

**PART C – Decision under Appeal**

The decision under appeal is the Ministry's reconsideration decision dated January 31, 2013, finding the Appellant no longer eligible for Persons with Persistent Multiple Barriers to Employment (PPMBE) designation under section 2 of the Employment and Assistance Regulation (EAR).

**PART D – Relevant Legislation**

The relevant legislation is the EAR section 2.

## PART E – Summary of Facts

The Appellant has been in receipt of income assistance and qualified for the PPMBE designation since September 2008. The reason she has qualified for the PPMBE designation is primarily diagnosed depression/anxiety. In November 2011, the Appellant underwent breast reduction surgery. There were some serious complications that arose due to this surgery, including post-operative infections requiring antibiotics, which resulted in the Appellant suffering a certain amount of pain and discomfort for a significant amount of time. These complications in turn aggravated the Appellant's depression/anxiety issues.

In late 2012 a number of things happened which led to this appeal (the Panel could not make a determination as to why as there was no Ministry representative at the hearing to ask). First, at an unknown date, the Appellant underwent the Ministry's "Employability Screen". This test is designed to assist the Ministry in assessing the employability of a recipient. This will be discussed further below, but for the purpose of a finding of facts we note at this point that the Appellant scored 12 on this assessment.

The Appellant also underwent an assessment by a medical professional on August 23, 2012, who completed a "Medical Report – Persons with Persistent Multiple Barriers" report. This report indicated that the Appellant suffered from depression/anxiety and was "Unable to work due to fatigue, depressed mood, chronic pain". The assessment also, however, indicated that the expected duration of the Appellant's medical condition was "Less than 2 years".

On November 23, 2012, the Ministry sent a letter to the Appellant informing her that she no longer qualified for the PPMBE designation as: (a) "Your Employability Screen score is less than 15 ..."; (b) "Your physician has not confirmed that you have a medical condition that is ... likely to continue for two years ..."; and (c) "In the opinion of the minister your medical conditions do not preclude you from all forms of employment ...".

On January 2, 2013, the Appellant returned to her medical practitioner and had another medical report completed. On this report the medical practitioner made three changes from the previous one. First, he indicated that the expected duration of the Appellant's medical condition was "2 years or more". Second, he added that the Appellant suffered from "poor memory and concentration". Third, he left out the words "unable to work".

Also on January 2, 2013, the Appellant submitted a Request for Consideration to the ministry requesting an extension to her PPMBE designation. In her written submissions dated December 23, 2012, she submits that she is experiencing ongoing complications with her breast reduction which are aggravating her depression/anxiety issues.

On January 31, 2013, the Ministry rendered its decision on the Appellant's Request for Reconsideration. In it, the Ministry reviews the evidence as above and opines as follows:

"As your medical treatment for depression/anxiety has resulted in a stable condition, related restrictions to employment are not considered to be severe. The breast reduction is within the last year and therefore relevant restrictions are not considerable. Moreover, analgesics are likely to ameliorate the chronic pain related to recent surgery and allow for better physical functioning. For

these reasons, in the opinion of the minister, your medical condition does not preclude you from searching for, accepting or continuing in all types of employment including part-time work. Therefore you do not meet the legislative criteria under section 2(4)(b)."

The Appellant appealed.

## PART F – Reasons for Panel Decision

The decision under appeal is the reasonableness of the Ministry's reconsideration decision dated January 31, 2013, finding the Appellant no longer eligible for Persons with Persistent Multiple Barriers to Employment (PPMBE) designation.

The relevant legislation is the EAR section 2:

### **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.

As the Appellant scored 12 on the Employability Assessment, there is no dispute that in order to qualify for the PPMBE designation, the Appellant must satisfy the requirements of subsections (2) and (4) of section 2 of the EAR.

As to subsection (2), there is no dispute that the Appellant has been a recipient of income assistance for more than 12 of the previous 15 months and so satisfies the criteria of this subsection.

In order to continue to qualify for the PPMBE designation, then, the Appellant must satisfy the criteria in subsection (4). These are that 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.

According to the medical report dated January 2, 2013, the Appellant has a medical condition which has continued for more than one year and is likely to continue for at least two years, so that the requirement under section (a) is satisfied.

The sole issue, then, is whether the minister's opinion that the Appellant's medical condition is not a barrier that precludes her from searching for, accepting or continuing in employment is reasonable or not.

The Panel notes that the medical report dated August 28, 2012, explicitly states that the Appellant is "Unable to work due to fatigue, depressed mood, chronic pain", while the medical report dated January 2, 2013, in the same section of the report simply states, "Depressed Mood, Fatigue, poor memory and Concentration", omitting the "Unable to work due to ...". However, the Panel considers that this change is nothing more than an oversight as there is no evidence that the Appellant's condition had changed between the two medical assessments. The Panel therefore concludes that the opinion of the medical practitioner in January 2013 is that the Appellant is not able to work due to her medical conditions.

This must be contrasted with the Minister's medical assessment contained in the reconsideration decision that the Appellant's "medical treatment for depression/anxiety has resulted in a stable condition" such that the Appellant's "related restrictions to employment are not considered to be severe". And that as "The breast reduction is within the last year [sic]" and that "therefore relevant restrictions are not considerable". And that, "Moreover, analgesics are likely to ameliorate the chronic pain related to recent surgery and allow for better physical functioning." And that "For these reasons, in the opinion of the minister, your medical condition does not preclude you from searching for, accepting or continuing in all types of employment."

The language of s. 2(4)(b) conveys the legislative intent to give the minister significant discretion in its decision making role. However, while the ministry is not required to simply accept the opinion of the physician without question or contemplation, it must exercise that discretion reasonably. In this case, the ministry appears to read the two medical reports as separate and interpret the earlier report to

say that the Appellant cannot work due to the pain of her surgery, and the latter to indicate that that pain has subsided leaving the Appellant able to work. Contrary to this conclusion, however, the ministry goes on to suggest that the Appellant can control her pain with analgesics.

The Panel considers that while the Ministry may reasonably decide to treat the reports as two separate assessments, it is not in a position to state that "medication is likely to ameliorate the chronic pain." There is no evidence before the ministry to suggest that this is the case. Therefore to come to such a conclusion is not reasonable.

Accordingly, the Panel finds that the Ministry's decision is not a reasonable application of the relevant legislation, that the appeal should be allowed. The ministry's decision is rescinded.