

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the ministry's) reconsideration decision dated May 31, 2013 denying the appellant designation as a Person with Persistent Multiple Barriers to employment (PPMB). The ministry determined that the appellant was not eligible for PPMB because her medical conditions did not preclude her from searching for, accepting or continuing in employment as required by section 2(4)(b) of the Employment and Assistance Regulation.

PART D – Relevant Legislation

Employment and Assistance Regulation (EAR), section 2

PART E – Summary of Facts

The evidence before the ministry at the time of reconsideration consisted of:

- 1) The appellant's Request for Reconsideration dated May 25, 2013 which states that:
 - it is difficult for the appellant to work because of her medical condition;
 - instead of getting better the pain is really bad every day;
 - the appellant hasn't been able to buy medications because they are not covered;
 - she has pain on her legs and back standing for long periods of time and when sitting down for a long period of time; and
 - she has pain in both shoulders and it's really hard for her to do housework.
- 2) Xray reports attached to the appellant's Request for Reconsideration indicating:
 - Lumbar spine, May 9, 2013: Mild dextro-rotoscoliosis, Increased lordosis, Bilateral mild sacroillitis;
 - Left shoulder, May 9, 2013: Early subacromial spur formation;
 - Bilateral hands, May 9, 2013: No abnormality is identified;
 - Bilateral hips, January 13, 2012: moderate narrowing but the articular surfaces remain smooth on both sides; there is an early spur on the inferior aspect of the right femoral head due to moderate osteoarthritis; early osteoarthritis is present in the left hip; no other abnormality;
 - Paranasal sinuses, May 15, 2012: The sinuses are clear;
 - Nasal bones, May 15, 2012: There is no fracture or deformity; the nasal septum is in the mid line;
 - Bilateral hands, May 15, 2012: There is no degenerative or erosive arthritis on either hand;
 - Bilateral knees, May 15, 2012: There is early-moderate osteoarthritis with minimal narrowing of the medial joint compartments and widening of lateral; Patellae, patellofemoral joints and soft tissues are bilaterally normal;
 - Cervical spine, February 9, 2012: There are no compression deformities of the vertebrae; disc spaces are normal; upper cervical junction is also normal;
 - Bilateral shoulders, February 9, 2012: There is flattening and minimal marginal sclerosis on the undersurface of both right and left acromion which may be due to rotator cuff impingement; there is no calcification in the rotator cuff or significant osteoarthritis in either shoulder joint.
- 3) Ultrasound reports attached to the appellant's Request for Reconsideration indicating:
 - Abdominal ultrasound, September 30, 2011: The liver is fatty; the spleen is normal; there was no cholelithiasis or other significant abnormality;
 - Pelvic ultrasound, September 30, 2011: Transabdominal scan; the patient is breast feeding; the uterus is normal. No fibroids. Endometrial thickness is 6 mm; there is a 9 mm follicle with 5 mm calcification in the right vary and 5 mm follicle in the left ovary; otherwise ovaries were normal. No adnexal mass or free fluid.
- 4) Medical report – Persons with Persistent Multiple Barriers, dated January 29, 2013 and completed by a family physician indicating:
 - Primary medical condition: Osteoarthritis both knees and hips, date of onset June 2012;
 - Secondary medical condition: Carpal tunnel syndrome
 - Treatment/remedial approaches: Celebrex 200 (illegal); Outcome – improved a bit; Naproxen

375 (illegible)

- The condition has existed for 6 months;
- Expected duration of medical condition(s) is 2 years or more;
- Additional comments: Ongoing problem, episodic occurrence, frequency (illegible) 3-6 per month;
- Restrictions: None.

5) Employability Screen (the Screen) indicating a total score of 14, with zero points for age between 25 to 49; zero points for never having been on social assistance anywhere in Canada in the last 3 years; 7 points for being on income or social assistance for more than 12 months in the last 3 years; zero points for high school completion; 4 points for having no or very limited work experience in paid employment over the last 3 years; and 3 points for English as a Second Language or in need of English skills training.

Appellant's Additional Documents

In her Notice of Appeal, the appellant states that she is appealing the ministry's decision because she feels that they haven't taken a good look at her illness. She states that she has been really sick, her legs hurt, and her back too. She states that she has been to the emergency two times in the past week because it is hard and painful to walk, sit or stand up. She adds that she is waiting for an MRI and a CT scan that the doctor has ordered, and she is taking pain killers at the moment.

On this appeal, the appellant submitted four additional documents as follows:

- 1) legal advocate's submission dated July 24, 2013 containing argument on how the appellant believes that the ministry erred in denying PPMB, and summarizing the appellant's medical evidence;
- 2) Letter from appellant dated July 17, 2013 stating that:
 - She was on assistance in another province from February 2010 to July 2011;
 - The ministry never asked her if she was on assistance anywhere in Canada in the last 3 years; she would have said yes if they asked;
 - She had previously given the ministry the information that she was on assistance in another province when she first applied for income assistance in BC;
 - in 2011 she had a different last name; she is in the process of getting divorced;
- 3) T5007 Supplementary, Statement of Benefits (T5007) from another province indicating that the appellant received \$7,385 in Income Support in 2011;
- 4) Questionnaire dated July 16, 2013, prepared by the appellant's legal advocate and completed by a different family physician than the one who completed that PPMB medical report, indicating:
 - in response to the question: "What are the appellant's medical conditions?", the physician wrote "widespread osteoarthritis, bilateral sacroillitis, and (illegible) lumbar pain";
 - in response to the question: "Does the appellant's medical condition seriously impede her ability to search for, accept, or continue in employment?", the physician wrote "yes" and added "arranged investigations to determine if her condition is surgical – if so, it will take at least 6 months to a year to be performed – because long waiting lists";
 - in response to the question: "If yes, how do they impede her ability to look for, accept or continue employment?", the physician wrote "severe lower back pain relative to impingement

of lumbar nerve (illegible) LS-S1 on the left side. Most activities such as standing, walking, bending, twisting, stooping, stair climbing, lifting greater than 10 pounds aggravate her painful symptoms. She is on medication to control her painful symptoms: But they do cause cognitive impairment, drowsiness, fatigue rendering her unable to work.”

In its submissions on this appeal, the ministry did not refer to the additional documents submitted by the appellant. The panel admits all of the additional documents as testimony in support of information that was before the ministry at the time the decision being appealed was made, under section 22(4)(b) of the *Employment and Assistance Act*. The panel finds that these documents support the information that was before the ministry because they expand on the appellant's medical reports and establish her history of collecting assistance in another province as relevant to the Employability Screen.

The panel makes the following findings of fact:

1. The appellant has been on income assistance for at least 12 of the immediately preceding 15 calendar months.
2. In 2011, the appellant was a recipient of income assistance in another province.
3. The appellant has a medical condition, other than an addiction that is confirmed by a medical practitioner and that in the opinion of the medical practitioner has occurred frequently in the past year and is likely to continue for at least 2 more years.

PART F – Reasons for Panel Decision

The issue in this appeal is whether the ministry reasonably determined that the appellant was not eligible for PPMB under section 2(4)(b) of the EAR because in the opinion of the minister, her medical condition is not a barrier that precludes the appellant from searching for, accepting or continuing in employment.

The relevant sections of the legislation are as follows:

Employment and Assistance Regulation

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*, or
- (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.

Ministry's Position

The position of the ministry, as set out in the reconsideration decision, is that the appellant does not qualify for PPMB because in the opinion of the minister, the appellant's medical conditions do not preclude her from searching for, accepting or continuing in employment as required by section 2(4)(b) of the EAR.

The ministry noted that the appellant was in receipt of income assistance since August 11, 2011, and therefore meets the criterion under section 2(2) of the EAR which requires the applicant to have been on assistance for at least 12 of the past 15 months in order to qualify for PPMB. On the basis of the PPMB medical report, the ministry was also satisfied that the appellant meets the criterion under section 2(4)(a) which requires the appellant to have a medical condition, other than an addiction, that is confirmed by a medical practitioner and in the opinion of the medical practitioner has continued for at least one year and is likely to continue for at least two more years, or has occurred frequently in the past year and is likely to continue for at least two more years. The ministry assessed the appellant's PPMB application under sections 2(2) and 2(4) of the EAR based on its determination that the appellant's Employability Screen score is 14.

With respect to section 2(4)(b), the ministry's position is that the appellant does not meet the criterion under this section because the physician who filled out the PPMB medical report wrote "None" in reference to restrictions specific to the appellant's medical conditions. While the appellant reported ongoing pain, and an inability to buy medications in her Request for Reconsideration, the ministry found that the numerous X-ray and ultrasound reports do not demonstrate that the appellant's medical conditions impact employability. The ministry states that remedial measures in the form of over-the-counter medication are available to ameliorate pain and allow for better functionality. As the physician reported no restrictions to employment, the ministry found that the appellant's medical conditions do not preclude her from searching for, accepting or continuing in all types of employment including part-time work, and therefore, the appellant has not met all criteria necessary to qualify for PPMB.

Appellant's Position

In the written submission prepared by the appellant's advocate, the appellant argues that the ministry calculated the Employability Screen score incorrectly by not giving the appellant any points for having been on income assistance elsewhere in Canada in the last 3 years (question 3 on the Screen). The ministry checked off that the appellant had never been on income assistance elsewhere in Canada, and gave the appellant zero points for that item. The advocate's submission and the appellant's letter and T5007 indicate that the appellant had received income assistance in another province in 2011. The advocate argues that the appellant should therefore receive one additional point on the Screen for having been on assistance elsewhere in Canada 1 to 3 times (question 3 on the Screen). Consequently, where the Screen score is 15 rather than 14, the advocate argues that the PPMB application should be assessed in accordance with sections 2(2) and 2(3) of the EAR.

Analysis

The panel accepts the appellant's evidence that she had been on assistance in another province in 2011 because this evidence is strong on the basis of the government social assistance record, T5007. The appellant argues that she provided the ministry with that information; however, the Employability Screen indicates that the ministry, for whatever reason, and despite the availability of clear government records for another province's assistance program, did not indicate that the appellant had been on income assistance in another province when calculating the Screen score. The panel finds that the appellant's Screen score should have been calculated as 15 based on the information available from the other province, thereby meeting the criterion of section 2(3)(a)(i) which states that when the Screen score is at least 15, the PPMB application should be assessed under sections 2(2) and 2(3) of the EAR, instead of sections 2(2) and 2(4) as determined by the ministry.

Section 2(2), which requires that the appellant has been on income assistance for 12 of the past 15 months, is not disputed in this appeal. Both sections 2(3)(b)(i) and 2(4)(a) require a medical practitioner's diagnosis of a medical condition that continues for a specified period of time. Therefore, regardless of which of these sections is applied in the decision, there is no dispute because as stated in the reconsideration decision, the ministry was satisfied that the appellant's condition has occurred frequently in the past year and is likely to continue for at least 2 more years.

The panel notes that section 2(1) requires that both section 2(2) AND either section 2(3) OR 2(4) must be met in order to qualify for PPMB designation. The panel finds that because the ministry unreasonably determined that the appellant's Screen score was 14 under section 2(3)(a)(1) and applied section 2(4) erroneously, when the PPMB application should have been assessed under section 2(3), the ministry could not reasonably determine that the appellant's medical evidence did not establish that her conditions are a barrier precluding her from searching for, accepting or continuing in employment.

Section 2(3) requires that in the opinion of the minister, the medical condition is a barrier that seriously impedes the person's ability to search for, accept or continue in employment – 2(3)(b)(ii), AND that the person has taken all steps that the minister considers reasonable for the person to overcome the barrier(s) imposed by the medical condition – 2(3)(c). The advocate argues that the appellant meets the criteria of section 2(3) on the basis that the most recent medical evidence from July 2013, the questionnaire prepared by the advocate and completed by the second physician, establishes that the appellant is seriously impeded by her medical conditions in searching for, accepting, or continuing in employment.

The advocate states that the physician indicates that 'yes', the appellant's conditions impede her ability to continue employment activities; that she is undergoing tests to see if surgery is required, and that she has severe lower back pain and her painful symptoms are aggravated by activities such as standing, walking, bending, twisting, stair climbing, and lifting over 10 pounds. The advocate states that the physician also indicates that the appellant is on medication to control pain and that this medication impairs her cognition and causes drowsiness and fatigue that make her unable to work.

While the panel notes the above arguments that the advocate makes for qualifying the appellant for PPMB under section 2(3), the ministry has not made decisions respecting the criteria of subsection 2(3), except for the requirement of a score of 15 under 2(3)(a)(i). Therefore, the panel is without the



jurisdiction to make its own determinations as to whether the remaining criteria of subsection 2(3) have been met. The panel finds that because the ministry made an unreasonable decision regarding the Employability Screen under section 2(3)(a)(i) and therefore erred by assessing the application under section 2(4), the ministry's decision to deny the appellant PPMB is not a reasonable application of the applicable legislative provisions in the circumstances of the appellant. Accordingly, the panel rescinds the ministry's decision and refers the matter back to the ministry to make a determination respecting the criteria under the applicable legislation, i.e., section 2(3), instead of section 2(4).