

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the "Ministry") July 18, 2013 reconsideration decision in which the Ministry determined that the Appellant did not meet all of the criteria in section 2(4) of the Employment and Assistance Regulation to qualify as a Person with Persistent Multiple Barriers ("PPMB"), and specifically it was not satisfied that:

- The Appellant has a medical condition, other than an addiction, confirmed by a medical practitioner, that in the opinion of the medical practitioner has continued for at least 1 year and is likely to continue for at least 2 more years; and,
- The Appellant has a medical condition, confirmed by a medical practitioner, that in the Minister's opinion is a barrier that precludes him from searching for, accepting or continuing in employment.

PART D – Relevant Legislation

Employment and Assistance Regulation ("EAR") section 2.

PART E – Summary of Facts

Neither the Appellant nor the Ministry appeared at the hearing. The Panel confirmed that both were provided with notice of the hearing and then proceeded in their absence in accordance with section 86(b) of the EAR.

For its reconsideration decision the Ministry had the following evidence:

1. Information from its records that:

- The Appellant has been receiving income assistance since April 19, 2012.
- His employability screen score is 10.
- His employability profile indicates stable employment history or volunteer, good employment search skills, grade 0-9 education, fluent written/spoken English, transportation available and accessible reliable child care, adequate shelter, severe health condition may limit certain types of occupations/require accommodations, good communication/interpersonal skills.
- PPMB Employment Checklist completed by a Ministry worker with information about the Appellant's barriers to employment; that is, anxiety, due to being unstable has balance issues; unable to stand up fast, feels vertigo while standing, unable to be up around heights/ladders, unable to walk a straight line, use equipment or split fire wood. Has memory loss, hard time being able to speak, unable to go to interviews because he cannot explain himself properly, avoids going out in public because he might fall down, his mom gets groceries. Takes all activities slowly, does at his own pace, takes anxiety meds every day to calm nerves. Doctor states light duties – Appellant states he means light house duties not working. Appellant saw specialist in 2012, states brain damage, has appointment with optic unit at end of May. Refers to PPMB form stating less than 2 years and to Form 3069 "filled out in 2012 stating over 2 years from the same doctor".

2. Medical Report – Employability completed by a physician on August 2, 2012 with the following information about the Appellant:

- Primary medical condition – chronic vestibulopathy onset August 2011, overall medical condition described as moderate
- Expected duration – illegible with "?" beside box which appears to have been checked for more than 2 years.
- Medical condition is constant.
- Restrictions – poor balance, nausea, anxiety.

3. Medical Report – PPMB completed by the same physician on April 19, 2013 indicating:

- Primary medical condition – anxiety; secondary medical condition – balance problems.
- Treatments – medication for relief of anxiety.
- Expected duration of medical conditions – less than 2 years; not episodic in nature.
- Restrictions – can do light duties; is upgrading at school.

4. Letter dated June 21, 2013 from an otolaryngologist to the physician who completed the PPMB report, with the following information based on his review of the Appellant that day:

- Returned essentially with no change in status; continues to note sensations of instability and unsteadiness; has fallen when walking over uneven surfaces; balance just generally feels off most of the time.
- Feels at ease with balance only when lying flat; once out of bed the sensation returns.
- Is able to look after his children and do some basic housework, but any other increased activity causes more sensations of instability and motion sickness.
- Becomes fatigued and anxious and is not able to cope; has been doing some exercises but it

is as if he has reached a plateau in his recovery.

The otolaryngologist referred to a complete balance assessment dated June 17, 2013 by a neurophysiologist (attached to his letter) which indicates abnormalities on Posturography; Vestibular Evoked Myogenic Potentials were abnormal both for saccular as well as utricular function; subjective visual vertical abnormal. The otolaryngologist summarized the assessment with these impressions:

- Appellant has objective evidence of abnormal vestibular function within the labyrinths bilaterally; would contribute to abnormalities seen on Posturography; would give rise to sensations of ongoing instability and disequilibrium.
- Also contributing is probably an anxiety overlay, but there is a significant underlying physiological abnormality which contributes to the symptom complex.
- Only option is to encourage ongoing head and body position exercises.
- May have to consider retraining to a more sedentary type of job; given the type of job he did (heavy equipment operator and labour); climbing around ladders and at heights is completely impractical and dangerous for the Appellant to pursue.

5. Letter dated June 19, 2012 from the same otolaryngologist providing the following information about the Appellant's condition:

- Recalls as a child getting motion sickness and car sickness; otherwise daily activities didn't bother him as to his balance; was comfortable climbing ladders on the job.
- July 2011, he dove to retrieve a lure, within 12-24 hours began having spaced out, disoriented sensations, felt off-kilter and the problem has persisted; has regular sense of fullness in the right ear and some right-sided intermittent tinnitus.
- His balance is okay only when he's lying flat; has spaced out sensation as soon as he gets up; notes sense of insecurity at times when walking; would bear from side to side; can be triggered or exacerbated by lots of activity in the external environment; standing, watching a movie or a rapidly moving objects on a screen can intensify the disequilibrium and then he becomes anxious and more stressed, making the disequilibrium worse.
- Had to stop working; feels very insecure at heights; cannot operate heavy equipment because rapid movement of machines exacerbates sensation.
- Has some sinus issues, some recurring neck tension; tried a medication but didn't think it helped with disequilibrium; on an anxiolytic medication; uses steroid nose sprays; smokes 15 cigarettes a day.
- Ear exam is normal; audiometry and impedance testing is normal; has an acute vestibulopathy post barotrauma on the right side; has been left with ongoing sense of disequilibrium and instability; anxiety overlay to symptom complex; treatment is to encourage ongoing head and body position exercises to induce central compensation; aggressive intervention for anxiety significant in helping manage current issues.

6. Appellant's request for reconsideration in which he wrote that he has been to two different doctors who confirmed his condition is severe and will be a life-long problem. He also felt that his scores were not looked at properly and were unfair. Specifically he indicated that he had 3-12 months of work 6 months prior to his injury, and has been unable to work since. The Appellant wrote that the medical form was not done correctly because neither his family doctor nor he knew that this condition would be permanent. As a result of his condition, he now has a hard time writing, spelling and speaking, but he keeps his head up and tries every day. The Appellant wrote that he is unable to attend school as a result of his chronic vestibulopathy. His condition gives him severe anxiety which makes him very faint and dizzy.

Because the Appellant did not appear at the hearing, the Panel will consider his submissions in his

request for reconsideration and in his notice of appeal to be his position. In that notice of appeal, the Appellant wrote that he believed that the Ministry had been misled on quite a few things and he wanted to straighten out some things.

The Panel will consider the Ministry's reconsideration decision to be its position in this appeal.

The Panel makes the following findings of fact:

1. The Appellant has a PPMB employability screen score of 10 - 11.
2. The Appellant's medical conditions as reported by the doctor who completed the PPMB and Employability Reports are:
 - Chronic vestibulopathy/balance problems onset July 2011.
 - Anxiety – treated with medication.
3. The restrictions reported in the Medical Reports for Employability and PPMB are poor balance, nausea, anxiety, can do light duties and is upgrading at school.

PART F – Reasons for Panel Decision

The issue in this appeal is whether the Ministry reasonably determined that the Appellant did not meet all of the criteria in section 2(4) of the EAR to qualify as a PPMB, and specifically that:

- The Appellant does not have a medical condition, other than an addiction, confirmed by a medical practitioner, that in the opinion of the medical practitioner has continued for at least 1 year and is likely to continue for at least 2 more years; and,
- The Appellant does not have a medical condition, confirmed by a medical practitioner, that in the Minister's opinion is a barrier that precludes him from searching for, accepting or continuing in employment.

The following sections of the EAR apply to the Appellant's circumstances in this appeal:

Persons with 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:

(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.

The Panel will consider the parties' positions under each criteria at issue in this appeal.

Medical condition likely to continue for at least 2 more years

The Appellant's position is that the doctors confirmed that his medical condition is severe, life-long, and prevents him from working and attending school.

Because the Ministry determined that the Appellant's employability screen score is 10, the Ministry considered the Appellant's PPMB application under section 2(2) and 2(4) of the EAR. The Ministry referred to the Medical Report – PPMB and noted that the primary medical condition reported is anxiety and the secondary medical condition is balance problems with an expected duration for both of less than 2 years. It also referred to a letter from the same doctor dated June 19, 2012 which stated that the Appellant experiences acute vestibulopathy post barotrauma on the right side from a diving incidence in July 2011. Based on this information, the Ministry determined that the Appellant's medical practitioner did not confirm that the Appellant has a medical condition that has lasted at least 1 year and is expected to last at least another 2 years, as required by section 2(4)(a) of the EAR.

The Panel's Findings

The Panel notes that in June 2012 a doctor referred to a diving incident in July 2011 as the onset of the Appellant's balance problems. Another doctor completed both the Medical Report – Employability and the Medical Report – PPMB. The Panel notes that in the first report, completed in August 2012, the notation for the expected duration was not legible, but appears to be more than 2 years. The

doctor wrote that anxiety was one of the restrictions and therefore the Panel finds that the medical condition of anxiety was reported in August 2012.

In the PPMB Medical Report, completed in April 2013, the two medical conditions reported are anxiety and balance problems. The doctor indicated that the expected duration of the medical conditions is less than 2 years. In addition, the otolaryngologist, in a letter dated June 21, 2013, stated that there was essentially no change in the Appellant's status. The Panel finds that these medical reports from April 2013 and June 2013 provide the most recent information about the Appellant's medical conditions and their duration. Therefore, based on this evidence, the Panel finds that the Ministry reasonably determined that a medical practitioner did not confirm that the Appellant's medical conditions have continued for at least 1 year and are likely to continue for at least 2 more years.

Medical conditions as a barrier to employment

The Appellant argues that his employability screen score is incorrect and he cannot work or attend school because of chronic vestibulopathy which leads to anxiety. He is unable to retrain for other work. He also submitted that doctors confirmed that he is unable to continue working as a heavy equipment operator or labourer.

The Ministry pointed out that the difference in the Appellant's employability screen score would be only 1 point for a total of 11 instead of 10, so that his application would still be considered under section 2(4) of the EAR. The Ministry determined that the Appellant's medical conditions do not preclude him from maintaining all types of employment, referring to the doctors' reports that he can do light duties, is upgrading at school and may have to consider retraining to a more sedentary type of job. Also, the Ministry noted that the Appellant's doctor prescribed medication for his anxiety. Therefore, the Ministry determined that the Appellant's medical conditions, with no reported restrictions, do not preclude him from searching for, accepting or continuing in all types of employment, including more sedentary types of work.

The Panel's Findings

In its reconsideration decision the Ministry wrote that the Appellant's medical conditions with no reported restrictions do not preclude him from searching for, accepting or continuing "in all types of employment, including sedentary type of work". The Panel notes that this statement does not accurately reflect the language in the regulation nor what was intended by the legislation. The Panel finds that section 2(4)(b) when applied to the Appellant's circumstances means that the issue is whether his medical conditions are a barrier with respect to employment other than as a heavy equipment operator and labourer.

The evidence from the medical practitioner in the PPMB Medical Report, dated April 2013, is that the Appellant's primary medical condition is anxiety and his secondary medical condition is balance problems. For restrictions from these conditions, the doctor wrote "can do light duties, is upgrading at school". In the June 21, 2013 letter, the otolaryngologist wrote that there was essentially no change in the Appellant's status and that the Appellant may have to consider retraining to a more sedentary type of job because it would be completely impractical and dangerous for the Appellant to pursue his former type of employment as a heavy equipment operator and labourer. Based on this evidence, the Panel finds that the Ministry reasonably determined, that in the medical practitioners' opinions,

the Appellant can do some sedentary jobs or ones with light duties, and may retrain. Thus, the Panel finds that the Ministry reasonably determined that the Appellant's medical conditions are not barriers that preclude him from searching for, accepting or continuing in employment, other than as a heavy equipment operator and labourer.

Conclusion

Having considered all of the evidence and the applicable legislation, the Panel finds that the Ministry's reconsideration decision was reasonably supported by the evidence and was a reasonable application of the applicable regulation. Therefore, the Panel confirms that decision.