

## PART C – Decision under Appeal

The decision under appeal is the ministry's reconsideration decision dated December 16, 2011 which held that the appellant did not meet all of the applicable statutory requirements of Section 2 of the Employment and Assistance Regulation (EAR) for requalification as a Persons with Persistent Multiple Barriers (PPMB) designation.

The ministry was satisfied that as the appellant has been in receipt of income assistance for at least 12 of the immediately preceding 15 calendar months she met the criterion set out in Section 2(2)(a) of the EAR Regulation. The ministry was also satisfied that the evidence established that the appellant scored 16 on the employability screen and that she has a medical condition, other than an addiction, that is confirmed by a medical practitioner and that, in the opinion of the medical practitioner, has continued for at least one year and is likely to continue for at least two more years pursuant to Section 2(3)(a) and Section 2(3)(b)(i)(A) and (B) of the EAR.

The ministry was also satisfied that the appellant was compliant with medical and therapeutic advice and has demonstrated reasonable efforts to overcome her medical conditions and has satisfied the criteria of Section 2(3)(c) of the EAR.

However, the ministry was not satisfied that:

- based on the result of the employability screen, the appellant has barriers that seriously impede her ability to search for accept or continue in employment as required in Section 2(3)(a)(ii) of the EAR; and
- the medical condition is a barrier that seriously impedes the appellant's ability to search for, accept or continue in employment pursuant to Section 2(3)(b)(ii) of the EAR.

## PART D – Relevant Legislation

*Employment and Assistance Regulation (EAR) Section 2*

**PART E – Summary of Facts**

At reconsideration, the documents that were before the ministry included the following:

- 1) Request for Reconsideration Reasons completed by an advocate on behalf of the appellant dated December 7, 2011 stating that the appellant has severe headaches and chronic neck pain (cervical osteoarthritis) that developed more than 20 years ago. The appellant states that she experiences severe pain including headaches of 5-7 days' duration multiple times per month, wakes 2-3 times per night and experiences nausea, dizziness, visual symptoms, diminished mobility and light sensitivity. The appellant states that she has remained under medical care for her condition, which is chronic and treatment-resistant. The appellant states that her condition has not improved and since 2005 the only changes have been that she attempted physiotherapy with little improvement, she has reduced her use of analgesics, and was assessed at a pain clinic in approximately November 2011.
- 2) The Request for Reconsideration Reasons also state that by attempting the recommended treatment the appellant has attempted to overcome her barriers to employment without success. The appellant states that she has been unable to obtain work since 1999, has been relieved of obligations to seek work or participate in employment programs, and has had no improvement in her symptoms.
- 3) Medical Report – Persons with Persistent Multiple Barriers, two pages, dated September 26, 2011 (the "Medical Report"), completed by the appellant's family doctor, which indicates that the appellant's primary medical condition is neck pain/headache and her secondary medical condition is cervical / neck osteoarthritis, with the dates of onset of both conditions left blank. The Medical Report indicates that the conditions have existed for 20 years, are expected to last 2 years or more, and are not episodic in nature. The Medical Report indicates that the appellant has attempted physiotherapy with little response, has chronic use of painkillers, and is to attend a pain clinic. Under prognosis, the Medical Report indicates that the expected duration of the medical conditions is 2 years or more and that the doctor was awaiting an opinion from a pain clinic. The restriction section states "*none other than pain*".
- 4) Employability Screen dated November 8, 2011 indicating the appellant's score of 16 and barriers to employment noted as more than 12 months on income assistance, grade 10-12 education, none or very limited work experience in the past 3 years, and English as a second language.
- 5) Letter from the ministry to the appellant dated November 3, 2011 advising the appellant that she no longer met the requirements for the Persons with Persistent Multiple Barriers (PPMB) category as her medical conditions do not seriously impede her from all forms of employment as required by Section 2(3)(a)(ii) of the EAR, that her medical conditions do not seriously impede her from seeking employment as required by Section 2(3)(b)(ii) of the EAR and stating that she has not taken all reasonable steps to overcome the barriers identified in the Employability Screen as required by Section 2(3)(c) of the EAR.
- 6) Ministry note dated November 3, 2011 (the "Ministry Note") containing a description of the

appellant's situation indicating PPMB denied as the appellant is not eligible under Section 2(4) of the EAR. The Ministry Note indicates that: "*Barriers identified on the employability screen and your medical conditions do not seriously impede you from all forms of employment. No reasonable steps to overcome barriers identified in the employability screen have been attempted. Conditions and degree of restrictions do not preclude all employment*".

- 7) Medical Report – Persons with Persistent Multiple Barriers, two pages, undated but stamped received by the Ministry of Employment on November 18, 2009 (the "Previous Medical Report"), completed by the appellant's family doctor, which indicates that the appellant's primary medical condition is chronic pain/headaches and her secondary medical condition is codeine dependant, with the dates of onset of both conditions as "20+ yrs" and "yrs" respectively. The Previous Medical Report indicates that the conditions have existed for 20 years, are expected to last 2 years or more and are not episodic in nature. The Previous Medical Report treatment section states "*reducing analgesics and investigating again*". The restriction section states "*none physical*".
- 8) Persons Who Have Persistent Multiple Barriers To Employment Checklist ("Employment Checklist") and Client Employability Profile ("CEP") dated December 3, 2009 (4 pages) indicating the appellant's employability screen score of 16, barriers to employment of chronic headaches, depression and chronic neck pains. Appendix 1 – Available Interventions states no interventions available as client is "*medically unable*". The Client Employability Profile indicates that the appellant had been unemployed for over 3 years, has severe lack of employment search and planning skills, education of Grade 12 or equivalent, possesses functional literacy ability, and has vehicle/public transportation available and accessible. The CEP also indicates that the appellant has a severe health condition and persistent disability that severely impacts on employment options, and good communication and interpersonal skills. These documents also indicate that the appellant had PPMB until June 2008 and that it had just expired.
- 9) Employability Screen dated December 3, 2009 indicating the appellant's score of 16 with barriers to employment noted as more than 12 months on income assistance in the last 3 years, grade 10-12 education, none or very limited work experience in the past 3 years and English as a second language. With this score she is expected to work and is employable with longer-term interventions.
- 10) Employment Plan dated November 18, 2009 and signed by the appellant listing required activities as follows: pursue and follow medical and therapeutic advice to decrease barriers to employment, explore appropriate employment, use community resources to enhance quality of life, attend meeting scheduled by MHSD and advise MHSD of changes in circumstances.

In the Reconsideration Decision, the ministry states that the appellant's barriers include more than 12 months on income assistance, grade 10-12 education, none or very limited work experience in the past 3 years and English as a second language. The Reconsideration Decision also states that as the appellant had previously worked as a care aide and has good communication and interpersonal skills, the ministry was not satisfied that her barriers seriously impede her ability to search for, accept or continue employment and she has not met the criterion set out in Section 2(3)(a)(ii) of the EAR.

The ministry's decision states that as the Medical Report states that the appellant has no restrictions other than pain, as the appellant's physician does not describe specific restrictions to employment and as remedial measures to alleviate her pain are in place, the minister is not satisfied that restrictions specific to the appellant's medical conditions seriously impedes her from all types of employment including working towards part-time employment or that her restrictions seriously impede her from attending a job program to work towards independence. The ministry states that the appellant has not met the criteria set out in Section 2(3)(b)(ii) of the EAR.

The appellant's Notice of Appeal dated January 11, 2012 indicates that submissions were to follow. The appellant's advocate provided submissions dated February 27, 2012 (the "Advocate's Submissions") with excerpts from the appellant's income assistance file (14 pages). The Advocate's Submissions state that the ministry based their conclusions on an unduly restrictive reading of the term "seriously impedes" and a failure to reasonably assess the evidence provided in the employability screen and the Medical Report. The Advocate's Submissions state that the ordinary meaning of the word "impede" is to obstruct or hinder, not to prevent, and the appellant's advocate states that "...the Minister has improperly assessed the appellant's eligibility by looking for absolute barriers to employment, rather than serious obstructions".

The advocate argues that the ministry has disregarded the results of the CEP which indicates that the ministry has identified impediments to employability in 6 out of 11 categories, and in 4 of the categories the impediments are identified as severe limitations. The Advocate's Submissions state that when read together, the Employability Screen and CEP indicate that the "...appellant faces long-term and significant barriers to employment based on language, literacy, length of unemployment, years on income assistance, ability to search for a job, health and disability". The Advocate's Submissions also state that while the appellant previously worked as a care aide she has not worked since 1998 which supports the conclusion that she is severely impeded in her ability to search for, accept, or continue in employment.

The Advocate's Submissions also refer to various line records of the appellant's income assistance file which indicate that the appellant attended a resident care aide upgrade program at Vancouver Community College in 1999, was referred to an employment program but in January 2001 was considered unemployable due to chronic migraine headaches. The Advocate's Submissions also refer to notes that the appellant was unable to attend employment plan appointments in 2003 due to severe headaches and illness. The Advocate's Submissions state that numerous employability interventions have been attempted without success and the appellant has remained unemployed since 1998.

Although the appellant has reduced her medication use and has been referred to the Pain Clinic at St. Paul's Hospital, the appellant's advocate argues that there is no evidence to support the ministry's conclusion that the appellant's pain is alleviated. The appellant's advocate argues that the ministry must approach their interpretation to the legislation with a fair, large and liberal construction in keeping with Section 8 of the *Interpretation Act*.

The appeal proceeded by way of a written hearing. Neither the ministry nor the appellant provided any further evidence or submissions.

Based on the evidence, the panel's finding of facts are as follows:

- The appellant has been diagnosed with neck pain, headaches and cervical / neck osteoarthritis;
- The appellant's doctor confirms that the appellant's medical conditions have existed for more than 20 years, are expected to last more than two years, and are not episodic in nature;
- The appellant has been a recipient of income assistance for at least 12 of the immediate preceding 15 months;
- The appellant's Employability Screen is 16,
- The appellant has a Grade 12 education equivalent and had worked as a care aide but not since 1998; and
- The appellant has had PPMB designation for over three years.

**PART F – Reasons for Panel Decision**

The issue to be decided is whether the ministry reasonably concluded that the appellant did not meet all of the statutory requirements of Section 2 of the EAR to re-qualify as a Person with Persistent Multiple Barriers to employment (PPMB) or whether the ministry's decision was a reasonable application of the legislation in the circumstances of the appellant.

Although the ministry accepted that the appellant has a medical condition, other than an addiction, that is confirmed by a medical practitioner and that in the opinion of the medical practitioner has continued for at least one year and is likely to continue for at least two more years, the ministry was not satisfied that the appellant had barriers that seriously impede her ability to search for, accept or continue in employment, or that the appellant's medical condition is a barrier that seriously impedes her ability to search for, accept or continue in employment as required by Sections 2(3)(a)(ii) and 2(3)(b)(ii) of the EAR.

The relevant legislation, section 2 of the EAR, provides as follows:

**Persons who have persistent multiple barriers to employment**

**2 (1)** To qualify as a person who has persistent multiple barriers to employment, a person must meet the requirements set out in

- (a) subsection (2), and
- (b) subsection (3) or (4).

(2) The person has been a recipient for at least 12 of the immediately preceding 15 calendar months of one or more of the following:

- (a) income assistance or hardship assistance under the Act;
- (b) income assistance, hardship assistance or a youth allowance under a former Act;
- (c) a disability allowance under the *Disability Benefits Program Act*;
- (d) disability assistance or hardship assistance under the *Employment and Assistance for Persons with Disabilities Act*.

(3) The following requirements apply

- (a) the minister
  - (i) has determined that the person scores at least 15 on the employability screen set out in Schedule E, and
  - (ii) based on the result of that employability screen, considers that the person has barriers that seriously impede the person's ability to search

for, accept or continue in employment,

(b) the person has a medical condition, other than an addiction, that is confirmed by a medical practitioner and that,

(i) in the opinion of the medical practitioner,

(A) has continued for at least one year and is likely to continue for at least 2 more years, or

(B) has occurred frequently in the past year and is likely to continue for at least 2 more years, and

(ii) in the opinion of the minister, is a barrier that seriously impedes the person's ability to search for, accept or continue in employment, and

(c) the person has taken all steps that the minister considers reasonable for the person to overcome the barriers referred to in paragraph (a).

(4) The person has a medical condition, other than an addiction, that is confirmed by a medical practitioner and that,

(a) in the opinion of the medical practitioner,

(i) has continued for at least 1 year and is likely to continue for at least 2 more years, or

(ii) has occurred frequently in the past year and is likely to continue for at least 2 more years, and

(b) in the opinion of the minister, is a barrier that precludes the person from searching for, accepting or continuing in employment.

[en. B.C. Reg. 368/2002.]

The panel finds that it is not disputed that the appellant's doctor has provided a medical opinion that the appellant suffers from a medical condition other than an addiction that has continued for at least one year and is likely to continue for at least two more years. The ministry's position is that although the appellant meets the requirements of Section 2(2), 2(3)(a)(i) and 2(3)(b)(i) of the EAR, she has not met all of the remaining applicable criteria.

The appellant scored 16 on the employability screen, and the ministry argues that she does not have barriers that seriously impede her ability to search for, accept or continue in employment as required in Section 2(3)(a)(ii) of the EAR. The ministry is not satisfied that the appellant's medical condition is a barrier that seriously impedes her ability to search for, accept or continue in employment as required by Section 2(3)(b)(ii) of the EAR.

Section 2(3)(a)(ii)

The ministry argues that despite the appellant's identified barriers (more than 12 months on income assistance, grade 10-12 education, none or very limited work experience in the past 3 years and English as a second language), she has worked as a care aide in the past, has good communication and interpersonal skills and that her barriers do not seriously impede her ability to search for, accept or continue in employment as required by Section 2(3)(a)(ii) of the EAR.

The Advocate's Submissions state that the appellant has ongoing, chronic conditions that have not improved despite the appellant's attempts at treatment, that she has not worked since 1998, had attempted numerous employability interventions without success and the evidence as a whole indicates that her medical conditions seriously impede her.

The ministry had previously granted the appellant PPMB designation and the CEP indicated that there were four categories in which the appellant's employment options were severely limited: unemployed for over 3 years, severe lack of employment search and planning skills, severe health condition, and persistent disability, severely impacts on employment options. The appellant's employability screens from 2009 and 2011 both indicate that her score was 16 and the appellant's Request for Reconsideration Submission states that no employment interventions have been attempted because the appellant is medically unable.

The panel finds that the evidence of the appellant's attempted employability interventions is not particularly helpful in that it is very dated and that there is no evidence of any employability attempts after 2003. On the other hand, the appellant's Request for Reconsideration Reasons state that the appellant "...has been relieved of obligations to seek work or participate in employment programs and has experienced no alleviation of the symptoms that separated her from the work force more than a decade ago". The ministry's Reconsideration Decision states that the appellant was compliant with the November 18, 2009 employment plan in that she had demonstrated reasonable efforts to overcome her medical conditions. The ministry's previous Employment Checklist, Appendix 1 – Available Interventions states "*none as client is medically unable*". There is no indication that the appellant failed to comply with any other employment plan programs or as directed by the ministry or any new medical evidence to indicate that the appellant is now medically able to participate in employment interventions.

The panel finds that there is no evidence indicating that the appellant's medical condition has improved or that she is now capable of overcoming her identified barriers given her ongoing medical conditions. The panel finds that the ministry's decision that the appellant's barriers did not seriously impede her ability to search for, accept or continue in employment as required by Section 2(3)(a)(ii) of the EAR was not reasonably supported by the evidence and was not a reasonable application of the legislation in the appellant's circumstances.

Section 2(3)(b)(ii)

The ministry's position is that as the Medical Report does not identify any restrictions to employment except "*none other than pain*", that treatment is ongoing in the form of medication and that as the appellant has been recently assessed at a pain clinic, the ministry is not satisfied that restrictions specific to the appellant's medical condition seriously impedes her from all types of employment



including part-time work or that the restrictions seriously impede her from attending a job program to work towards independence. Based on that information, the ministry's position is that the appellant has not met the criteria set out in Section 2(3)(b)(ii) of the EAR.

The Advocate's Submissions state that there is nothing in the EAR that requires the appellant's medical condition to create specific functional limitations. The appellant's position is that she has been in chronic pain for more than 20 years, her record indicates a clear pattern of pain symptoms seriously impeding her ability to search for, accept or continue in employment and that all referrals to employment programs have resulted in pain-related missed appointments.

The ministry had previously granted the appellant PPMB designation and there is no medical evidence indicating that her medical conditions have improved or that her identified restriction of pain has decreased. The appellant's conditions have continued and that she has been referred and recently assessed at a pain clinic for specialized services for management of her chronic pain. The Medical Report identifies pain as the restriction specific to the appellant's medical conditions.

The panel finds that on the whole of the evidence the appellant has ongoing pain symptoms and therefore, the panel finds that the ministry's decision that the appellant's barriers did not seriously impede her ability to search for, accept or continue in employment as required by Section 2(3)(b)(ii) of the EAR was not reasonably supported by the evidence and was not a reasonable application of the legislation in the appellant's circumstances.

In conclusion, the panel finds that the ministry's reconsideration decision was not reasonably supported by the evidence and was not a reasonable application of the legislation in the circumstances of the appellant. Therefore, the panel rescinds the ministry's decision and it is overturned in the appellant's favor.