

PART C – Decision under Appeal

The decision under appeal is the ministry's Reconsideration Decision dated December 5, 2012, which held that the appellant does not qualify as a person who has persistent multiple barriers to employment because she does not meet the requirements set out in section 2 of the Employment and Assistance Regulation.

PART D – Relevant Legislation

Employment and Assistance Regulation (the "Regulation"), section 2

PART E – Summary of Facts

The appellant did not attend the hearing. After confirming that notice of the hearing was delivered to the appellant, the hearing proceeded under section 86(b) of the Regulation.

Evidence before the minister at the time of the Reconsideration Decision consisted of:

1. pre-surgery report of the appellant's surgeon dated August 16, 2012;
2. post-surgery report of the appellant's surgeon dated August 16, 2012;
3. Medical Report signed by the appellant's family physician October 2, 2012;
4. ministry employability screen (undated); and
5. statements of the appellant in her Request for Reconsideration dated November 21, 2012.

The minister pointed out that the Reconsideration Decision contains an error; the appellant's request was not for a "renewal" of her qualification as a person with persistent multiple barriers to employment, but an initial request.

The relevant facts are as follows.

1. The appellant receives income assistance and has received it for at least 12 of the preceding 15 calendar months.
2. On August 12, 2012, the appellant suffered an injury shattering her right knee.
3. On August 16, 2012, the appellant underwent surgery to repair the injury.
4. In the surgeon's opinion, the appellant would take at least eight weeks to heal from the surgery and "is at high risk for having problems with chronic pain" in her leg due to post-traumatic arthritis related to the injury.
5. As of October 10, 2012, the appellant's family physician observed that the appellant was suffering pain and unable to walk without a brace and crutches and expressed the opinion that the appellant's medical condition would last two years or more.
6. The appellant cannot walk, stand or sit for long periods. She has difficulty flexing and straightening her leg.
7. The appellant scored 13 on the ministry employability screen.

PART F – Reasons for Panel Decision

Issue

The issue is whether the evidence reasonably supports the decision of the minister that the appellant does not qualify as a person who has persistent multiple barriers to employment because she does not meet the requirements set out in section 2 of the Regulation.

Relevant Law

Section 2 of the Regulation 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 one 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.

Analysis

The appellant asserts that she should qualify as a person with persistent multiple barriers to employment because she can walk for only ten minutes and expects to undergo further surgery as a result of her knee injury.

The minister takes the position that the appellant does not qualify as a person with persistent multiple barriers to employment because she does not meet the requirements set out in the Regulation.

To qualify as a person with persistent multiple barriers to employment, the appellant must meet the requirements set out in subsection 2 and either subsection 3 or subsection 4 of section 2 of the Regulation.

Subsection 2

Since the appellant has received income assistance for at least 12 of the immediately preceding 15 calendar months, the appellant has met the requirements of subsection 2.

Subsection 3

The appellant does not meet the requirements of subsection 3(a)(i) because she scored only 13 on the employability screen. That fact eliminates the need to consider subsection 3(a)(ii) and subsections 3(b) and 3(c), although the minister did so in the Reconsideration Decision.

Subsection 4

The appellant's shattered knee, causing pain and requiring use of a brace and crutches to walk, is clearly a medical condition that a medical practitioner has confirmed. The appellant's surgeon indicated that the appellant risks suffering chronic pain as a result of the injury, and the appellant's family physician expressed the opinion that she expected the appellant's medical condition to last two years or more. But, since the injury occurred on August 12, 2012, the appellant's medical condition has not continued for at least one year. The appellant has not met the requirements of subsection 4(a)(i). Therefore, consideration of subsection 4(b) is unnecessary. The appellant's medical condition is not recurring, so subsection 4(a)(ii) does not apply.

Even though the conclusion in relation to subsection 4(a) makes consideration of subsection 4(b) unnecessary, since the minister expressed an opinion under subsection 4(b), the panel will address it. In the Reconsideration Decision, the minister expresses the opinion that the appellant's medical condition is not a barrier that would "preclude [her] from all types of employment" or that "precludes [her] from participating in any type of employment for any length of time." The minister bases this opinion solely on the observation of the appellant's family physician that the appellant is "unable to walk without brace and crutches – pain."

For the appellant to meet the requirement of subsection 4(b), the minister must be of the opinion that the appellant's medical condition is a barrier that precludes her "from searching for, accepting or continuing in employment." The subsection does not provide that the minister hold the opinion that the medical condition is a barrier precluding her from all types of employment or any type of employment for any length of time. The minister failed to apply appropriate criteria when considering the requirement of subsection 4(b).

In formulating an opinion under subsection 4(b), the minister is entitled to consider evidence in addition to the opinion of a medical practitioner. At the time of the Reconsideration Decision the minister had not only the family physician's report, but additional, uncontroverted evidence that the appellant cannot sit for long without suffering leg pain and cramps, cannot walk or stand "very long", and anticipates further surgery. These complaints are effects of and part of the appellant's medical condition. Had the appellant been employed at the time of her injury, her employer may have made accommodation for her pain and lack of mobility to allow her to continue in her employment. If someone, aware of her medical condition, offered her employment, her medical condition would not preclude her from accepting the offer. For the appellant to accept employment, however, someone would have to offer it to her. The panel finds that the likelihood of a prospective employer, aware of her medical condition, offering employment to the appellant is so remote that her medical condition effectively precludes her from accepting employment. Further, although her medical condition, especially her current lack of mobility, may not make searching for employment entirely impossible, it constitutes a barrier to a practical search.

The panel concludes that the opinion of the minister is not that required under subsection 4(b), and, in any event, is not reasonable.

Conclusion

Based on the foregoing analysis, the panel finds that the Reconsideration Decision that the appellant does not qualify as a person who has persistent multiple barriers to employment because she does not meet the requirements set out in section 2 of the Regulation was reasonably supported by the evidence and was a reasonable application of the Regulation in the circumstances of the appellant. The panel confirms the decision.