

Part C – Decision Under Appeal

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

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

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

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

Part D – Relevant Legislation

Employment and Assistance for Persons with Disabilities Act (Act), s. 2

Employment and Assistance for Persons with Disabilities Regulation (Regulation), s. 2

Employment and Assistance Act (EAA), s. 22(4)

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

Part E – Summary of Facts

The hearing took place in person, with the Ministry attending by telephone. The Appellant attended with his parent as witness and support person.

Evidence Before the Ministry at Reconsideration:

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

- Medical Report completed by a Doctor, dated April 19, 2023
- Assessor Report completed by a Physiotherapist, dated May 11, 2023
- Appellant's Self Report and statement in the Request for Reconsideration
- Letter from the Appellant's parent.

Medical Report:

The Doctor states that the Appellant has been their patient for one month, and they have seen the Appellant once before the day they completed the form.

Diagnosis:

The Doctor provides the following diagnoses, all with onset February 2022:

- Left Hemianopsia
- Pelvic fractures
- CVA [cerebrovascular accident] – right vertebral art. diss. [artery dissection]
- Fracture left tibia and fibula
- Diaphragmatic rupture/liver [illegible].

Health History:

The Doctor states that the Appellant:

“has difficulty performing tasks close up due to vision. Unable to lift heavy weights. Stiffness in the morning 1 hour. Pain neck, back, L. thigh. Some PTSD, [decreased] concentration.”

They indicate that the Appellant has been prescribed the medication suboxone, which interferes with his ability to perform daily living activities. They also indicate that the Appellant requires a cane for his impairment.

Functional Skills:

The Doctor indicates that the Appellant can:

- Walk 2 to 4 blocks unaided on a flat surface
- Climb 2 to 5 steps unaided
- Lift 2 to 7 kilograms

- Remain seated less than one hour.

They indicate that the Appellant has difficulty with communication, due to a sensory cause, specifically hemianopsia.

The Doctor indicates that the Appellant has significant deficits with cognitive and emotional functioning in the following areas:

- Executive
- Language
- Memory
- Perceptual psychomotor
- Emotional disturbance.

Under Comments, the Doctor states “[Left] hemianopsia. Some brain fog. Difficulty learning new things. Mild depression.”

Daily Living Activities:

The Doctor indicates that the Appellant’s impairment directly and continuously restricts his mobility inside and outside the home, and his social functioning. The Doctor repeats that the Appellant has some brain fog, as well as decreased memory and visual issues. They also note chronic back and leg pain. In answer to the question of what assistance the Appellant needs with daily living activities, they state that the Appellant walks with a cane.

Assessor Report:

The Physiotherapist states that they have known the Appellant since March 21, 2023, and have seen him for six appointments for active rehabilitation.

Mobility and Physical Ability:

The Physiotherapist indicates that the Appellant uses a cane to walk indoors and outdoors, and to climb stairs, until the Appellant regains strength and full range of motion. They indicate that the Appellant is independent standing, lifting, carrying, and holding.

Cognitive and Emotional Functioning:

They indicate that the Appellant’s mental impairment or brain injury has a major impact in the following areas:

- Bodily functions, specifically sleep disturbance
- Emotion
- Attention/concentration
- Memory.

They indicate moderate impact in the areas of:

- Consciousness
- Executive function
- Motivation
- Motor activity
- Other emotional or mental problems (unspecified).

They add that the Appellant suffered a “brain stroke” in March 2022, with a CT scan in January 2023 that showed “notable brain damage, hemianopsia”.

Daily Living Activities:

Under Personal Care, the Physiotherapist indicates that the Appellant takes significantly longer than typical for bathing, toileting, and transfers in and out of bed and on and off a chair, “sometimes upwards of 1 – 2 hours”. They indicate that the Appellant uses an assistive device for feeding himself, but comment “has meals made since February 2022”, which suggests that the Physiotherapist may have intended to tick the adjacent box to indicate that the Appellant needs continuous assistance from another person.

They indicate that the Appellant needs continuous assistance from another person or is unable to:

- Do laundry and basic housekeeping
- Go to and from stores and carry purchases home
- Perform all listed tasks under the heading “Meals”: meal planning, food preparation, cooking, safe storage of food.

They indicate that the Appellant is independent for paying rent and bills, medication management and usage, and accessing transportation.

For Social Functioning, they indicate that the Appellant needs periodic support/supervision in the following areas:

- Developing and maintaining relationships
- Securing assistance from others.

They indicate marginal functioning with immediate and extended social networks.

Assistance Provided for Applicant:

The Physiotherapist indicates that help required for daily living activities is provided by family. They also indicate that the Appellant uses a cane, walker, shower bench and back brace to compensate for his impairment.

Additional Information:

The Physiotherapist states that the Appellant has:

- A noticeable limp

- Poor vision in his left eye
- Permanent brain damage
- Multiple and extensive fractures C 6-7 and 5-6
- Psoriatic arthritis.

Self Report:

The Appellant states:

- On February 16, 2022, he was hit by a motor vehicle travelling 60 kilometres an hour. He was thrown 100 feet and suffered severe injuries.
- The accident occurred in another province.
- He broke his neck and back, fractured his tibia, shattered his pelvis, crushed both hips, punctured his lung, ruptured his spleen and liver, tore ligaments in his knee.
- He had surgery on his diaphragm.
- On April 12, 2022, he suffered a brain stroke while in hospital.
- He now has brain damage and hemianopsia.
- He was in hospital for five months.
- He can walk again, but with a limp.
- If he sits for over five minutes, his body seizes up.
- His left leg is his biggest concern; he has no feeling in his upper left leg and he cannot straighten his leg from the knee down.
- Waking up and moving in the morning “takes some time”.
- The “cord from brain to eye muscle was severed” so he has no peripheral vision on the left side. For example, at a restaurant he told the server that he did not receive sausages with his order, but the sausages were on the plate – he just could not see them.
- He has brain fog.
- His disability affects his sleep, walking, hobbies, and ability to work.
- He can still take care of himself but at a slower rate.
- If he thinks about his condition too much, he gets hopeless.

In the Request for Reconsideration, the Appellant provided a further statement, which the Panel includes as part of the Appellant’s Self Report. The Appellant states:

- He cannot physically get out of bed or straighten his leg.
- His parent and step-parent take care of him.
- His condition is not going to improve.
- He lives with chronic pain, a permanent limp, is half-blind, has severe migraines and has constant difficulty walking and getting up.

- He uses a cane.
- He needs medication to be able to get out of bed; without suboxone he just lays in bed.
- His disability is frustrating to the point where he wants to end his life.
- If he does any physical exertion, like working, he is bedridden for days.
- He has psoriatic arthritis, which is so severe that he cannot walk in the morning, his hands and feet sting and are numb.
- He is mentally fatigued and depressed.

Letter from the Appellant's Parent:

The Appellant's parent states:

- The Appellant has lived with them since March 2023.
- He has had ten major surgeries, hips reconstructed and loss of peripheral vision on the left side.
- The Appellant has brain fog and gets overwhelmed and depressed when too much is thrown at him at once.
- They try to take away extra tasks like cooking, laundry, and cleaning so the Appellant can focus on strength building, physiotherapy, medical appointments and trying to work.
- The Appellant was not expected to live, and he has come a long way since the accident, but he cannot function like a person his age – his body is like a 70-year old's.
- The Appellant has a permanent limp and can't get out of bed because his body seizes up if he lies down or sits for ten minutes.
- Some days the Appellant cannot get out of bed.
- After a day of work the Appellant needs a day or sometimes two days to recover.
- He has tried to wean off the medication but he cannot; if he does not take medication to deal with the pain he cannot work.
- They have had difficulty finding doctors willing to accept the Appellant as a patient because of the shortage of doctors in the province, and the fact that his case is very complicated.
- If someone is on his left side, the Appellant does not see them and does not know they are there unless they speak.
- One of his legs is shorter than the other and cannot straighten out fully.
- He has spasms, pain, and numbness in his lower thighs every day.
- He uses a cane most of the time.

Additional Evidence:

The Appellant submitted a 33-page medical-legal report from an Occupational Therapist dated October 31, 2023. The report is based on an assessment that took place on June 28 and 29, 2023.

The Occupational Therapist states that they have reviewed the medical records from the other province. They summarize the Appellant's extensive medical treatment there between February 17, 2022 (the date of the accident) and February 17, 2023. They provide a functional capacity evaluation based on available medical records, the Appellant's report, information gathered during an interview, his demonstrated abilities on standardized tests, clinical observations and clinical experience.

Problem List:

- Vision: Left-sided hemianopsia presenting as loss of vision in the left side peripheral vision of both eyes.
- Right Hip: intermittent sharp pain, arthritic pain and altered gait associated with prosthetic hip and knee issues.
- Left Leg/Knee: unable to fully extend left knee, cramping in the hamstrings, pain in the thigh and medial side of the knee, especially when trying to sleep. Reduced lifting and carrying capacity, reduced tolerance for walking longer distances and sitting. Difficulty getting out of a vehicle after sitting for a period of time.
- Neck: "bothers him on occasion", can lock up when doing upper back exercises, affects his sleep.
- Cognition: brain fog coming on with physical activity, cognitive fatigue when talking and/or trying to concentrate. Memory issues, relying on use of a calendar, phone reminder and his parents, and still forgetting things like appointments. The Appellant gave an example of making a physiotherapy appointment and then having to call back to ask when the appointment was.
- Mood: depressed, low mood.
- Sleep: wakes frequently during the night, does not feel rested in the morning, naps during the day. Sleep disrupted by hip and knee pain. Gave the example of waking up at 2:30 in the morning, needing to use the bathroom but not getting up because his legs felt locked up and it takes him a long time to get moving. He woke three more times before 6:15 a.m. when he finally got up for the day.

When asked to assess functional changes in everyday activities, the Appellant reported "Big Change" in the following areas:

- Getting ready in the morning
- Choosing what to wear
- Finding items on a crowded shelf or closet
- Following a new recipe.

He reported “moderate change” in the following areas:

- Planning and preparing meals
- Setting a table
- Investigating and solving problems
- Adjusting to unexpected changes
- Sticking with the same activity for more than an hour
- Performing daily activities at a normal speed
- Learning new factual information
- Feeling the desire to be involved in previous interests and activities.

The Appellant reported the following memory complaints on a frequent basis:

- Keeping track of where he puts things
- Remembering to take his medication at the scheduled time
- Remembering where things are.

He reports that he always uses an appointment book and frequently asks other people to remind him of something.

The Occupational Therapist assessed functional capacity in a work context, and reports that the Appellant:

- Could sit for 60 minutes with shifting positions
- Could remain weightbearing for 20 minutes
- Could stand for 10 minutes with his weight shifted to the right leg
- Walks with an antalgic gait
- Uses a cane for support when walking outside
- Has poor balance
- Could lift 40 lbs. floor to waist on an occasional basis (less than 2.7 hours in an 8-hour workday)
- Could lift 30 lbs. floor to waist on a frequent basis (2.7 – 5.33 hours per 8-hour workday)
- Has difficulty lifting to shoulder level but could lift 20 lbs. to shoulder level on an occasional basis, noting that “mobility, coordination and pace of movement impact his ability to lift to shoulder level at a competitive pace.”
- Could carry up to 40 lbs. but was concerned that the effort would cause increased pain lasting into the next day.

The Occupational Therapist states that the Appellant had “cognitive fatigue, and required redirection, cueing, prompting, and restatement of instructions.” They state that the Appellant “lacks insight, particularly regarding the functional limitations associated with the injuries he sustained. ...He also appears to consider himself perhaps more capable or becoming capable of tasks that presently are likely not within his abilities.”

Activities of Daily Living:

The Occupational Therapist states:

“[The Appellant] is independent with self-care including grooming, hygiene, and dressing. He has adequate mobility to transfer in and out of beds, chairs, bathtubs/showers, and vehicles. He can ambulate on stairs. He moves slower due to his injuries.

[The Appellant] described having slower thinking (processing speed) and noted his speech has changed post-injury. ...He stated he has issues with memory, attention, concentration, and other cognitive problems.

He is able to manage financial transactions. With regard to shopping and meals he stated that he is a “terrible cook” but could manage to make something for himself if needed. I understand that [his parents] do the grocery shopping and prepare the meals. It was indicated that [the Appellant’s] visual neglect impacted his ability to cook and clean up afterward....

[The Appellant] reported believing he could manage the following tasks: laundry, change the bedding, bathroom cleaning, vacuuming, sweeping, mopping, garbage and recycling, dusting and tidying, dishes, basic meals, and kitchen clean up. He felt he would be able to do seasonal cleaning tasks but that it would take him longer.

[The Appellant] indicated he was unsure about how to schedule or organize household chores, (when and how often to do certain things) and this may affect his motivation.

[The Appellant] commented that he would not be able to tell how well he dusted because of his vision. He recognized issues with grocery shopping citing it would take him a long time, and getting groceries with public transportation would be difficult.”

The Appellant’s parent reported that the Appellant “in general...performs the above listed chores. His visual impairment is a factor in completing tasks properly or completely. He requires cueing and reminders about visual scanning.”

The Occupation Therapist reports that, in their opinion

- “it is clear that as one of three adults living in the home, he is not able to contribute on an equal basis.”

- The Appellant “likely can perform the majority of household tasks, with additional time, and implementing appropriate strategies. Given his visual impairment, mobility and behavioral issues, it would be reasonable for him to have access to heavy household (deep cleaning) once per month.”
- The Appellant would benefit from working with an occupational therapist for “task organization, task scheduling, visual scanning practices, body mechanics, pacing, and use of devices.”
- They recommend that the Appellant have a Case Manager to assist with “establishing and maintaining an appropriate routine for his home, potential work and community participation. This role is presently being performed by his [parent].”
- They recommend that, while living with his parents, the Appellant should be provided with a proportional contribution to household cleaning, and monthly heavy household cleaning when living independently.

Appellant's Parent:

At the hearing, the Appellant's parent stated:

- The Appellant has lived with them since March 2023.
- The Appellant needs more help than his parents can give him.
- The Appellant has tried working at landscaping, but it is too much for him. After trying to work in that job, he couldn't get out of bed, and his depression worsened.
- They helped him to get another job, in construction, with family friends, but again, after a day of trying to work, he would be flat on his back in bed, with his whole body seized up.
- He only sees half his visual field, which causes anxiety and depression.
- The Appellant tries to do things around the house, but because of his vision problems, he will try to clean what he can see, but the parent has to come after and clean, because the Appellant hasn't seen everything that needed to be cleaned.
- They do many things for him to free up the time he needs to do other things to do with his health and recovery.
- The Appellant could do something like put a meal in the oven, but it would be a lot slower because of the way his mind works.
- If he is being rushed, he will be lost, so, for example, if they have to go out somewhere, the parent will start to prepare him two hours ahead of time so he can get his medication organized and plan what he has to do to be ready.
- They observed him at a restaurant, where he could not see the eggs on his plate, and he had to rotate the plate to be able to see what was on it.
- They have finally been able to secure an appointment with a head and eye specialist, in April 2024, and they hope that will help.

- Recently the Appellant did not come downstairs for breakfast because he did not think he could make it down the stairs.
- In the morning, it takes an hour for the Appellant's medication to take effect so that he can get out of bed.
- Two or three days a week (sometimes more, sometimes less, depending on activity), the Appellant literally cannot get out of bed to go to the bathroom until the medication takes effect.
- The Appellant gets anxiety often. For example, at Christmas people came to the house, and even though it was all family, the Appellant got overwhelmed and went to his room.
- Part of his anxiety is that he does not see everyone in the room, because of his visual impairment.
- He has phone reminders of tasks and appointments, but his parent still has to remind him.

Appellant:

At the hearing, the Appellant said:

- He "does not see half of life" because of the hemianopsia, which cuts his visual field.
- If he sits down for half an hour, he cannot get up again.
- He cannot function without the suboxone, which he takes to wean off an opioid addiction, and which also has painkilling properties.
- He finds using a cane to be embarrassing at his age, and he hates to use it. He tries to use it only when he is exerting himself.
- His vision problem is "a brain thing", due to the stroke he suffered in hospital; it is not the result of a physical injury to his eyes.
- When he has tried to work, he is slower because he has to be more careful, due to the vision limitations.
- Crossing the street, he cannot see anything to the left.
- It takes him an hour to get out of bed in the morning because of the time it takes the medication to kick in.
- Everything he does takes longer, so while he can do many of the things that are listed in the reports, "it takes forever".
- He is embarrassed to admit that his parents do everything for him.
- He did not remember that the hearing was taking place, until his parent reminded him the day before.

Admissibility of Additional Evidence:

The Ministry did not object to the admissibility of the Occupational Therapist's report or the additional oral evidence of the Appellant and his parent at the hearing. 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 says that he meets the criteria for PWD designation. He says that his mental and physical impairments are severe, and as a result, his ability to perform daily living activities is significantly restricted. He says that he is not able to work. He has tried landscaping and construction-related work with employers willing to accommodate his disabilities, without success. He says that he uses a cane, and he receives significant help from others to perform restricted activities.

Ministry Position:***Physical Impairment:***

The Ministry maintains that the Appellant's physical impairment is moderate, rather than severe. They accept that the Appellant is limited to walking 2 to 4 blocks unaided, climbing 2 to 5 steps unaided, lift 5 to 15 lbs., sitting less than one hour and that he has vision problems in his left eye, as reported by the Doctor. However, they argue that these restrictions are a moderate, rather than a severe, physical impairment. They say that the Doctor's functional assessment would indicate that the Appellant can perform daily living activities independently, and they accept the Doctor's assessment over the Physiotherapist's report that the Appellant requires continuous assistance with those activities. While the Ministry recognizes that the Appellant takes longer to mobilize and complete daily living activities, without more details about how much longer the Appellant takes, the Ministry says it cannot determine a severe physical impairment. The Ministry also says that it cannot establish that the Appellant needs a cane most of the time, given the Doctor's indication of the Appellant's ability to walk and climb stairs unaided.

Mental Impairment:

The Ministry maintains that the Appellant has a moderate, rather than a severe, mental impairment. They argue that the Doctor has not provided a diagnosis of a brain injury or other "mental diagnosis". While they note the Physiotherapist's report that the Appellant

suffered a brain stroke in March 2022 and a CT scan in January 2023 showed notable brain damage and hemianopsia, they say that, under the legislation, these conditions must be reported by a medical practitioner or nurse practitioner. The Ministry says it cannot make an informed decision about the level of mental impairment if a doctor or nurse practitioner has not confirmed the Physiotherapist's report of notable brain damage. The Ministry acknowledges the mental deficits that the Doctor, the Physiotherapist, the Appellant, and his parent report, but argues that, as the Appellant is "primarily independent" in daily living activities where the Appellant would need to make a decision, he does not have a severe mental impairment.

Daily Living Activities:

The Ministry is satisfied that the Appellant has moderate restrictions in daily living activities. They note the functional limitations reported by the Doctor and the Physiotherapist, but also note that the Appellant is independent in many daily living activities. They acknowledge that the Doctor reports continuous restrictions to mobility inside and outside the home and with social functioning but note that the Doctor does not report any restrictions to the rest of the daily living activities listed on the medical report. They say that, without confirmation from a medical practitioner or nurse practitioner that the Appellant has a brain injury or notable brain damage, they cannot conclude that a mental impairment has significant impact on his ability to perform daily living activities. Therefore, the Ministry maintains that there is not enough evidence to confirm that the Appellant is directly and significantly restricted in his ability to perform daily living activities continuously or periodically for extended periods.

Help with Daily Living Activities:

The Ministry says that, as it has not been established that daily living activities are significantly restricted, it cannot determine that the Appellant needs significant help with restricted activities.

Consideration of Additional Evidence:

At the hearing, the Ministry said that the report from the Occupational Therapist did not change the Ministry's position. They reviewed the report, stating that:

- It is challenging to assess the report because the Occupational Therapist does not say how many blocks the Appellant can walk, or how many stairs he can climb, as the Doctor does.
- What the Doctor says is more than enough for the Ministry to accurately assess the Appellant's impairment.
- They note that the Appellant walks with an antalgic gait but say that use of a cane alone does not indicate a severe impairment.

- They note that the Appellant walked up and down stairs with a non-reciprocal gait, or with a reciprocal gait with significant upper body support on the railings, but railings are not an “assistive device” as defined in the Regulation.
- The Appellant reports memory issues, saying he forgets appointments, but a calendar and phone reminders are not “assistive devices” under the Regulation, and the report does not say how often the Appellant’s parents give him reminders.
- While the Appellant reports a “big change” in his functional ability in a number of areas, it is unclear how often he has difficulty, and what help he needs for those activities.
- The Appellant stated that he does not do laundry or dishes, not that he cannot do them. If his parent is “OCD” about their kitchen and house, as the Appellant says, the Ministry suggests that the parent prefers to do the laundry and dishes. The Ministry notes that the Appellant said elsewhere that he had put clothes in the laundry.
- The report says that the Appellant can do housework and seasonal cleaning tasks but it would take him longer. However, the report does not say how much longer, which is information the Ministry needs when determining if the Appellant meets the criteria for PWD designation.
- It is unclear how often the Appellant needs cueing and reminders about visual scanning when performing household chores, and the Ministry suggests that the Appellant believes he can do these tasks but misses “finer details”.
- While the Appellant says that grocery shopping on his own would take him a long time, there is no explanation of how much longer than typical it would take.
- The Occupational Therapist says that the Appellant will need heavy household cleaning services when he moves out of his parents’ home, but the Ministry does not consider what he might need in the future, only what assistance he needs now.
- There is no explanation of why the Appellant does not go out with other people, and the Ministry suggests it could be just his personal choice rather than the result of a mental impairment.

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. When the inability to work is the major reason for applying for PWD designation, the Panel encourages applicants 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.

The Ministry's decision is based, in part, on a mis-reading of one of the Doctor's diagnoses, in turn due to the Doctor's use of abbreviations, and their handwriting, which is challenging to decipher sometimes. Where the Doctor writes "CVA - R Vertebral Art Diss", the Ministry mis-read "CVA - R vertebral disc", which it understood to mean "cerebrovascular accident right vertebral disc". Based on that reading, the Ministry goes on to state throughout the reconsideration decision that a medical practitioner or nurse practitioner has not provided a diagnosis of a brain injury or brain damage. That statement is incorrect. The Panel appreciates the Ministry's explanation that "CVA" is the abbreviation for "cerebrovascular accident". The Merriam Webster Medical Dictionary defines "cerebrovascular accident" as "a stroke". The letters that follow "CVA - R Vertebral" in the Medical Report do not say "disc" as the Ministry noted, they say "Art Diss". In relation to a cerebrovascular accident, "R Vertebral Art Diss" means "right vertebral artery dissection", which the Doctor is identifying as the cause of the stroke.

Even without the explanation of the cause, a stroke is a brain injury. The Doctor also diagnosed left hemianopsia, which is a loss of the left half of the visual field due to stroke,

brain injury or trauma. The Ministry noted these diagnoses at the start of the reconsideration decision but goes on to state that the Doctor does not diagnose a brain injury. The Panel finds that both cerebrovascular accident and hemianopsia are brain injuries, as defined in the Merriam Webster Medical Dictionary. To the extent that the reconsideration decision is based on the determination that a medical practitioner has not diagnosed a brain injury, the Panel finds that the reconsideration decision is not reasonable.

1. Physical Impairment:

The Panel finds that the Ministry was not reasonable in its determination that the Appellant's physical impairment is moderate rather than severe.

The Appellant suffered multiple severe injuries when he was struck by a motor vehicle in February 2022. He sustained fractures of the spine, pelvis, left tibia and fibula and injury to his diaphragm and liver. He was in hospital for five months. During that time, he suffered a stroke and left hemianopsia. He was not expected to survive.

In the reconsideration decision, the Ministry appears to place most weight on the Doctor's indication, by ticking boxes on the Medical Report form, that the Appellant can walk 2 to 4 blocks unaided, on a flat surface, climb 2 to 5 steps unaided and lift 2 to 7 kilograms. The Ministry accepts that the Appellant can sit for less than one hour and has limited vision and concludes that the Appellant's physical impairment is moderate.

The Doctor's evidence in the Medical Report is inconsistent in some respects, as he indicates that the Appellant can walk that distance unaided, but also says in two places that the Appellant walks with a cane. The Panel places greater weight on the Doctor's report where there are consistencies within their report, and where it is consistent with the evidence of the Physiotherapist and the Occupational Therapist. Both therapists state that the Appellant uses a cane, although the Appellant says he does not like to use it. (The Physiotherapist also says that the Appellant uses a walker and back brace, but the Panel finds they were referring to past rather than current usage, as neither the Doctor nor the Appellant say he uses those devices now.)

The Panel also notes that the Doctor saw the Appellant once before completing the report, where the Physiotherapist had seen the Appellant for six appointments before preparing the Assessor Report, and the Occupational Therapist conducted a complete functional assessment over the course of two days, before preparing a 33-page report. The Panel also notes that the Occupational Therapist has reviewed previous medical records, listed

in the report. The Panel places significant weight on the more detailed evidence of the Physiotherapist and the Occupational Therapist, which appears to be based on more extensive knowledge of the Appellant's abilities than the Doctor may have had at the time of completing the Medical Report.

The Panel also notes that the Doctor's report is consistent with the other reports, in stating that the Appellant's mobility inside and outside the home is continuously restricted, his vision is impaired due to hemianopsia, he is "stiff in the morning one hour" and has chronic pain in the back and leg. The other reports, and the evidence of the Appellant and his parent, explain that he cannot get out of bed until the suboxone takes effect, and the pain and stiffness subside enough for him to move. It takes at least one, and sometimes two, hours for him to be able to get out of bed. The Appellant and their parent explain that some days he cannot get out of bed at all. The Appellant described being unable to get up even for an urgent need to use the toilet. If he exerts himself, he may be bedridden for several days.

The Appellant also has impaired vision, being unable to see the left half of his visual field in both eyes. He cannot see a person standing next to him to his left, or all the contents of a dinner plate in front of him.

The Panel finds that, considering the whole of the medical evidence, including the new evidence from the Occupational Therapist, and the additional detail provided by the Appellant and his parent, the Appellant has a severe physical impairment.

2. Mental Impairment:

The Panel finds that the Ministry was not reasonable in its determination that the information provided does not indicate a severe mental impairment.

The Ministry's reconsideration decision is contradictory in its analysis of the evidence of mental impairment, and the Panel finds that the Ministry was not reasonable in its consideration of this criterion. As explained above, at reconsideration, the Ministry stated, incorrectly, that the Doctor "does not include a mental diagnosis or brain injury" and has not confirmed that the Appellant suffered a stroke. At the same time, the Ministry acknowledged the cerebrovascular accident, or stroke, that the Doctor identified as a diagnosis in the Medical Report.

The Doctor also stated that the Appellant has:

- PTSD

- brain fog
- difficulty learning new things
- mild depression
- significant deficits in five areas of cognitive and emotional functioning:
 - executive function
 - language
 - memory
 - perceptual psychomotor
 - emotional disturbance.

In addition, the Doctor indicated that the Appellant is continuously restricted in social functioning, where the Ministry's form states "this category only applies for persons with an identified mental impairment or brain injury".

The Panel has found that the Doctor has diagnosed a brain injury, and has provided significant evidence of mental impairment, which is confirmed by the Physiotherapist, the Occupational Therapist, the Appellant, and his parent. The Physiotherapist indicates that the Appellant's mental impairment or brain injury has a major impact on bodily function (sleep), emotion, attention/concentration, and memory, referring to the effects of a stroke in March 2022, a CT scan and hemianopsia. The Appellant and his parent have provided further details about his cognitive impairment relating to brain fog, memory, and concentration. They confirm that he is easily overwhelmed and, as the Physiotherapist indicates in the Assessor Report, has marginal functioning with immediate and extended social networks. The Panel finds no basis in the evidence to support the Ministry's suggestion at the hearing that the Appellant may simply be choosing not to have contact with people outside his immediate family.

The Ministry appears to place significant weight on the indications that the Appellant is marked as "independent" in daily living activities that the Ministry says require decision-making, such as making appropriate choices when shopping and paying rent and bills. They also note that the Appellant is marked as "independent" in most (three out of five) of the areas of social functioning listed in the Assessor Report. However, the Panel places greater weight on the areas where the Appellant's function is impaired, than those areas where he is said to be independent. The evidence of the Appellant and his parent provides more detail about the times when the Appellant is overwhelmed and suffering from the cognitive fatigue, brain fog, problems with memory and attention, sleep disturbance and depression identified by the Doctor, the Physiotherapist, and the Occupational Therapist. The Panel notes, for example, the more detailed assessment in the report of the Occupational Therapist, who observed that the Appellant required "redirection, cueing, prompting, and restatement of instructions" during the functional capacity evaluation. The

Appellant's parent says, for example, that they need to start organizing the Appellant two hours in advance if he needs to go out to an appointment, otherwise he will be overwhelmed. The Occupational Therapist recommends that the Appellant have a Case Manager to assist with establishing routines, noting that the Appellant's mother is now filling that role.

The Panel finds that the Ministry failed to give sufficient weight to the cumulative evidence of impaired cognitive and emotional functioning. Where the Ministry maintained that there was insufficient evidence about aspects such as how often the Appellant needs cueing and reminders, the Panel finds that the Appellant and their parent have provided sufficient evidence in their oral evidence. Therefore, the Panel finds that the Appellant has 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.

At reconsideration, the Ministry's conclusions about restricted Activities are unclear and contradictory. The Ministry states that it is "satisfied that moderate restrictions with [Activities] had been established given the functional limits, need for a cane often for mobility, limits with sitting, lifting, vision problems, and some of the mental restrictions noted....", but then says that "there is not enough evidence to confirm that in the opinion of a prescribed professional, you are directly and significantly restricted in your ability to perform daily living activities continuously or periodically for extended periods". The Panel finds that the Ministry has not provided a sufficient explanation of why the "moderate restrictions" it accepts, are not "direct and significant".

Further, in support of its determination that it cannot conclude that a mental impairment has significant impact on the Appellant's ability to perform Activities, the Ministry again refers, incorrectly, to a lack of confirmation from the Doctor that the Appellant had a brain injury.

The Panel finds that the information provided by the Doctor, the Physiotherapist and the Occupational Therapist confirms direct and significant restrictions to the Appellant's ability to perform two or more Activities. While the Doctor does not identify restrictions in all the Activities that the Physiotherapist reports, the Doctor does indicate that the Appellant's mobility inside and outside the home, and his social functioning, are continuously restricted. The Panel also notes that the Medical Report asks only if the Activity is restricted, where the Assessor Report asks for additional details such as whether the person uses an assistive device or takes significantly longer than typical. The Occupational

Therapist also explains that, while the Appellant can manage many household tasks, it takes him longer and he is not sure how to schedule or organize those tasks. The Panel gives greater weight to the more detailed reports of the Physiotherapist and the Occupational Therapist, which are consistent with the evidence of the Appellant and their parent.

Further, the Panel finds that the Doctor has identified two Activities that are directly and significantly restricted by severe mental or physical impairments. They state that the Appellant is restricted in mobility inside and outside the home, and in social functioning, which the Panel finds correspond with two Activities listed in the Regulation: moving about indoors and outdoors and making decisions about personal activities. The Ministry notes that the Doctor reports no restrictions to the rest of the Appellant's Activities – however the Panel notes that, for PWD designation, the question is whether two or more Activities are significantly restricted, not whether Activities are restricted overall.

The Physiotherapist and the Occupational Therapist provide further and more detailed information about restrictions to the Appellant's ability to perform Activities. The Panel finds that the Appellant is restricted in the following Activities:

- Move about indoors and outdoors:
 - It takes the Appellant one to two hours to mobilize in the morning, after taking his medication
 - He can sit for less than one hour (he reports that his body seizes up if he sits for more than ten minutes)
 - If he exerts himself, he may be bed ridden the next day
 - He needs to use a cane when walking outdoors, though he tries not to use one as he finds it embarrassing
 - While he can ambulate and transfer in and out of bed, the Occupational Therapist reports that he takes longer.
- Perform housework to maintain the person's place of residence in acceptable sanitary condition:
 - While the Occupational Therapist says that the Appellant can perform most household chores, he takes additional time and needs to implement "appropriate strategies"
 - His visual impairment significantly restricts his ability to complete tasks properly or completely
 - He has difficulty performing tasks close up, and he cannot see the left half of his peripheral vision
 - He needs cueing and reminders about performing household tasks

- The Panel finds that his parent cleans up after him, not because they are “OCD” but because, as they report, the Appellant cannot see what needs to be cleaned.
- Make decisions about personal activities:
 - The Appellant has significant deficits in cognitive and emotional functioning due to brain fog and difficulty with memory and concentration
 - He has deficits in executive planning
 - His parent needs to start getting him organized to go to an appointment two hours beforehand because if he is rushed, he will be overwhelmed and unable to function.

Considering the whole of the medical evidence, with additional detail provided by the Appellant and his parent, the Panel finds that the Ministry was not reasonable in its determination that the Appellant is not directly and significantly restricted in his ability to perform Activities.

Help Required:

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

The Panel has found that the Ministry was not reasonable in determining that the Appellant was not directly and significantly restricted in his ability to perform two or more Activities. The Panel also finds that the Ministry was also not reasonable in determining that it could not find that the Appellant needs help to perform those Activities.

The Appellant receives significant help and supervision from his parents, with whom he lives, to perform the restricted Activities. The Occupational Therapist has assessed the Appellant’s ability to perform various activities, and reports that the Appellant needs:

- Household cleaning services while living with his parents, as he is not able to contribute to household chores on an equal basis with his parents;
- A Case Manager to assist with establishing and maintaining routines for home and community participation, and to help resolve issues with care providers, landlords and employers – a role that they say the Appellant’s parent is performing at present.

The Occupational Therapist’s assessment confirms the help that the Appellant needs from others to perform restricted Activities, and which their parent is now providing. Therefore,

the Panel finds that the Appellant needs significant help and supervision from others to perform restricted Activities.

The Panel also finds that the Appellant needs a cane, which is an assistive device, for mobility inside and outside the home.

Conclusion:

The Panel finds that the Ministry's decision to deny the Appellant PWD designation was not reasonably supported by the evidence. 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 2023-0309

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)
2024/01/17

Print Name
Kulwant Bal

Signature of Member

Date (Year/Month/Day)
2024/01/17

Print Name
Carla Tibbo

Signature of Member

Date (Year/Month/Day)
2024/01/17