

Part C – Decision Under Appeal

The decision under appeal is the Ministry of Social Development and Poverty Reduction (“Ministry”) decision dated January 2, 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 Facts

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

Evidence Before the Ministry at Reconsideration:

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

- Medical Report and Assessor Report dated September 1, 2023, completed by a Doctor
- Medical Imaging Reports
- Appellant's Statement in the Request for Reconsideration.

Medical Report:

The Doctor states that the Appellant has been their patient for eight months and they have seen him 11 or more times.

Diagnosis:

The Doctor provides the diagnoses of osteoporosis with arthritis in multiple joints, specifying left hip and shoulder, with a history of right hip replacement.

Health History:

The Doctor reports the information in the Medical Imaging Reports, stating that the Appellant has:

- Severe left glenohumeral joint degenerative changes, with likely prior avascular necrosis
- Moderate to severe degenerative changes, with possible avascular necrosis
- Osteoporosis with compression fracture in the mid thoracic spine and L3 vertebra.

They state that the Appellant has ongoing pain which affects daily activity. The Doctor adds that the Appellant is awaiting a consultation with an orthopedic surgeon and a hip replacement. While hip pain will likely improve after surgery (date unknown), they are unsure about a treatment plan for the Appellant's shoulder.

Functional Skills:

The Doctor indicates that the Appellant can:

- Walk 1 to 2 blocks unaided on a flat surface
- Climb 2 to 4 stairs unaided
- Lift 2 to 7 kilograms
- Remain seated less than 1 hour.

They indicate that the Appellant has significant deficits with cognitive and emotional functioning, in the area of emotional disturbance. They add that the Appellant is taking a medication for anxiety and depression “but he never brought it up till now.”

Daily Living Activities:

The Doctor indicates that the Appellant’s impairment directly restricts his ability to perform daily living activities. They indicate that the Appellant is periodically restricted in his ability to perform basic housework due to shoulder pain, and in mobility outside the home, due to hip pain. They state that the Appellant uses a cane “at times” and his family helps with housework.

Assessor Report:

The Doctor also completed the Assessor Report.

Mental or Physical Impairment:

The Doctor identifies the Appellant’s impairments as severe degenerative disease in the left hip and right shoulder joint, and osteoporosis with thoracic and lumbar compression fracture.

Mobility and Physical Ability:

The Doctor indicates that the Appellant is independent for walking outdoors, climbing stairs and standing. They indicate that the Appellant is independent for walking outdoors, but uses an assistive device, adding that “severe hip pain prevents him from prolonged walking, uses cane sometimes”. They indicate that the Appellant needs periodic assistance from another person for lifting, carrying and holding heavy objects.

Cognitive and Emotional Functioning:

The Doctor indicates that the Appellant’s cognitive and emotional functioning is not impacted by a mental impairment or brain injury.

Daily Living Activities:

The Doctor indicates that the Appellant needs periodic assistance from another person for:

- Basic housekeeping and laundry: Appellant cannot do heavy lifting
- Carrying purchases home from shopping: Appellant cannot carry heavy objects.

The Doctor adds that the Appellant cannot do prolonged walking, maximum 1 to 2 blocks, and cannot do heavy lifting, maximum 5 kilograms.

The Doctor indicates that the Appellant is independent for all other aspects of daily living activities listed on the form.

Assistance Provided for Applicant:

The Doctor states that family provides the help required for daily living activities.

Self Report:

The Appellant did not provide a Self Report in the original application but did provide a statement with the Request for Reconsideration. He states:

- He has severe arthritis and osteoporosis in his hips and shoulders.
- He has had a right hip replacement and is on a waitlist for the same surgery on his left hip.
- These conditions cause him pain that wakes him up four to five times a night.
- He takes multiple pain medications throughout the day and night.
- He takes medication for depression: Mirtazapine at night to sleep and Citalopram in the morning.
- In the morning, he cannot move for two hours due to severe back pain that he describes as "7 out of 10".
- He cannot sit for more than 30 minutes before he has to get up and change the position of his legs.
- He cannot climb more than 5 steps without a cane.
- He cannot cook on his own because if he stands for a long period of time, the pain escalates to 9 out of 10, and then he has to sit down or stop cooking.
- He cannot do laundry on his own because of pain.
- He needs a cane to walk to the bathroom.
- He can only walk one block before his pain "escalates back to 7".
- The most he can lift is 5 kilograms, but he cannot carry that weight for even one block, and therefore he needs help from family and friends to shop.
- All of these restrictions occur on a daily basis and leave him with very limited functioning in his daily life.

Additional Evidence:

Appellant:

At the hearing the Appellant provided a consult report from an Orthopedic Surgeon, about the Appellant's shoulders, dated October 24, 2023, which stated:

- Current pain level is reported as 10/10.

- Non-steroidal anti-inflammatory medication is “mildly effective” for pain management.
- The Appellant is not employed due to this condition.
- Arm function is “estimated to be 0 percent of normal”.
- The Orthopedic Surgeon administered a right shoulder injection.
- Further treatment would be explored based on the response to that injection.

At the hearing the Appellant’s Sibling said:

- In the morning, they and the Appellant’s parent help him to wake up.
- The Appellant cannot walk more than one block, with a cane.
- After one block, the Appellant cannot go on, or he has to sit for a while.
- The Appellant has some problems with his hands and cannot lift his right hand higher than his head.

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

- The Appellant lives with his 81-year-old parent, and the Sibling lives nearby and is with them “mostly”.
- They help the Appellant to get up in the morning because when he is lying down, he cannot put his hand down to get up, they take his hand and his shoulder and help him to get out of bed.

At the hearing, the Appellant said:

- His condition is getting worse every day, and it is worse now than when he applied for PWD designation.
- He cannot lift up his hand.
- He cannot work.
- He has stomach problems because of the medications he takes.
- He cannot lift anything because his shoulder and his hands hurt.
- It is hard for him to get dressed or shower because of pain in his shoulder and hands.

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

- He used to use a cane most of the time, but for the last 6 months he uses a cane always, every day.
- He has not had any improvement from the right shoulder injection, and his shoulder is getting worse.
- He was only going to have an injection in the left shoulder if the right shoulder injection was helpful; as there was no improvement, he is not going to have the left shoulder injection.

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

- His Sibling helps him bathe because he needs help to wash his back and shoulders, and to get dressed.
- The medication he takes for depression and anxiety was prescribed by a doctor in another country, which is why the Doctor was not aware of it before completing the Medical Report.
- His Sibling and his parent help with housework because he cannot do housework at all.

Ministry:

The Ministry did not present any additional evidence.

Admissibility of Additional Evidence:

The Panel read the consult report to the Ministry (attending by telephone), and the Ministry stated that they did not need additional time to consider the report. The Ministry did not object to the admissibility of the report, or the additional evidence of the Appellant and his Sibling.

The Panel finds that the additional written and oral evidence provides information about the Appellant's medical condition and his functional ability. 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.

Mental and Physical Impairment

He says that he has a severe physical impairment due to hip and shoulder pain caused by severe osteoarthritis. He says that it takes him two hours to get out of bed in the morning, due to pain, and he needs the help of his sibling and his parent to get up. He says that he cannot lift anything, and he is not able to work.

Daily Living Activities

He says that he cannot bathe, cook, or do housework because of pain, and he can only walk one block, with a cane.

Help with Daily Living Activities:

He says that he uses a cane almost all the time, his sibling helps him shower and bathe, and his sibling and parent do housework, which he is not able to do himself.

Ministry Position:

The Ministry's position is that the Appellant does not meet all of the criteria for PWD designation.

Mental and Physical Impairment

The Ministry maintains that the Appellant does not have a severe physical impairment. The Ministry acknowledges that the Appellant experiences pain, sometimes uses a cane, and is not able to lift heavy objects. However, they argue that the Appellant's ability to walk,

climb steps and lift indicates that he is able to function independently to a reasonable degree.

The Ministry says that it is not satisfied that the Appellant has a severe mental impairment, as the Doctor indicates that the Appellant's deficits in cognitive and emotional functioning have no impact on his daily functioning.

Daily Living Activities

The Ministry says that there is not enough evidence to confirm that the Appellant is directly and significantly restricted in performing daily living activities. They maintain that the Appellant is independent in performing most daily living activities. They argue that, as the Doctor has not described the nature, frequency, and duration of the help the Appellant needs for laundry, basic housekeeping and carrying purchases home, the Ministry cannot confirm that the Appellant is significantly restricted. They also note that there is a discrepancy between the level of restriction indicated by the Doctor, and the restrictions that the Appellant describes.

Help with Daily Living Activities

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

1. Physical Impairment:

The Panel finds that the Ministry's reconsideration decision that the Appellant's physical impairment is not severe, is not reasonably supported by the evidence.

The Doctor has confirmed that the Appellant has severe degenerative disease in the left hip and right shoulder joint, and osteoporosis with thoracic and lumbar compression fracture. As a result of these conditions, the Appellant has severe hip pain that affects his daily activity, including walking, lifting, and carrying.

In the additional report from the Orthopedic Surgeon, they note shoulder pain reported as "10/10" and "function of the arm estimated to be 0 percent of normal". The Appellant confirms that his condition has not improved since the date of that report, despite an injection in his right shoulder. He is not going to have an injection in his left shoulder, because there was no improvement in his right shoulder.

The Panel places significant weight on the opinion of the Orthopedic Surgeon about the Appellant's arm function, as the treating specialist, and in light of the Doctor's comment that they are "not sure what would be the plan for shoulder issue".

The Appellant provides additional detail about the physical impairments that the Doctor and the Orthopedic Surgeon identify. He explains that he cannot lift or bear any weight on his hand. His Sibling described that the Appellant cannot put his hand down to push himself out of bed in the morning. He struggles to get dressed, shower or bathe because

of hand and arm pain. He says his condition is getting worse, and his hip pain has increased to the point where he uses a cane “every day, always”.

Considering the evidence as a whole, including the report of the Orthopedic Surgeon and the Appellant’s evidence at the hearing, the Panel finds that the Appellant has a severe physical impairment due to hip, back, shoulder and arm pain. His arm function is “0 percent of normal”. Therefore, the Panel finds that the Ministry’s determination that the Appellant does not have a severe physical impairment is not reasonably supported by the evidence.

2. Mental Impairment:

The Appellant did not argue at the hearing that he has a severe mental impairment. The Doctor confirms diagnoses of depression and anxiety but indicates no impact on the Appellant’s cognitive and emotional functioning. Although the Doctor had seen the Appellant eleven or more times in the twelve months before they completed the Medical Report, they note that the Appellant did not mention that he was taking medication for those conditions until September 1, 2023, when the Doctor completed the Medical Report. The Panel finds that this evidence does not indicate a severe mental impairment. 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 Doctor has confirmed that the Appellant's physical impairment directly and significantly affects his ability to perform the following two Activities, with supporting opinion from the Orthopedic Surgeon:

- Basic housework:
 - the Doctor says that shoulder and hip pain affect the Appellant's ability to do laundry and basic housework;
 - the Appellant cannot lift or carry heavy objects;
 - the Orthopedic surgeon says that arm function is "0 percent of normal", which is consistent with the evidence of the Appellant and his Sibling that he cannot do laundry or housework on his own.
- Mobility outside the home:
 - the Doctor says that severe hip pain prevents the Appellant from "prolonged walking" and he uses a cane "at times";
 - the Appellant explains that he uses a cane almost all the time now;
 - the Doctor ticked the box that indicates that the Appellant can walk 1 to 2 blocks; the Appellant's Sibling confirms that the Appellant cannot walk more than one block, and then he has to stop, or sit down after one block; the

Appellant reports that after walking one block his pain has increased to “7 out of 10”.

The Doctor identified the restrictions as periodic. At the same time, they indicated that the Appellant’s hip and shoulder pain affects his activities on a daily basis. There is no indication that the Appellant’s pain comes and goes, except to the extent that it is aggravated by activity. The Panel finds that the Doctor was likely referring to frequency of activity, rather than improvement of symptoms, when they indicated that the Appellant needs help with Activities periodically.

The Appellant describes greater restrictions on more Activities than the Doctor indicates in the Medical Report and the Assessor Report. The Appellant explained that he is restricted in preparing meals, shopping, performing personal hygiene and self care and moving about indoors. The Panel acknowledges that the Appellant has the restrictions he describes because his condition is worsening. Those restrictions are consistent with the Orthopedic Surgeon’s assessment that the Appellant’s arm function is “0 percent of normal”, although the Orthopedic Surgeon does not address the Activities that are restricted. However, the Panel, and the Ministry, can only consider the restrictions on Activities that the Doctor identifies, because the legislation requires the opinion of the prescribed professional that Activities are significantly restricted, either continuously or periodically for extended periods. Where the Doctor and the Orthopedic Surgeon have identified restricted ability to perform Activities, the Panel accepts the additional details provided by the Appellant and his Sibling, about his ability to perform those Activities.

The Panel finds that the information provided by the Doctor confirms direct and significant restrictions to the Appellant’s ability to perform Activities.

The Panel finds that the Ministry was not reasonable in its determination that the limitations described in the Medical and Assessor Reports did not indicate a significant overall restriction in the Appellant’s 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 Doctor confirms that the Appellant uses a cane to walk outdoors, although the Doctor says the Appellant uses the cane sometimes, and the Appellant says he now uses it always, indoors and out. The Doctor also says that the Appellant's family helps with restricted Activities. The Appellant's Sibling confirms that they help with housework. Again, the Panel acknowledges that the Appellant's family helps with other Activities, but the legislation requires the opinion of the prescribed professional, and the Doctor only identified the Activities of basic housework and mobility outside the home, as requiring an assistive device or significant help from others.

The Ministry acknowledged that the Appellant uses a cane and receives help from family. However, the Ministry said it could not determine that significant help was needed to perform restricted Activities, because it was not established that Activities were significantly restricted. As the Panel has found that two Activities are significantly restricted, the Panel also finds that the Appellant uses an assistive device and receives significant help from family. Therefore, the Panel finds that the Ministry's determination that the criterion was not established, is not reasonably supported by the evidence.

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.

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Part G – Order

The panel decision is: (Check one) Unanimous By Majority

The Panel Confirms the Ministry Decision Rescinds the Ministry Decision

If the ministry decision is rescinded, is the panel decision referred back to the Minister for a decision as to amount? Yes No

Legislative Authority for the Decision:

Employment and Assistance Act

Section 24(1)(a) or Section 24(1)(b)

Section 24(2)(a) or Section 24(2)(b)

Part H – Signatures

Print Name
Susan Ferguson

Signature of Chair

Date (Year/Month/Day)
2024/02/23

Print Name
Kulwant Bal

Signature of Member

Date (Year/Month/Day)
2024/02/13

Print Name
Warren Fox

Signature of Member

Date (Year/Month/Day)
2024/02/10