

PART C – Decision under Appeal

The decision under appeal is the Reconsideration Decision dated June 14th, 2013 in which the Ministry of Social Development (the “ministry”) denied the appellant’s application to be designated a person with persistent, multiple barriers to employment (a “PPMB”). The ministry denied the appellant’s application on the grounds that, in its opinion, the appellant’s medical condition, pursuant to section 2(4)(b) of the *Employment and Assistance Regulation*, did not preclude 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 attended the hearing. After confirming that these parties had been notified of the hearing, the panel proceeded with the hearing under section 86(b) of the EAR.

The written evidence before the ministry on reconsideration which was included in the appeal record was comprised of the following documents:

1. Medical Report (the "Report") completed by the appellant's doctor and signed on January 18th, 2013. In the Report the doctor identified the appellant's primary medical condition as "chronic degenerative osteoarthritis with pain" which had existed for more than 8 years and which was expected to continue for 2 years or more. The doctor also stated that the appellant would be "unable to work due to knees and low back pain".
2. Undated form titled Employability Screen (the "Screen"). The Screen set out that the appellant was between 25 and 45 years of age, had high school or equivalent education, had not worked or had very limited work in the past 3 years and had a good working knowledge of English. The ministry caseworker who had completed the Screen did not complete the item in the Screen intended to determine if the "situation warranted no employment related obligations". The appellant's score on the Screen was 11.
3. Letter dated June 6th, 2013 from the appellant's doctor which had been prepared by the appellant's advocate. In this letter the doctor agreed with statements drafted by the advocate to the effect that:
 - (a) due to low back pain, the appellant could not sit for more than 20 minutes nor repetitively bend or lift more than 20 pounds;
 - (b) the appellant also had pain in his left knee which restricted his ability to bend and lift;
 - (c) the appellant suffered from migraine headaches at least 3 to 4 times for month and these lasted for 1 or 2 days and, while suffering from them, he had to rest; and
 - (d) the appellant suffered from sleep apnea which resulted in ongoing drowsiness, "at times inability to sleep" and impaired "focus, concentrate [sic] and thought processing".The doctor noted in a handwritten comment that the "sleep apnea symptoms had improved with use of CPAP, but he is not able to use it every night due to poor tolerance".

In his Notice of Appeal the appellant listed several prescription drugs that he had taken since December, 2012 to help deal with the pain in his knee. He stated that he was having surgery on his knee on July 5th, 2013. Further, he stated that his sleep apnea affected him daily. The panel admitted these statements from the Notice of Appeal as being in support of the information and records that were before the minister at the time of reconsideration in accordance with s. 22(4) of the *Employment and Assistance Act*.

In addition to the foregoing documentary evidence, the ministry identified other relevant evidence in the Reconsideration Decision. That evidence included the following statements:

1. The appellant is 41 years of age and had been in receipt of assistance since October, 2008.
2. To help manage the pain associated with his osteoarthritic left knee the appellant sometimes uses a prescription medication or relies on over-the-counter medications and ice.
3. As a result of his sleep apnea the appellant had been advised that he should not drive unless he was well rested. Further, the sleep apnea sometime causes the appellant to fall asleep while sitting or eating.
4. The pain from which the appellant suffers sometimes affects his sciatic nerve.
5. The low back pain from which the appellant suffers sometimes causes him difficulty getting out

of bed in the morning.

There is nothing in the appeal record to suggest that the appellant and the ministry differed with regard to the evidence related to the appellant's medical conditions. Therefore the panel, particularly in the absence of any oral testimony from either party at the hearing of the appeal, had no basis for questioning any of that evidence. Accordingly, the panel found as facts the evidence summarized above in regard to the medical condition of the appellant.

PART F – Reasons for Panel Decision

The issue on this appeal is whether, pursuant to section 2(4)(b) of the EAR, the minister reasonably formed the opinion that the appellant's medical conditions were such as to not preclude him from "searching for, accepting or continuing in employment" and, accordingly, that the appellant did not satisfy the ultimate eligibility criterion for designation as a PPMB.

The relevant legislation is as follows:

EAR

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.

The position of the appellant on appeal was that his medical conditions precluded any reasonable expectation that he could become employed. Those conditions included:

1. chronic degenerative osteoarthritis in his left knee and lower back, from which he had suffered for more than 8 years, such as to render sitting more than 20 minutes at a stretch or bending difficult and painful;
2. repetitive lifting more than 20 pounds is difficult and painful;
3. daily symptoms relating to sleep apnea that included drowsiness, at times inability to sleep, and impaired thought processes and which sometimes caused him to fall asleep while sitting or even eating and which restricted his ability to drive; and
4. the need for prescription and over-the-counter medications to manage pain.

He had not worked for five or more years and, further, his doctor had said he was unable to work due to pain.

Shortly after the date of the reconsideration decision the appellant was to have surgery on his left knee. However, in the absence of any oral or other evidence from the appellant regarding the reason for the surgery or the result of surgery, the panel was unable to determine whether or not this intervention had ameliorated his disabling symptoms.

In the absence of a ministry representative at the hearing, the panel proceeded on the presumption that the position of the ministry on appeal was that the reconsideration decision was reasonable in the circumstances of the appellant. The ministry's position was that the appellant was not precluded from employment, that there existed forms of employment for which the appellant was suited notwithstanding his serious and significant medical conditions.

The panel noted that in the reconsideration decision the ministry interpreted the portion of section 2(4)(b) of the EAR relevant to this appeal - that is the clause which states "a medical condition that is ... a barrier that precludes the person from searching for, accepting or continuing in employment" - that added a gloss to the language of the regulation. At one point the ministry restated the regulation as "a medical condition [that rendered the appellant] unable to participate in any type of employment for any length of time except in a supported or sheltered-type work environment" and at another point it described "employment" as including "part-time and sedentary work" and alternatively as "all forms of employment". The panel is of the opinion that restatements which expand upon the language of the regulation may be of some help in applying the regulation in some instances but in no way bind the panel which must reach its own conclusion as to the meaning of the regulation. However, on this appeal, while not accepting the ministry's restatement of the statutory language, the panel concluded that the ministry's reinterpretation did not affect the issue of whether or not the ministry's decision was reasonable. The ministry's decision was based, in large part, on the ministry's conclusion that the appellant had not met the criterion set out in section 2(4)(b) of the EAR because his doctor had

not provided an "explanation ... as to how osteoarthritis and pain results in an inability to work or what remedial measures are in place to ameliorate [the appellant's] medical condition and allow for better functionality". While the panel is of the view that there is nothing in section 2(4)(b) of the EAR that imposes an obligation on the appellant or his doctor to provide such an explanation, it is reasonable for the ministry to seek some description of the relationship between the appellant's medical conditions and his ability to function in some form of employment. Where such relationship is not obvious, as in this appeal, the appellant's failure or neglect to provide some such description is not in the appellant's interest.

Ultimately, however, the panel has to decide whether the minister, in concluding that the appellant had not established that he was "precluded from ... employment", had come to a reasonable decision in the circumstances of the appellant. In arriving at its decision the panel took note of the difference in the standard set out in subsections 2(3)(b) and 2(4)(b) of the EAR. In the former section the operative verb is "impedes"; in the latter, "precludes". Clearly the evidentiary burden on the appellant is much more demanding in section 2(4)(b) of the EAR. The appellant did not provide sufficient evidence to meet that standard. The only unambiguous evidence that related the appellant's medical conditions to his employability was the doctor's statement that the appellant was "unable to work due to knees and low back pain". While this statement appears to be definitive, the ministry noted, first, that it did not rule out employment of a more sedentary nature and, secondly, it did not clarify to what degree, if any, the pain could be reduced through medications. The panel was of the opinion that the ministry's unanswered questions in this regard were reasonable.

The panel noted also that section 2(4)(b) of the EAR stipulates that the decision on whether or not the appellant's medical conditions constituted a "barrier that precludes" employment is to be determined "in the opinion of the minister". Such language requires the panel to accord the decision-maker a significant measure of deference.

The ministry referred to each of the appellant's medical conditions and considered the nature of the barrier each of them presented to the appellant's prospect for employment. The reconsideration decision does not make clear whether or not the ministry considered the medical conditions not only separately but also cumulatively but the panel was satisfied that such consideration is implicit in the decision. The analysis of the evidence by the ministry was thorough and rational. Further, as discussed above, though it is the opinion of the panel that the ministry was not at liberty to restate the statutory test set out in section 2(4)(b), its decision does not rely upon its restatement of the legislative language. In seeking clarification of the manner in which the appellant's medical conditions affected his functionality and whether, and to what extent, the medical interventions had resulted in some amelioration in the symptomology of those conditions – which information was provided by the appellant or his doctor – the ministry demonstrated that its decision was responsive to the particular of the appellant.

The panel does not find, given the evidence before the ministry on reconsideration, that the opinion of the minister was not reasonable. Accordingly, the panel concluded that the decision of the ministry – that the appellant was ineligible to be designated a PPMB – was reasonably supported by the evidence and was a reasonable application of the relevant statutory provision in the circumstances of the appellant. The June 14th, 2013 reconsideration decision is confirmed.