the Doctor's opinion, when the Doctor did not state clearly that they reviewed and endorsed what the Appellant wrote. However, the Appellant stated at the hearing that the Doctor told him to complete the forms, then the Doctor read and signed the Reports. The Panel accepts the Appellant's evidence that he did not add to or change any part of the Reports after the Doctor signed them. The Panel finds that the Doctor's signature, and the fact that the Doctor did make changes and additions to the form after the Appellant filled it out, confirm that the Doctor has adopted the Appellant's statements in the Reports as his own. Therefore, the Panel finds that it is not reasonable for the Ministry to determine the Appellant's eligibility for PWD designation without considering the whole of the Medical and Assessor Reports as the Doctor's assessment.

There are inconsistencies in the medical evidence. For example, under Daily Living Activities in the Medical Report, the Doctor states both "extreme discomfort and pain" and "mild" degree of restriction for mobility inside and outside the home. The difference may be explained by the Doctor's comment that the limitation "waxes and wanes depending on length of activity." In the additional letter, the Doctor confirms that the Appellant limps and can only walk two blocks without significant pain and has difficulty walking up stairs due to significant pain. The Doctor does not seem to see the information in the letter as different from the Reports, as they say they are "reiterating" the accounts of pain in the initial application.

The Panel places greater weight on the more frequent description of overall pain levels as extreme and significant, supplemented with additional detail from the Appellant at the hearing. The Panel finds that it is not reasonable to view physical functioning without reference to the

degree of pain involved in the activity. Sometimes the Appellant cannot walk due to pain, and sometimes he can walk but has significant pain – either way, his function is impaired. The Panel finds that the significant pain the Appellant and the Doctor describe is a severe physical impairment.

## *2. Mental Impairment:*

The Doctor does not identify a mental health diagnosis, although they state that the Appellant has anxiety. They do not identify any other significant deficits in cognitive and emotional functioning, and no restrictions in social functioning. Therefore, the Panel finds that the Ministry was reasonable in its determination that the information provided does not indicate a severe mental impairment.

### *Restrictions to Daily Living Activities (Activities):*

A prescribed professional must provide an opinion that the applicant's impairment restricts the ability to perform the daily living activities ("Activities") listed in the legislation. The Activities that are considered are listed in the Regulation. Those Activities are:

- Prepare own meals
- Manage personal finances
- Shop for personal needs
- Use public or personal transportation facilities
- Perform housework to maintain the person's place of residence in acceptable sanitary condition
- Move about indoors and outdoors
- Perform personal hygiene and self care
- Manage personal medication.

For a person who has a severe mental impairment, Activities also include:

- Make decisions about personal activities, care, or finances
- Relate to, communicate, or interact with others effectively.

At least two Activities must be restricted in a way that meets the requirements. Not all Activities, or even the majority, need to be restricted. The inability to work and financial need are not listed as Activities and are only relevant to the extent that they impact listed Activities.

The restrictions to Activities must be significant and caused by the impairment. This means that the restriction must be to a great extent and that not being able to do the Activities without a lot of help or support will have a large impact on the person's life.

The restrictions also must be continuous or periodic. Continuous means the activity is generally restricted all the time. A periodic restriction must be for extended periods meaning frequent or for longer periods of time. For example, the activity is restricted most days of the week, or for the whole day on the days that the person cannot do the activity without help or support. To figure out if a periodic restriction is for extended periods, it is reasonable to look for information on the duration or frequency of the restriction.

The Medical Report and Assessor Report also have activities that are listed, and though they do not match the list in the Regulation exactly, they generally cover the same activities. The Medical Report and Assessor Report provide the professional with an opportunity to provide additional details on the applicant's restrictions.

The Panel finds that the information provided by the Doctor and the additional detail provided by the Appellant confirm direct and significant restrictions to the Appellant's ability to perform Activities. In the Medical Report, the Doctor states that left hip pain, secondary to osteoarthritis, limits independent activities of daily living. They indicate periodic restrictions in mobility inside and outside the home. As noted above, there is some inconsistency in the comments that follow, where the Doctor states that the restriction "waxes and wanes depending on length of activity", with "extreme discomfort and pain", and also that the degree of restriction is "mild." At the same time, they state "continuous pain, mobility issues" and repeat that comment in the Assessor Report.

The Panel has considered the medical evidence as a whole, with further detail provided by the Appellant at the hearing and finds that the most consistent information is that the Appellant is restricted in performing two or more Activities due to severe pain that is continuous and increases depending on the activity. While the Ministry notes that the Doctor indicates that the Appellant is "independent in the large majority of listed areas of daily living activities," the question is whether the Appellant is directly and significantly restricted in performing two or more Activities, not the majority of Activities. The Panel finds that the Appellant is directly, significantly, and continuously restricted in performing the following Activities:

- Shop for personal needs: the Appellant takes five times as long as typical to go to and from stores and carry purchases home; he reports that recently he was not able to walk 2 blocks to the store for an item he needed and depended on a friend to make the purchase for him; the Doctor reports that the Appellant has limited ability to stand, lift, carry and hold.
- Use public or personal transportation facilities: the Doctor reports that the Appellant takes twice as long as typical to get in and out of a vehicle, and five times as long to use public transit.

- Move about indoors and outdoors: the Appellant takes twice as long as typical and has significant pain when walking indoors and outdoors and climbing stairs; he has limited ability to stand, and he needs to use a cane when he walks.

As the Panel has found that two or more Activities are restricted, the Panel finds that the Ministry was not reasonable in its determination that there was not enough evidence to confirm that the Appellant's ability to perform Activities was directly and significantly restricted either continuously or periodically for extended periods.

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.

The Doctor reports that the Appellant uses a cane, which the Panel finds is an assistive device. The Panel also finds that the Appellant receives significant help from other people, as his friends shop for him when his pain is too severe. As the Panel has found that the Appellant is restricted in performing Activities, the Panel finds that the Appellant also requires help to perform those restricted Activities.

Procedural Fairness

The Appellant argues that he was deprived of procedural fairness in the reconsideration process because he says the Ministry took four months to provide him with a reconsideration package. He also maintains that the Ministry has an interest in the outcome of his application for PWD designation, and therefore is not an independent decision maker.

In the Act and Regulation, the government has created a legislated scheme for administration of disability benefits, including reconsideration and appeal processes. The Panel does not have jurisdiction to change those processes, which give the Ministry the authority to reconsider decisions in accordance with the Act and the Regulation, as it has done for the Appellant's application. If there was a delay in providing a reconsideration package, that would be unfortunate, but the Appellant did receive reconsideration. The Panel has considered the reasonableness of the decision, and any delay has not affected the outcome of this appeal.

Conclusion:

The Panel finds that the Ministry's decision to deny the Appellant PWD designation is not reasonably supported by the evidence. The purpose of the legislation is to provide a benefit where certain criteria are met. The Appellant has provided confirmation in his oral evidence and in a letter from his doctor that he is in significant pain at practically all times, and it affects almost every aspect of his life. In the view of the Panel the Appellant's significant and ongoing pain is a severe physical impairment, he is restricted in his daily living activities, and he needs the assistance of others as well as a cane to function in daily life. The Panel rescinds the reconsideration decision. The Appellant is successful in the appeal.

Schedule – Relevant Legislation

Employment and Assistance for Persons with Disabilities Act

**Persons with disabilities**

s. 2 (1) In this section:

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

"daily living activity" has the prescribed meaning;

"prescribed professional" has the prescribed meaning.

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

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

(b) in the opinion of a prescribed professional

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

(A) continuously, or

(B) periodically for extended periods, and

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

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

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

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

(i) an assistive device,

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

(iii) the services of an assistance animal.

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

## Employment and Assistance for Persons with Disabilities Regulation

### Definitions for Act

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

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

(i) prepare own meals;

(ii) manage personal finances;

(iii) shop for personal needs;

(iv) use public or personal transportation facilities;

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

(vi) move about indoors and outdoors;

(vii) perform personal hygiene and self care;

(viii) manage personal medication, and

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

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

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

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

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

(i) medical practitioner,

ii) registered psychologist,

(iii) registered nurse or registered psychiatric nurse,



(iv) occupational therapist,

(v) physical therapist,

(vi) social worker,

(vii) chiropractor, or

(viii) nurse practitioner, or

(b) acting in the course of the person's employment as a school psychologist by

(i) an authority, as that term is defined in section 1 (1) of the *Independent School Act*, or

(ii) a board or a francophone education authority, as those terms are defined in section 1 (1) of the *School Act*,

if qualifications in psychology are a condition of such employment.

(3) The definition of "parent" in section 1 (1) applies for the purposes of the definition of "dependent child" in section 1 (1) of the Act.

### Employment and Assistance Act

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

APPEAL NUMBER 2023-0344

**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)

2023/12/04

Print Name

Susanne Dahlin

Signature of Member

Date (Year/Month/Day)

Print Name

David Handelman

Signature of Member

Date (Year/Month/Day)