

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

The decision under appeal is the Ministry of Social Development and Poverty Reduction (the “Ministry”) Reconsideration Decision dated April 25, 2024, denying the Appellant the persons with disabilities (“PWD”) designation.

The Ministry found that the Appellant met the age and duration of impairment requirements.

However, the Ministry found:

- The Appellant did not have a severe physical or mental impairment;
- The Appellant's daily living activities aren't directly and significantly restricted; and,
- The Appellant doesn't need significant help to do daily living activities because of any significant restrictions.

The Ministry also 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* (the “Act”), section 2

*Employment and Assistance for Persons with Disabilities Regulation* (the “Regulation”), section 2

*Employment and Assistance Act*, section 22(4)

**The legislation is in the Appendix at the end of this decision.**

**Part E – Summary of Facts**

The hearing took place on June 11, 2024, as a teleconference hearing.

The information the Ministry had at the time of the Reconsideration Decision included:

- The Medical Report, dated February 4, 2024, completed by the Appellant’s Doctor (the “Doctor”);
- The Assessor Report, dated February 4, 2024, also completed by the Doctor;
- The Self Report, dated January 9, 2024, completed by the Appellant; and,
- The Appellant’s Reconsideration Request, dated April 9, 2024, which explains why he wanted the Ministry to reconsider its original decision. Information in the Reconsideration Request is summarized in the appropriate sections of the discussion below.

***Diagnoses***

In the Medical Report, the Doctor says the Appellant has left knee arthritis, recurrent meniscal tears, loose bodies, effusion, for which he has had multiple surgeries, with a date of onset of September 2021.

**Physical Impairment**

In the Medical Report, the Doctor says the Appellant’s medical conditions relating to his impairment are a recurrent meniscal tear, both anterior and posterior, which causes him severe pain due to recurrent joint effusion. In addition, he experiences severe pain whenever he tries to walk more than three blocks or stands longer than twenty minutes because his left knee swells up. As a result, he will be bedridden for several days. The Doctor also says that the Appellant has had several unsuccessful knee surgeries.

The Doctor says the Appellant can:

- Walk two to four blocks on a flat surface without help;
- Climb two to five steps;
- Lift two to seven kgs; and,
- Has no limitation to the amount of time he can remain seated.

In the Assessor Report, the Doctor says (with comments in *italics*), the Appellant needs periodic assistance from another person with walking indoors (*holds on to furniture*), and takes significantly longer than typical with all other listed activities: walking outdoors and climbing stairs (*takes moderate amount of time all the time*), standing (*ten – twenty minutes*), and lifting and carrying and holding (*ten lbs*).

In the Self Report the Appellant says that it hurts when he walks, when he's going to sleep, and when he wakes up. He also says his knee "*blows up for a week after one days work*".

In the Reconsideration Request, the Appellant says he "*hobbles to work 4 days a month and (his) knee blows up for 5 days afterwards*". He says he has to work four days a month to earn enough to pay his bills, and he doesn't have enough money to pay for the surgery he needs.

### **Mental Impairment**

The Appellant has not been diagnosed with any mental impairments.

In the Medical Report, under Health History, the Doctor says the pain in the Appellant's left knee has caused deep depression and a low mood.

In the Medical Report, the Doctor says the Appellant has significant deficits in his cognitive and emotional functioning in the area of emotional disturbance, adding "*Decreased mobility and mobility to work has led to significant financial struggles, homelessness and a deep depression*".

In the Assessor Report, the Doctor says the Appellant's speaking and hearing abilities are good and his reading and writing abilities are satisfactory. The Doctor has not completed the section of the Assessor Report that asks the assessor to identify impacts on a range of cognitive and emotional functions.

The Appellant does not identify any mental impairments in the Self Report or the Reconsideration Request.

### **Restrictions in the Ability to Perform Daily Living Activities**

In the Medical Report, the Doctor says the Appellant has not been prescribed any medications that interfere with his ability to do daily living activities.

In the Assessor Report, the Doctor says that the Appellant has the following abilities with daily living activities (with comments in *italics*):

- **Perform personal hygiene and self care** – Independent (no assistance required) with respect to most of the listed activities, but an answer is not provided regarding some of them (regular diet, and transfers in and out of bed or a chair);
- **Perform housework to maintain the person's place of residence in acceptable sanitary condition** - Requires periodic assistance (*needs assistance from friends*);
- **Shop for personal needs** – Independent with most listed activities but requires periodic assistance with carrying purchases home (*needs help carrying purchases if ↑ 10 lb*);
- **Prepare own meals** - Requires periodic assistance with food preparation and cooking (no explanation or description is provided);

- **Use public or personal transportation facilities** – Takes longer with all listed activities (*takes significantly longer than typical [50%] Have to rest often*); and,
- **Move about indoors and outdoors** – See Doctor’s comments in the “Physical Impairment” section above (*uses a walking stick and holds on to furniture*).

### **Need for Help**

In the Medical Report the Doctor says the Appellant uses a walking stick.

In the Assessor Report, the Doctor says the Appellant needs assistance from his friends to do housekeeping, needs help carrying purchases home if they weigh more than ten lbs, holds on to furniture when walking indoors, and uses a walking stick for mobility.

### **Additional Information Submitted after Reconsideration**

Section 22(4) of the *Employment and Assistance Act* says that a panel can consider evidence that is not part of the record when the Ministry made the decision. But first the panel must decide the new information is relevant. Once a panel has determined if any new evidence can be admitted, it must decide if the decision was reasonable considering the new evidence.

In the Notice of Appeal, the Appellant says he can’t work more than a couple of days a month unless he gets surgery, and he doesn’t have enough money to afford a place to rent.

### **Evidence Presented at the Hearing**

At the hearing, the Appellant said he is unable to work or walk. He said his knee has given out, and three or four days ago he suffered a tibial plateau fracture. As a result of the fracture he has been bedridden since the accident.

The Appellant also explained that he needed the additional financial assistance he would get with the PWD designation because recovery from the surgery he needs on his left knee would take some time. Over that recovery period he would not be able to work the few days a month that he was able to work before he broke his right tibia. As a result, he would not have enough money to pay rent and would be homeless. He also said that with the broken leg he can no longer work at all.

The Appellant explained that he and a friend had a new business idea, but his friend had stolen the Appellant’s \$50,000 contribution to this new business idea.

In response to a question from the panel, the Appellant said that before he broke his tibia he had been able to walk up to about two blocks with minimal swelling in his left knee, but if he went any further than that “*it would swell up*”. Regarding the Doctor’s comments in the Medical Report about the Appellant having had several previous unsuccessful surgeries, the Appellant said that that wasn’t true. He had only had one previous surgery which was unsuccessful because the surgeon didn’t do it properly.

In response to another question from the panel the Appellant said his mother has passed away, the rest of the members of his family live in a different province, and he has no one to help him with daily living activities. Regarding a need for assistive devices, the Appellant said that after he broke his tibia a few days ago he has been in a cast. He said he has crutches now but can't use them because he is unable to put any pressure on his right leg.

In response to a question from the panel the Appellant said that before the broken tibia he could lift up to 150 lbs above his head but he was unable to carry anything over a few pounds. He said that he used to be able to drive to the store for groceries but the motor in his truck "*blew up*" and since then a friend has lent him his car a few times.

Regarding any mental impairments, the Appellant said he is depressed because his physical impairment means that he can't work, he has no one to help him and he is now confined to bed because he has broken the tibia in his right leg.

In response to another question from the Panel, the Appellant said he did not know if he qualified for a Canada Pension Plan (CPP) disability pension because he had not applied for it.

At the hearing, the Ministry relied on the Reconsideration Decision, and explained that the recent injury to his right leg was recent and therefore was not considered when the Ministry made the Reconsideration Decision. However, the Ministry said that no evidence had been presented to indicate the recovery period for the broken tibia, which would have to be assessed by the Ministry to identify any impact of that injury on the Appellant's eligibility for the PWD designation.

In response to a question from the panel, the Ministry said there was a Ministry program that provided additional financial assistance for people who for various reasons were unable to work (the Persons with Persistent Multiple Barriers to Employment or PPMB designation), but that the Ministry did not know if the Appellant would qualify for the PPMB designation unless he applied for it.

### **Admissibility of New Evidence**

There is no new information in the Notice of Appeal.

New verbal evidence provided by the Appellant at the hearing was the information he provided about his recent tibial plateau fracture and the impact of that injury on his mobility.

New verbal evidence provided by the Ministry at the hearing was that the Ministry would need additional information to indicate the recovery period for the Appellant's broken tibia, and that that new evidence would be required so the Ministry could assess the impact of the injury, if any, on the Appellant's eligibility for the PWD designation.

Neither party objected to the panel considering any of the new evidence presented at the hearing.

The panel admits the new information provided by the parties about the Appellant's new injury and whether it might have affected the Ministry's decision because it is relevant to the decision.

**Part F – Reasons for Panel Decision**

The issue in the appeal is whether the Reconsideration Decision was reasonable based on all the evidence or whether the legislation was reasonably applied in this case. In other words, was it reasonable for the Ministry to determine that:

- The Appellant doesn't have a severe mental or physical impairment;
- The Appellant's daily living activities aren't directly and significantly restricted either continuously or periodically for extended periods due to the severe impairment; and,
- It couldn't be determined that the Appellant needs help to do daily living activities because of significant restrictions.

**ANALYSIS****Severity of Impairment**

The legislation requires that the Ministry determine whether it thinks an impairment is severe. Clearly this assessment must be made in light of the available evidence. The evidence of severity is contained in an applicant's PWD application, together with any relevant new evidence admitted by the Panel under section 22(4) of the *Employment and Assistance Act*. While the information in the applicant's self report should also be taken into account, the legislation requires that the Ministry rely primarily on an assessment of the severity of an applicant's impairment as expressed by medical practitioners and prescribed professionals. The Ministry has created two reports: the Medical Report (section 2 of the application form) and the Assessor Report (section 3 of the application) for this purpose.

In this case, both the Medical Report and the Assessor Report were completed by the Doctor. Both reports ask the prescribed professional to indicate if the person applying for PWD has any restrictions in physical functioning, and if so, to explain the restrictions or provide comments giving more detail, such as how any restrictions impact the applicant's physical and mental capabilities.

The Panel notes that the legislation provides no guidance on how prescribed professionals are to form their opinions. However, prescribed professionals are duty-bound to provide fair and honest opinions of the severity of an applicant's impairments. These opinions might be the result of direct observation, medical tests, or other similar measures.

**Physical Impairment***The Appellant's Position*

The Appellant's position is that unless he gets the surgery he needs on his left knee he won't be able to work, which means he won't be able to pay his rent and he will be homeless. In addition, now that he has broken his right tibia he is bedridden and unable to do anything.

#### *The Ministry's Position*

The Ministry notes that the PWD designation is based on whether a person has a severe mental or physical impairment and a significant loss in their ability to function independently, effectively and for a reasonable duration. The Doctor has indicated that the Appellant takes an "*inordinate amount of time*" to walk outdoors and climb stairs, but the Doctor does not explain how much longer it takes the Appellant to complete these activities, making it difficult to establish that he is severely impaired. In addition, employability is not a consideration in determining PWD eligibility.

#### *Panel Decision*

The panel notes that the Doctor has indicated in the Medical Report that the Appellant can walk two to four blocks on a flat surface without help, climb two to five steps, lift two to seven kgs, and has no limitation to the amount of time he can remain seated. At the hearing, the Appellant confirmed that he could walk up to two blocks without severe swelling in his left knee, and that he could lift considerably more than seven kgs. While "*severe impairment*" is not precisely defined in the legislation, based on all the available evidence, the panel finds that the Ministry reasonably determined that the Appellant's restrictions in his physical capabilities (walking, climbing, lifting, carrying, standing) could not be considered severe as he is able to perform all these activities to some degree.

In addition, no evidence has been presented by the Appellant to confirm the verbal information. There has been no supporting evidence provided by the Appellant such as an X-ray of the fracture, a letter from the Doctor explaining the recovery period and other details, or a picture of the cast, for example. Therefore the panel assigns this new information little weight. The panel also finds the Ministry's position, as expressed at the hearing, that it would need a prescribed professional's opinion about the time the fractured tibia was expected to take to heal, to be reasonable. Therefore, even if the additional evidence were available, the panel finds that it is not clear that it would have had an impact on the Ministry's Reconsideration Decision.

For these reasons, the panel considers the Ministry's finding that there is not sufficient evidence to conclude that the Appellant has a severe physical impairment to be reasonable.

#### **Mental Functioning**

In the Medical Report, the prescribed professional is asked if the applicant has any significant deficits in their cognitive and emotional functioning, and if so, in what areas. In the Assessor Report, if the applicant has a mental impairment, the prescribed professional is asked to indicate whether any impairment to the applicant's cognitive and emotional deficits are considered to



have mild, moderate, or major impacts on their mental functioning. The legislation doesn't define what mild, moderate or major impacts are.

#### *The Appellant's Position*

The Appellant's position is that his physical impairments make it impossible for him to work, which means he can't afford to rent his home or pay for groceries, and as a result he is severely depressed.

#### *The Ministry's Position*

The Ministry's position is that the Appellant's depression does not appear to severely impair his mental functioning, as the Doctor has identified no major impacts to the Appellant's daily cognitive and emotional functioning, and the Appellant is reported to be independent in all of his personal activities, care, finances, and social functioning.

#### *Panel Decision*

The Doctor, as a prescribed professional, is fully qualified to diagnose a person's impairments and to assess their severity.

The panel notes that the Doctor has not diagnosed the Appellant with a mental impairment. The panel also notes that the Doctor has left the entire page of the Assessor Report that deals with Cognitive and Emotional Functioning blank. In addition, the Doctor has not answered the question "*Are there any significant deficits with cognitive and emotional function?*" in the Medical Report. Without any detailed information from a medical practitioner or a prescribed professional regarding whether the Appellant has any cognitive emotional functioning difficulties, the Ministry cannot reasonably determine that a severe mental impairment exists.

For these reasons, the panel finds that the Ministry reasonably determined that the Appellant does not have a severe mental impairment.

### **Restrictions in the Ability to Perform Daily Living Activities**

#### *The Appellant's Position*

The Appellant's position is that he is unable to work enough hours to earn enough to pay his living expenses, but has not identified any daily living activities, as defined in the legislation, that he is unable to perform either continuously or periodically for extended periods.

#### *The Ministry's Position*

The Ministry's position is that, while the Doctor reports that the Appellant needs periodic assistance to do housekeeping, shopping, carrying purchases home and preparing meals, no description has been provided to explain the nature, frequency and duration of the assistance

required. As such, the Ministry is unable to confirm that the Appellant requires assistance periodically for extended periods of time. In addition, with regard to those daily living activities that the Doctor says takes the Appellant significantly longer to do, the Ministry's position is that taking twice as long to do daily activities is not considered a significant restriction.

#### *Panel Decision*

After assessing the severity of an impairment, the Ministry must consider how long a severe impairment is likely to last, how much the applicant's ability to do daily living activities is restricted, and if they need help with those activities.

Under Section 2(2)(b)(i) of the *Act*, the Ministry must be satisfied that a prescribed professional has said that an applicant's severe impairment *directly and significantly* restricts their daily living activities, either *continuously or periodically for extended periods*. As confirmed in the case of *Hudson v. British Columbia (Employment and Assistance Appeal Tribunal), 2009 BCSC 1461*, daily living activities appears in the Act in the plural ("*daily living activities*"), so at least two of the daily living activities must be significantly restricted.

"*Directly*" means that a severe impairment must itself be the cause of any daily living activity restrictions. A direct restriction must also be significant and either continuous or periodic. If periodic, it must be for extended periods, so the frequency and duration of any periodic restrictions must be noted by the prescribed professional.

Having considered the language under Section 2(2)(b) of the *Act* and the lack of detail in the Medical Report and the Assessor Report, which includes both sections of the forms not completed by the Doctor and a lack of detail on the frequency and duration of any periodic restrictions, the panel finds that the Ministry reasonably determined that the Appellant does not have significant restrictions in his ability to perform daily living activities continuously or periodically for extended periods based on all the available evidence.

### **Help with Daily Living Activities**

#### *The Appellant's Position*

The Appellant's position is that he needs help with several daily living activities and occasionally gets help from friends, but he has no family nearby to support him.

#### *The Ministry's Position*

The Ministry's position is that it has not been established that the Appellant's daily living activities are significantly restricted and as a result it cannot be determined that significant help is required from other persons or an assistive device.

#### *Panel Decision*

Help in relation to a daily living activity is defined in the legislation as the need for:

- An assistive device;

- The significant help or supervision of another person; or,
- The services of an assistance animal.

The legislation also says that a person must need help to do daily living activities *as a result of direct and significant restrictions in their ability to perform daily living activities*. So direct and significant daily living activities restrictions must be the cause of the need for help. Because the Ministry reasonably determined that the Appellant does not have significant restrictions in his ability to perform daily living activities, the panel finds that the Ministry reasonably determined that the Appellant does not need help.

### **Conclusion**

Based on all the evidence and legislation, the Panel finds that the Reconsideration Decision was reasonably supported by the evidence and was a reasonable application of the legislation, and confirms the decision. The Appellant's appeal, therefore, is not successful.

The panel sympathizes with the Appellant in these circumstances. However, the legislative criteria in this case have not been met. The PWD designation is based on daily living activity abilities, which do not include work or employment-related activities. If the Appellant were to re-apply with the information that is missing, including any significant impact on his ability to do daily living activities for two or more years as a result of his recent tibia fracture, he might be successful. In addition, there are possibly additional federal or provincial programs for which the Appellant might qualify (e.g. CPP disability benefit, PPMB).

**APPENDIX**  
**RELEVANT LEGISLATION**

The criteria for being designated as a PWD are set out in Section 2 of the Act as follows:

**Persons with disabilities**

**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).

The Regulation provides as follows:

**Definitions for Act**

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 ...

The *Employment and Assistance Act* provides as follows:

**Panels of the tribunal to conduct appeals**

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 2024-0168

**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

Simon Clews

Signature of Chair

Date (Year/Month/Day)

2024/06/14

Print Name

Kulwant Bal

Signature of Member

Date (Year/Month/Day)

2024/06/14

Print Name

Julie Iuvancigh

Signature of Member

Date (Year/Month/Day)

2024/06/14