



PART C – Decision under Appeal

The decision under appeal is the Reconsideration Decision dated March 16th, 2012 in which, pursuant to s. 2 of the *Employment and Assistance Regulation*, the ministry determined that the appellant was not eligible to be designated a person with multiple persistent barriers to employment (a “PPMB”) because she did not have, in the opinion of the minister, a medical condition that constituted a barrier precluding her from searching for, accepting, or continuing in employment.

PART D – Relevant Legislation

*Employment and Assistance Regulation (“EAR”), s. 2.*

## PART E – Summary of Facts

The evidence before the ministry on reconsideration was comprised of the following documents:

- (a) Medical Report – Persons with Persistent Multiple Barriers completed by the appellant's doctor and dated January 17, 2012. The doctor identified chronic low back pain dating back to 2000 as the appellant's primary medical condition and chronic neck pain dating back to 2006 as a secondary medical condition. The doctor expected these conditions to persist for in excess of two years, continuously not episodically. They limited the appellant's ability to bend repetitively or to lift.
- (b) Employability Screen dated February 2, 2012 on which the appellant scored 12. This document confirmed that the appellant had been employed less than three months during the previous three years and during that time that she had been receiving income assistance for more in excess of twelve months.
- (c) Undated letter from the appellant's advocate to the appellant's doctor to which the doctor had responded (by completing a checklist that the advocate had included in the letter) on March 6, 2012 that the appellant's physical disabilities restricted her ability to undertake employment in the following ways (quoting the wording used in the advocate's letter):
  - limited sitting due to back pain (60 minutes max)
  - repetitive activity causes headaches due to neck problems
  - limited range of neck motion
  - interrupted sleep (due to pain) affects ability to focus & concentrate
  - unable to do repetitive lifting or bending due to back and neck problems
  - inability to hold bowel movement ... which restricts several jobs
  - stress increases bowel problems

The doctor also commented that the appellant was "currently being investigated for irritable bowel syndrome".

At the hearing of the appeal the appellant submitted a one-page document which in part summarized her present physical symptoms. The balance of the document formed the basis of her submission at the hearing of her appeal. The ministry did not object to the introduction of this document and, to the extent that it contained evidence not before the ministry on reconsideration, the panel admitted it into evidence under s. 22(4)(b) of the *Employment and Assistance Act* as being in support of the evidence and records before the ministry on reconsideration.

At the hearing of the appeal the appellant described her physical symptoms in some detail. The appellant described herself as being in constant pain attributable to lower back and neck trauma suffered in a motor vehicle, a calcium build-up on her right hip, a torn ligament in her right knee and water on her knee. She suffered from near constant headaches. She said she took extra-strength Advil as an analgesic but it was only partly effective in controlling the pain. She sometimes increased the dosage if she was going to engage in any activity that would not permit her to rest frequently during the activity but, when she increased the dosage, she often suffered from nausea. Her headaches were exacerbated by bright lights. She had an adverse reaction some years ago to the gas emitted by an industrial chemical and since then she has an extreme reaction to many scents including otherwise benign scents such as perfumes. Her bowel control problems were such that she had to ensure that she was always near a bathroom. Several times a week she experienced diarrhea-like symptoms.

The result of these adverse physical conditions was that she was severely limited in the physical activities she could undertake. She was unable to remain sitting for periods longer than one hour, and sometimes much less. Driving was difficult, in part because of the limited range of motion in her neck. She could no longer engage in activities such as walking her dog for more than a block or two. Lifting was uncomfortable and she doubted that she would have been able to lift anything heavier than 20 pounds. She could not attempt any activity that had any possibility of being strenuous. She observed that she was overweight and was frustrated because her inability to exercise made it impossible for her to reduce her weight.

Moreover, the effect of the constant pain had a deleterious effect on her mental and emotional state. When the pain became difficult to bear she would become irritable and unable to concentrate. This occurred frequently. The appellant experienced similar effects from to lack of sleep. She did not sleep well because of the constant pain.

Regarding barriers to her employment, the appellant also referred to her education – she had not completed Grade 10 – and her lack of computer and keyboarding skills.

The appellant suggested that if she was to find employment it would likely have to be part-time employment in which she could engage from her home. This would allow her to set her own pace and take frequent breaks.

The appellant stated that the reason she had agreed with the ministry that she would seek employment was because she was led to believe that if she did not say this she would be “cut off” income assistance. So she entered into an employment plan and, as part of that plan, enrolled in a 3-week job counseling program that she attended from 9:00 a.m. to 3:00 p.m. (with a 30-minute break for lunch) each day. Further, she accepted a part-time job as a Welcome Wagon hostess in her community only to find out that the incumbent planned on retiring and handing over the entire job to her. The appellant initially thought the job would be limited to a few visits a week and she thought she would be able to handle that, particularly if she had some help with any lifting. She was sure, however, that she could not take on the job if she was the sole person involved. In any event, just about when she was to begin her computer “broke” and, since having a computer was a prerequisite for the job and since she could not afford to have the computer repaired, the job came to an end before it began.

The ministry representative did not take issue with any of the appellant’s evidence. Nor did the ministry representative seek to introduce any new evidence. The ministry representative inquired of the appellant as to whether or not the appellant had obtained and submitted a Medical Report – Employability. The appellant advised that she had, indeed perhaps two such reports, but she did not have a copy. The ministry representative opined that this Report might have been helpful.

In the absence of any challenge to the foregoing evidence and noting that either it had been accepted by the ministry on reconsideration or that it was consistent with that evidence, the panel held that the foregoing evidence was admissible and credible. Additionally, with regard to the conclusions set out in the reconsideration decision relating to the criteria for designating a person a PPMB, the panel found as facts that:



- (a) the appellant had been in receipt of income assistance for at least 12 of the preceding 15 months [subs. 2(2)];
- (b) the appellant had a score of 12 on the employability screen set out in Schedule E and, accordingly, her application to be designated a PPMB had to be determined under subs. 2(4) [subs. 2(3)];
- (c) the appellant had a medical condition, other than an addiction, confirmed by a medical practitioner [subs. 2(4)]; and
- (d) the medical practitioner confirmed that the medical condition had continued for at least 1 year and was likely to continue for at least 2 more years [subs. 2(4)(i)].

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## PART F – Reasons for Panel Decision

The issue on this appeal is whether the ministry's decision on reconsideration is reasonably supported by the evidence, that is did the evidence before the ministry on reconsideration reasonably support the minister's determination that, pursuant to subs. 2(4)(b) of the EAR, the appellant's medical conditions did not constitute a barrier precluding her from searching for, accepting, or continuing in employment.

The legislation relevant to this appeal is section 2 of the EAR. It is excerpted 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.

At the outset the panel held that the barriers to employment that the minister had to consider in applying subs. 2(4)(b) of the EAR were necessarily medical in nature. Thus the appellant's reference to barriers resulting from what she described as her lack of education, her lack of computer and other office skills, and her "broken" computer, while certainly barriers as that term is commonly understood, were not barriers as that term is used in the relevant legislation.

Further, the panel held that the ministry on reconsideration could not reasonably have been expected to take into consideration several medical conditions of which it had no notice and no independent means of determining or even suspecting. Those conditions were the calcium build-up on her right hip, her "extreme sensitivity to scents" and, the injuries and pain in her right knee. In particular, the panel noted that the materials submitted by the appellant to the ministry on reconsideration made no mention of any of these serious conditions. It was for the appellant to ensure that this evidence was before the ministry in the form of an opinion from a medical practitioner. This she did not do.

The panel noted that in both the original decision denying the appellant PPMB status and the reconsideration decision the ministry placed an incorrect gloss on the statutory criterion contained in subs. 2(4)(b). In the original decision the language used was "your medical conditions do not preclude you from *all forms of employment*" while in the reconsideration decision the wording was "you are not precluded from searching for, accepting or continuing in *all types of employment*" [emphasis added]. The language of the statute is "precluded the person from searching for, accepting or continuing in employment". There is no reference in the subsection to "all types" or "all forms", qualifiers that extend the definition of employment in an unspecified manner. The view of the panel in this regard is supported by the fact that subs. 3(2)(b) of Schedule B of the EAR permits a PPMB to earn a modest income without jeopardizing his or her PPMB designation. The clear implication of this regulation is that the ministry recognizes that there is a level of employment-like activities that do not reach the threshold that would disentitle a person to being designated a PPMB. In making its decision on this appeal, the panel did not accept the reformulation of the statutory test by the ministry in the circumstances of this appeal.

The evidence which the panel found persuasive in deciding that the ministry's decision on reconsideration was a reasonable application of the legislation in the circumstances of the appellant was based on both the medical and non-medical evidence. Many of the appellant's medical conditions were severe; all of them adversely impacted her ability to search for, accept or continue employment. However, in the view of the panel, even in combination, it could not be said that the medical conditions went beyond imposing significant, not absolute, limitations or barriers on the appellant's prospects for finding employment. The panel was in particular cognizant of the fact that at the time relevant to this appeal the appellant was searching for part-time employment and, indeed, had found such employment. Though ultimately she did not take up that employment, the reasons she did not do so were unconnected to her medical conditions. Moreover, she was able for a three-week period to attend a job counseling program for six hours each day, not easily and not without considerable discomfort, but nonetheless successfully. And she entered into an employment plan albeit, she says, because she felt pressured to do so. The panel was not unsympathetic to the



appellant's feeling of being pressured but, in the panel's view, the appellant's actions in response to that pressure, if such it was, was not a determining factor in the minister's decision to deny her PPMB status.

As the ministry representative observed at the hearing, the operative verb used in subs. 2(4)(b) of the EAR in describing the effect of a person's medical conditions on his or her employability is "preclude", not some less absolute description such as "render difficult". The ministry arrived at its conclusion that the appellant's medical conditions – at least those of which it had knowledge and were confirmed by a medical practitioner as having met the requirements set out in subs. 2(4)(a)– did not reach the level of precluding the appellant from searching for and, in due course, accepting or continuing in employment. In coming to this conclusion it relied on the appellant's acts and words and not inferences or conjecture. Indeed, even at the time of the appeal the appellant stated that she could probably undertake employment provided that it was part-time and home-based so that she could take breaks and rests as required. The prospects for finding such employment may be remote, but that is not a factor in the statutory scheme for determining eligibility for designation as a PPMB.

Thus while the panel recognizes that the combined effect of the appellant's medical conditions constitute formidable barriers to employment, without more that is not sufficient to satisfy the statutory criteria for the PPMB designation. The existence of those medical conditions must be confirmed by a medical practitioner and the minister, acting reasonably, must conclude that those conditions are of a severity that precludes the person from, to paraphrase the statutory criteria, finding and maintaining employment. The panel finds that given the evidence before the ministry on reconsideration, the decision under appeal was a reasonable application of the discretion given to the minister in subs. 2(4)(b) of the EAR. The panel confirms that decision.