

Part C – Decision Under Appeal

The decision under appeal is the Ministry of Social Development and Poverty Reduction (“Ministry”) decision dated January 12, 2024, 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 FactsEvidence Before the Ministry at Reconsideration:

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

- Medical Report and Assessor Report dated September 16, 2023, completed by a Doctor
- Appellant's Self Report.

Medical Report:

The Doctor states that the Appellant has been their patient since August 7, 2023, and they have seen them between two and ten times.

Diagnosis:

The Doctor provides diagnoses of coronary artery disease and bypass surgery (onset 2017), neuropathic complications of diabetes (onset 2020), diabetes Type I (since childhood) and depression (many years).

Health History:

The Doctor reports:

- Exertional shortness of breath and intolerance to physical activity, including walking and activities of daily living
- Pain and lack of sensation in lower limbs due to diabetes
- Generalized diabetic neuropathy causes sensory ataxia which results in postural instability and is "quite debilitating (for example, he falls if he closes his eyes, due to loss of position sense)".

They state that some of the medications the Appellant takes for his heart cause tiredness, and "insulin needs very regular meal planning".

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 kilograms
- Remain seated 1 to 2 hours.

They indicate significant deficits in cognitive and emotional functioning, in the areas of:

- Executive function
- Memory

- Emotional disturbance
- Motivation
- Attention or sustained concentration.

Assessor Report:

Living Environment:

The Doctor indicates that the Appellant lives alone.

Mental or Physical Impairment:

The Doctor states that the Appellant's impairments are coronary artery disease, diabetes and diabetic neuropathy and depression.

Mobility and Physical Ability:

The Doctor indicates that the Appellant is independent for walking indoors, but needs periodic assistance for:

- Walking outdoors
- Climbing stairs
- Standing
- Lifting
- Carrying and holding.

The Doctor does not explain what assistance is needed.

Cognitive and Emotional Functioning:

The Doctor indicates that the Appellant's mental impairment has a moderate impact on:

- Emotion
- Attention/concentration
- Executive function
- Memory
- Motivation
- Other neuropsychological problems, specifically learning disabilities.

The indicate minimal impact on:

- Bodily functions
- Impulse control.

Daily Living Activities:

The Doctor indicates that the Appellant needs periodic assistance for:

- Regulating diet
- Laundry and basic housekeeping

- Going to and from stores and carrying purchases home
- Food preparation and cooking
- Getting in and out of a vehicle.

They indicate that the Appellant is independent in performing the other activities listed on the form, adding that the Appellant can do these activities “with a very slow pace and frequent breaks. For some of them he needs help.”

They also indicate that the Appellant needs periodic support or supervision for all aspects of social functioning listed in the Assessor Report:

- Making appropriate social decisions
- Developing and maintaining relationships
- Interacting appropriately with others
- Dealing appropriately with unexpected demands
- Securing assistance from others.

They indicate marginal functioning with immediate and extended social networks. The Doctor adds that the Appellant requires support or supervision from outreach programs, home health and community resources.

Assistance Provided for Applicantt:

The Doctor indicates that help required for daily living activities is provided by health authority professionals, volunteers, and community service agencies.

Self Report:

The Appellant states:

- His legs “don’t work half the time when I walk”.
- He has dizziness “quite a bit”.
- His knuckles hurt a lot and he has a hard time doing up buttons and shoelaces.
- He was a construction worker all his life, but now he is afraid to do anything laborious because of his heart, hands, and poor balance.
- He had to take three breaks while writing his Self Report because his writing hand is weak.
- He feels “like half the man I used to be physically”.

Additional Evidence:Appellant:

At the hearing, the Appellant said:

- He wakes up every day in pain.
- He cannot use his hands.
 - He cannot open a bottle of pop or a bag of chips.
 - He cannot straighten his hands.
- His feet are in pain all the time.
- He had a stroke in October 2023, and he is waiting for an appointment with a neurologist.
- He is attending the hearing on a day pass from the hospital.
- He has headaches all the time.
- When he walks, his legs go out to the right and left.
- He has scars on his knees from falling because he gets dizzy when he is walking.
- If he closes his eyes, for example when he washes his hair in the shower, he falls forward.
- He has sores on his toes and his feet.
- He is in pain all day and just wants to sit all the time.
- He is nervous crossing the street because he might fall.
- He has a leg brace on one leg.
- He needs help getting out of the tub and shower.
- He had a job as a security guard, but he had to quit because of the walking required.

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

- He has seen the Doctor three times, once when the Doctor completed the Medical Report and Assessor Report, then again to get a blood test, and for a prescription refill. The Doctor did not ask him many questions when he filled out the reports.
- He can microwave meals for himself, but his girlfriend does most of the cooking for him, as he could not lift a pot, or carry boiling water safely.
- His girlfriend does most of the housecleaning for him because he cannot get up and down easily.
- He cannot lean over to clean a bathtub and cannot hold a mop.
- His girlfriend also does his laundry because he cannot open the doors of the machines.
- It is hard for him to push the buttons in the elevator.
- His girlfriend holds his arm when he goes to and from the stores and shops.

- He has been using a walker in the hospital, and he finds that helps him a lot.
- He walks very slowly.
- People help him to get in and out of vehicles.
- He cannot stand to wait for a bus, and he asks the driver not to start the bus until he is sitting down, so that he does not fall.
- He does not receive help from the people or agencies the Doctor lists (health authority professionals, community service agencies or volunteers). He receives help from friends.

Ministry:

The Ministry did not present any additional evidence.

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 says that he meets the criteria for PWD designation.

Mental and Physical Impairment:

The Appellant says that heart disease and complications from Type I diabetes leave him unable to exert himself and cause pain and dizziness that affect his balance and ability to walk. His condition is worse since he had a stroke in October 2023. He says he cannot use his hands for daily activities such as opening bottles or holding a mop. He says that he could not work in construction because of his fear of losing his balance and falling, and he had to quit a job as a security guard because he could not walk.

The Appellant says that he has significant deficits in cognitive and emotional functioning due to longstanding depression.

Ability to Perform Daily Living Activities:

The Appellant says that he is significantly restricted in performing daily living activities because he takes significantly longer and has to take frequent breaks. He says that he is restricted in preparing meals, cleaning his residence, doing laundry, showering, and bathing, shopping, and getting in and out of vehicles.

Help to Perform Daily Living Activities:

The Doctor says that the Appellant receives help from health authority professionals, community service agencies and volunteers. The Appellant says that he receives help from friends.

Ministry Position:*Mental and Physical Impairment:*

The Ministry maintains that the Appellant does not have a severe physical impairment. They acknowledge that the Appellant has some limitations his physical abilities but says that the range of functional skills that the Doctor reports does not support a severe degree of impairment. They also argue that, while the Appellant requires periodic assistance with most mobility and physical ability tasks, the Doctor has not reported the nature, frequency, and duration of the assistance. Therefore, the Ministry says it cannot confirm that the assistance indicates a severe degree of physical impairment.

The Ministry also says that there is not enough information to show a severe impairment of mental functioning. While the Ministry acknowledges that the Appellant has limitations in cognitive and emotional functioning due to depression, they maintain that the Doctor has provided very little information about how those limitations affect the Appellant's functioning. They also argue that the reported deficits do not appear to result in significant restrictions in daily living activities.

Daily Living Activities:

The Ministry also says that the information provided does not indicate direct and significant restrictions in daily living activities. They argue that, while the Doctor reports that the Appellant needs periodic assistance with some daily living activities, the Doctor has not reported the nature, frequency and duration of the assistance needed. The Doctor also has not reported how much support the Appellant needs for social functioning. The Ministry also says that the Appellant's ability to walk, climb stairs and lift 2 to 7 pounds, with occasional assistance shows that he can be independent in daily living activities. Therefore, the Ministry says that there is not enough information to confirm that the Appellant is significantly restricted in performing daily living activities.

Help with Daily Living Activities:

The Ministry says that, as it has not been established that daily living activities are significantly restricted, the Ministry 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 Panel finds that the Ministry was reasonable in its determination that the information provided in the Doctor's reports does not establish a severe physical impairment.

The Appellant reports more impairment of his physical functioning now, than the Doctor reported in September 2023. While the Doctor said that the Appellant needed only periodic assistance to walk outdoors, climb stairs, stand, lift, carry and hold items, the

Appellant says that he is in pain every day and he cannot use his hands. He says that his girlfriend holds his arm when he walks, or goes to the store, and he frequently falls when he walks by himself. He has been admitted to hospital, and is trying out the use of a walker, which he says is helpful.

It may be that the Appellant's medical condition has worsened, either due to progression of his medical conditions, the stroke he suffered in October 2023, or a combination of these factors. However, the Panel finds that it is reasonable for the Ministry to base its determination on the information provided by the Doctor at the time of the application if the Appellant does not provide updated medical information for the appeal.

Where, as in the Appellant's case, it appears that the Appellant's condition has worsened since the Doctor completed the Medical Report and Assessor Report, the Ministry would have needed updated reports from the Doctor or another prescribed professional, to confirm the Appellant's current level of physical functioning. It is also reasonable for the Ministry to consider details about the nature, frequency, and duration of the assistance the Appellant needs to help him function, when determining if there is a severe physical impairment. The Doctor did not provide those details in the Medical Report and the Assessor Report submitted with the application.

Therefore, the Panel finds that the Ministry was reasonable in its determination that, based on the information provided by the Doctor, the Appellant does not have a severe physical impairment.

2. Mental Impairment:

The Panel finds that the Ministry was reasonable in its determination that it was not satisfied that the Appellant has a severe mental impairment.

The Doctor provided a diagnosis of longstanding depression, with moderate impact on emotion, attention/concentration, executive function, memory, motivation, and a learning disability. They noted that the Appellant needs periodic support with all aspects of social functioning listed on the form, but they did not provide any information about what kind of support the Appellant needs, or how often he needs it. The Appellant did not give additional information about how depression affects his daily functioning, focusing instead on his physical restrictions.

Without further detail about how the Appellant's mental health diagnosis affects his daily functioning, the Panel finds that the Ministry was reasonable in its determination that the information provided did not show 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 does not confirm direct and significant restrictions to the Appellant's ability to perform two or more Activities either continuously or periodically for extended periods.

The Doctor indicates that the Appellant needs periodic assistance with the following Activities:

- Prepare own meals: food preparation and cooking
- Shop for personal needs: going to and from the store and carrying purchases home
- Use public or personal transportation facilities: getting in and out of a vehicle
- Perform housework to maintain the person's place of residence in acceptable sanitary condition: basic housekeeping and laundry
- Perform personal hygiene and self care: regulating diet related to diabetes requirements.

While the Doctor has ticked the boxes to indicate the need for periodic assistance, they have not provided explanation or information about what assistance is needed or how often the Appellant needs assistance, for the Ministry to determine that the Appellant is significantly restricted in performing those activities periodically for extended periods.

The Appellant describes greater, and continuous, restrictions in performing these and other Activities, but under the legislation, the Ministry needs the opinion of the prescribed professional, in the case, the Doctor, about the Appellant's restrictions.

For social functioning, the Doctor indicates that the Appellant needs periodic support or supervision for all listed aspects of social functioning. However, again the Doctor does not explain what support or supervision is needed, or how often the Appellant needs assistance. The Appellant denies that he receives help from the agencies that the Doctor identifies on the form.

The Panel finds that, based on the information provided by the Doctor, the Ministry was reasonable in its determination that there was not enough information to confirm that, in the opinion of a prescribed professional, the Appellant was significantly restricted in his ability to perform two or more Activities 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.

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. The Panel notes that the Appellant may now be using an assistive device, as he says he is starting to use a walker, but under the legislation, the Doctor, or another prescribed professional, must provide the opinion that the Appellant needs to use the assistive device.

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.

APPEAL NUMBER 2024-0022

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)
2024-02-12

Print Name
Kulwant Bal

Signature of Member

Date (Year/Month/Day)
2024/02/11

Print Name
Warren Fox

Signature of Member

Date (Year/Month/Day)
2024/02/12