

PART C – Decision under Appeal

The decision under appeal is the reconsideration decision of the Ministry of Social Development (“the ministry”) dated February 20, 2012 which held that the appellant did not meet the eligibility criteria under s. 2 of the Employment and Assistance Regulation (EAR) to qualify as a person with persistent multiple barriers (PPMB) to employment. The ministry determined that the criteria of s. 2(3) of the EAR were not met because the appellant’s employability screen score was less than 15 and that the criteria of s. 2(4)(b) were not met because the minister was not of the opinion that the appellant’s medical condition is a barrier that precludes all forms of employment. The ministry was satisfied that a medical practitioner confirmed that the appellant’s medical condition has existed for more than 1 year and is likely to continue for at least 2 more years satisfying the criterion of s. 2(4)(a).

PART D – Relevant Legislation

Employment and Assistance Regulation (EAR), s. 2 and Schedule E

PART E – Summary of Facts

The evidence before the ministry at reconsideration is that the appellant has been in continuous receipt of income assistance since June 2009 as a single parent with five dependent children and applied for PPMB designation on December 19, 2012.

Documentary evidence before the ministry at the time of reconsideration comprised:

- 1) A Medical Report – Persons with Persistent Multiple Barriers (“the Medical Report”) completed by a general practitioner on October 20, 2011 which lists the appellant’s primary medical condition as left ankle fracture. No secondary medical conditions are reported. The appellant’s medical condition is not episodic as it occurs daily and the expected duration is 2 years or more. Treatment is described as “surgical repair required.” Restrictions specific to the medical condition are described as “limited mobility, unable to stand for long periods.”
- 2) An Employability Screen for the appellant indicating a score of 12.
- 3) A January 17, 2012 consult letter from an orthopaedic surgeon (“the consult letter”) stating that the appellant reports continued symptoms in her ankle – it clicks and catches, causes pain anterolaterally and is very tender over the anterolateral ankle joint. The surgeon writes that a September 20, 2011 CT scan shows that the appellant’s fibular fracture is healed with a little deformity. There is a little narrowing between the talus and the edge of the fibula. Additionally, there is a small 7 mm bony fragment just anteromedial to the fibula, adjacent to the talus. The appellant may have a loose body in the ankle joint. The loose body may be contributing to some of the symptoms. Unfortunately it is also possible that the fracture healed with a little irregularity and some narrowing adjacent to the talus may be causing some of the symptoms. The appellant is referred to a foot and ankle surgeon for further investigation.
- 4) A supplemental medical opinion (“the SMO”) signed on February 8, 2012 by the general practitioner who completed the Medical Report. The appellant is reported to have significant barriers to employment due to extensive and severe medical conditions and is restricted from taking part in any kind of work. The appellant is reported as having two injuries to the left ankle, an injury to the left elbow, depression and fatigue. The appellant is restricted to standing less than 30 minutes, walking less than 4 blocks, and lifting/carrying under 5 lbs due to pain, swelling, and stiffness and has continuous feelings of hopelessness and lack of motivation. As a result of her medical conditions, the appellant has significant barriers to the degree that she is precluded in her ability to search for, accept or continue employment and is unable to participate in any employment related activities.

In its reconsideration decision, the ministry notes that during a PPMB interview the appellant stated that she uses her bicycle for transportation and is able to manage daily activities on her own.

On appeal, the appellant submitted a 3-page advocate’s submission which was accepted by the panel as argument. On appeal, the ministry relies on its reconsideration summary.

PART F – Reasons for Panel Decision

The issue under appeal is whether the ministry's decision that the appellant did not meet the eligibility criteria under s. 2 of the EAR to qualify as a person with persistent multiple barriers (PPMB) to employment is reasonably supported by the evidence or a reasonable application of the applicable enactment in the appellant's circumstances. The ministry determined that the criteria of s. 2(3) of the EAR were not met because the appellant's employability screen score was less than 15 and that the criteria of s. 2(4) were not met because the minister was not of the opinion that the appellant's medical condition is a barrier that precludes the ability to search for, accept or continue in all forms of employment.

Section 2 of the EAR is set out below.

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.

The ministry's position, based on the written record, is that the appellant is not eligible for designation as a PPMB under s. 2(3) of the EAR because her employability screen score was not at least 15 which is required for eligibility consideration under this subsection. The ministry also takes the position that the appellant is not eligible under the alternative eligibility criteria set out in s. 2(4) of the EAR. The ministry determined that the criteria of s. 2(4)(a) were met because the appellant has a medical condition, other than an addiction, left ankle fracture with onset in 2000 and 2009, that is confirmed by a medical practitioner and has, in the opinion of a medical practitioner, existed for at least one year and is likely to continue for at least two more years. However, the ministry determined that the criterion of s. 2(4)(b) was not met because it was not satisfied that the evidence from the medical practitioner identifying limits to mobility and an inability to stand for long periods, together with the appellant's evidence that she uses her bicycle for transportation and is able to manage her daily living activities on her own, established that the restrictions caused by the appellant's medical conditions preclude her ability to search for, accept, or continue in all forms of employment.

The appellant's position, based on her advocate's written submissions, is that the information provided from the physicians establishes that the appellant has medical conditions which preclude her from all forms of employment thus meeting the criteria for PPMB designation under s. 2(4)(b) of the EAR. The advocate argues that the ministry interpreted the meaning of "precluded" too narrowly thereby defeating the purpose of the assistance program and that the reasons for denial give minimal or no weight to the surgeon's consult letter or SMO and do not acknowledge the additional conditions of left elbow injury and depression, or the identified restrictions. The advocate also argues that the ministry has unreasonably relied on the appellant's evidence obtained during her PPMB interview that she uses a bicycle and manages her daily living activities because this information is not applicable to the criterion of s. 2(4)(b) of the EAR and was not provided as a reason for the original denial and could therefore not be properly disputed at reconsideration.

With respect to the ministry's determination that the appellant has not met the eligibility requirements for PPMB designation set out in s. 2(3) of the EAR, the panel notes that although the reconsideration decision identifies an employability score of 14, a copy of the appellant's employability screen is included in the record and indicates a total score of 12. The panel relies on the employability screen

itself and finds that the appellant's employability screen score is 12 and the reference to a score of 14 was in error. The panel also finds that the fact that the appellant did not score at least 15 on her employability screen is not in dispute. Therefore, as the initial requirement to satisfy the criteria of s. 2(3) of the EAR is having scored at least 15 on the employability screen set out in Schedule E, the ministry reasonably determined that the appellant did not qualify for PPMB designation under s. 2(3) of the EAR.

With respect to the issue of whether the ministry reasonably determined that the appellant has not met the eligibility criteria for designation as a PPMB under s. 2(4) of the EAR, specifically the criterion of s. 2(4)(b), the panel has considered the arguments advanced by the appellant's advocate.

Firstly, the panel does not find the argument that the ministry has interpreted the meaning of "precluded" too narrowly to be compelling. The plain meaning of "preclude" is reasonably viewed as denoting an absolute inability and this interpretation is supported when contrasted with the language "seriously impedes" used in s. 2(3) to establish a lower employment threshold for applicants with employability screen scores of at least 15.

Secondly, the panel finds that the ministry was not unreasonable in its consideration of the information that the appellant provided during a PPMB interview because the information in question relates to her functional abilities which are reasonably considered when assessing employability. Furthermore, a reconsideration decision is a new decision and may take into account information not relied on in the original decision, including new information provided by an applicant, and may provide reasons different from those originally provided and even result in a different conclusion. The panel also notes that an applicant is afforded an opportunity to dispute the evidence, reasons, and conclusion of a reconsideration decision on appeal and that, in this instance, the appellant has availed herself of this opportunity and disputes not the evidence itself but the ministry's reliance on that information.

Thirdly, the panel considered the advocate's argument that the ministry was unreasonable in its failure to place weight on the medical information provided at reconsideration, the SMO and consult letter. The panel finds that, while it may have been preferable for the ministry to expressly state its reasons for not considering the medical conditions not originally diagnosed by the physician, left elbow injury and depression, it is sufficiently clear from the reconsideration decision that the ministry considered the only medical condition confirmed by a medical practitioner as having met the duration requirements of s. 2(4)(a) of the EAR - the left ankle injury. Although the medical practitioner states in the SMO that the appellant "has severe medical conditions that have existed for more than one year and will continue for at least 2 more years", the SMO provided no information respecting the date of onset or duration specific to the appellant's depression or left elbow injury or treatment for those conditions. The panel finds it reasonable for the ministry to require information specifically addressing the onset and expected duration of each individual medical condition and notes that the Medical Report provides an opportunity for a medical practitioner to identify any secondary medical conditions, the date of onset and any treatment and outcome but that no secondary medical conditions were identified in October 2011 when the Medical Report was completed.

With respect to the advocate's argument that the ministry was unreasonable in failing to place weight on the medical information provided at reconsideration as it relates to the injury to the appellant's left ankle, the panel finds that the SMO and consult letter presented significant new and further

information about the ankle injury that was important to address in the reconsideration decision with reference to the statutory criteria in assessing the matter. However, pursuant to s. 24(2) of the Employment and Assistance Act the panel's authority is limited to either rescinding or confirming a reconsideration decision based on the panel's determination as to whether or not the reconsideration decision is reasonably supported by the evidence or a reasonable application of the applicable enactment. Accordingly, the panel will consider whether the reconsideration decision is reasonable in light of all of the evidence respecting the diagnosed injury to the appellant's left ankle.

In the Medical Report, the appellant is reported as requiring surgical repair for her left ankle fracture though the subsequent consult letter from the orthopaedic surgeon defers the question of surgery to a foot and ankle surgeon. No further information was provided as to whether the appellant has or will undergo surgical repair. Restrictions identified by the medical practitioner in the Medical Report are that the appellant's left ankle fracture results in limited mobility and that the appellant is unable to stand for long periods. In the SMO, the same medical practitioner specifies that the appellant is limited to standing less than 30 minutes and walking less than 4 blocks. The SMO also indicates that the appellant is limited to lifting and carrying less than 5 lbs. and that the periodic use of crutches is required. The panel finds it reasonable to view the restriction with carrying as relating, in part, to the appellant's left ankle injury. In the SMO, the medical practitioner states that as a result of her medical conditions, the appellant has significant barriers to the degree that she is precluded in her ability to search for, accept or continue in employment, is unemployable and unable to participate in any employment related activities, a statement which appears to draw a conclusion based on not only the left ankle condition but also the depression and left elbow injury. The consult letter confirms that the appellant experiences pain and tenderness in her left ankle and that the fibular fracture "healed with a little deformity" with a small bony fragment but does not address how this condition impacts the appellant's general ability to function or her ability to seek or maintain employment. Additional evidence is that the appellant told the ministry that she rides a bicycle for transportation and that she independently manages her daily living activities. While the appellant's advocate has argued that it was unreasonable for the ministry to rely on the appellant's statements provided during her PPMB interview, neither the appellant nor the advocate dispute the accuracy of the statements.

Section 2(4)(b) of the EAR requires that the minister be of the opinion that a person's medical condition(s) is a barrier that precludes the person from searching for, accepting or continuing in employment. The panel finds that while the evidence of the medical practitioner identifies that the appellant's ankle injuries result in certain limitations, namely the inability to stand for long periods (less than 30 minutes), walk 4 or more blocks, and carry loads of 5 lbs or more, the level of functioning reported is reasonably viewed as not precluding all forms of employment. Furthermore, the appellant's own evidence indicates that she has a good degree of independent functioning in terms of managing daily activities, which are reasonably viewed as involving tasks associated with walking, standing, lifting and carrying, and that she transports herself by bicycle. For these reasons, the panel finds that the ministry reasonably determined that the appellant is not precluded from searching for, accepting or continuing in all forms of employment.

The panel finds that the ministry's reconsideration decision was reasonably supported by the evidence and confirms the decision.