

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation's (Ministry) reconsideration decision dated October 29, 2013 which held that the appellant is not eligible for Persons with Persistent Multiple Barriers (PPMB) designation pursuant to section 2 of the Employment and Assistance Regulation (EAR). The ministry found that the appellant has been in receipt of income assistance for at least 12 of the past 15 months as required by section 2 (2) (a), and that in the opinion of a medical practitioner the appellant has a medical condition other than an addiction that is likely to continue for at least two years as required by section 2 (4) (a). However, the ministry was not satisfied that:

- the evidence establishes that the appellant's medical condition other than an addiction presents a barrier that precludes her from searching or accepting or continuing in employment, as required by section 2 (4) (b) of the EAR.

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 consists of:

- 1) Request for Reconsideration dated Oct. 16, 2013 and signed by the appellant that states, that she does meet the eligibility requirements for PPMB and that she has a letter from her doctor that confirms that her medical condition and health limitations preclude her from sustaining any kind of employment;
- 2) Letter dated Oct. 23, 2013 signed by the appellant's physician stating that the appellant's Chronic Obstructive Pulmonary Disease (COPD) "causes fatigue and decreased energy as well as frequent bronchitis and associated exertional dyspnea [shortness of breath]", and "at present she is unable to continue employment";
- 3) Medical report – persons with persistent multiple barriers, signed by the appellant's physician and dated Aug. 14, 2013, which states that:
 - section 1- medical condition, the appellant has a primary medical condition of substance use disorder for which the treatment has been substance use counselling and the outcome has been the stabilization of sobriety,
 - a secondary medical condition of COPD for which the treatment has been medications and the outcome has been "control exacerbations"
 - section 2-prognosis, that the condition(s) are expected to continue for 2 years or more, with a hand written note under additional information stating "may be able to be employed with counselling and stable social situation", an indication that the medical condition(s) are not episodic in nature, and no further information in this section,
 - section 3-restrictions, the doctor stated "difficulty with concentration and emotional regulation – unable to maintain regular employment";
- 4) Employability Screen with a score of 12.

Additional Information:

Prior to the hearing, the appellant submitted a letter, signed by her physician and dated Nov. 29, 2013, which stated that the physician has seen the appellant on a regular basis for one year regarding her COPD. The physician notes that the appellant is limited in her tolerance for exertion, she is unable to walk more than 2 blocks without stopping due to coughing or dyspnea, and her activity is limited to one or two errands or she is exhausted and lacks energy the next day. The physician also states that in spite of the appellant's compliance with medical therapy, her symptoms preclude her from regular employment. The Ministry did not object to the admissibility of this new letter as evidence in support of the information before the ministry at the time of reconsideration.

At the hearing it was the appellant's submission that the Oct. 23, 2013 and Nov. 29, 2013 letters address the concerns of the Ministry and that collectively the evidence establishes that the appellant's medical condition of COPD presents a barrier that precludes her from searching or accepting or continuing in employment, as required by section 2 (4) (b). The appellant stated that the doctor who completed the Medical Report and both letters is her family doctor and, although he recently graduated from medical school and lacks experience, she believes he is a good doctor. She admits that substance use was a problem in the past but states that it is not a barrier to employment now because she has been sober for over one year, with the exception of a relapse in July 2013, and that she continues to see an outreach worker every week at a local counselling agency.

The appellant stated that she presents well and could get a job but the COPD is the barrier to employment because it prevents her from keeping the job as she must take too much time off due to illness or fatigue. She described that due to damage to her lungs, they are of 'barrel' shape which does not allow her to expel all of the air that she inhales. As a result, the remaining air in her lungs utilizes space thus depriving her of the ability to inhale fresh oxygen and causing fatigue. In addition, the appellant stated that COPD causes constant coughing, slower movements, and the need for frequent resting breaks. She had a job as a cashier but was let go after the 3-month probation period because of her fatigue and bouts of coughing.

She stated that she is more prone to upper respiratory problems such as bronchitis and pneumonia. To avoid getting sick she is careful about washing her hands and using hand sanitizer, wearing a mask or staying home when pollution and pollen levels are high, using a flow meter to check her lung capacity and using her medications as prescribed by her doctor. Currently, she uses two different types of puffers, once in the morning, afternoon and evening, and an extra dose when pollution levels are high. The appellant stated that she must be careful not to take too much medicine as both puffers contain steroids and she cannot surpass the amount of medication that is covered by pharmacare or she will have to pay for medicine herself.

The appellant stated that she suffers from bronchitis about 3 times a year with each bout lasting about 3 weeks, and she must take a steroid, antibiotic and an acid control pill (for a total of 5 pills) for 5 days to prevent pneumonia as pneumonia could be fatal for her. It takes her about 3 to 4 weeks to recover from a respiratory infection. She stated that COPD is in the bottom of her lungs and as it progresses to the upper part of her lungs she will lose more lung capacity, and in 5 years she will likely require to be on oxygen.

The appellant's oral submission provided new evidence and the Ministry did not object to the inclusion of the appellant's oral evidence.

The appellant's oral testimony and the Nov. 29, 2013 letter from the appellant's physician, provide additional detail with respect to the specific diagnosed conditions addressed in the appellant's original application form. Accordingly, the panel has admitted this new information as being in support of the information and records that were before the ministry at the time of reconsideration, in accordance with s. 22(4) of the *Employment and Assistance Act*.

The Ministry reviewed the reconsideration decision and explained that the Ministry interprets section 3 of the medical report, in which the physician stated "difficulty with concentration and emotional regulation – unable to maintain regular employment", as speaking to the condition of substance use disorder and not COPD. The Ministry also pointed out that both the Oct, 23, 2013 and Nov. 29, 2013 letters contradict the original medical report and do not address why the physician changed both the primary diagnosis and prognosis. Finally, the Ministry stated that neither of the additional letters specify the severity or frequency of the appellant's condition and that the appellant's oral evidence has not been verified by a medical practitioner.

PART F – Reasons for Panel Decision

The issue on the appeal is whether the ministry decision to deny the appellant PPMB designation on the grounds that the information provided did not establish that the appellant's medical condition was a barrier that precluded her from seeking, accepting, or continuing employment as required by section 2 (4) (b) of the EAR, was reasonably supported by the evidence or was a reasonable application of the applicable enactment in the circumstances of the appellant.

Section 2 of the EAR sets out the eligibility requirements which are at issue on this appeal 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.

The Appellant's Position

The appellant's position is that the Oct. 23, 2013 letter from the physician focuses solely on the condition of COPD and not addiction. It emphasizes that COPD causes fatigue, frequent bronchitis and dyspnea, and that these are the reasons why the appellant is precluded from employment. But since the Ministry did not find the information in this letter to be sufficient, the appellant got another one from her physician, dated Nov. 29, 2013. This additional information provides confirmation that COPD is the primary condition, COPD limits the appellant's tolerance for exertion, causes coughing or dyspnea and that the appellant is precluded from employment because of her COPD symptoms.

The Ministry's Position

The Ministry' position is that the medical report focuses on restrictions related solely to the appellant's primary condition of addiction and not to the secondary condition of COPD and the medical practitioner did not mention substance use disorder at all in his subsequent letter. Though in his Oct, 23, 2013 letter, the physician explains that COPD causes fatigue, frequent bronchitis and associated exertional dyspnea, he does not specify the reasons why COPD restricts the appellant from continuing employment. In addition this letter does not provide enough detail as it does not address the concerns of severity or frequency. Finally, the appellant's testimony and the letter from the physician dated Nov. 29, 2013 have not been confirmed by a physician. Therefore, the evidence does not establish that the appellant's medical condition of COPD present a barrier that precludes her from searching, accepting or continuing in employment as required by section 2 (4) (b) of the EAR.

The Panel's Decision

While the Ministry argued that the narrative of the physician in the medical report relates solely to the condition of addiction and not COPD and that the restriction outlined related to addictions not COPD, the Ministry reviewed and considered the physician's letter dated Oct. 23, 2013, in which he describes COPD and its symptoms as the medical condition that restricts the appellant's ability to work. The physician explains that COPD causes fatigue, frequent bronchitis and associated exertional dyspnea, and that at present appellant is unable to continue employment. The Panel finds that this letter provides more information about a condition that was already mentioned in the medical report and provided some information as to why COPD is a barrier to employment.

In the Reconsideration Decision, the Ministry mentions that it is unclear why the physician originally reported substance use disorder as the primary medical condition but did not mention this condition in the Oct. 23, 2013 letter. The Panel finds that although the Ministry questioned the reliability of the Oct. 23, 2013 letter from the physician, the Ministry went on to consider this evidence and found that there was not enough detail to establish that COPD, as the "medical condition other than addiction", is a barrier that precludes the appellant from employment. Section 2 (4) (a) of the EAR states that a medical practitioner must confirm a medical condition other than addiction and that it has continued for at least one year and is likely to continue for at least 2 more years, or it has occurred frequently in the past year and is likely to continue for at least 2 more years. The Panel finds that the legislation does not require that the medical condition must be a primary condition.

The Nov. 29, 2013 letter expands on information addressed in the Oct. 23, 2013 letter and confirms the severity of the appellant's medical condition. The medical practitioner wrote that he has seen the appellant on a regular basis for approximately one year primarily with regard to her COPD, that she is compliant with medical therapy but she continues to have symptoms which he feels would preclude her from regular employment. The appellant is limited in her tolerance for exertion and she is unable to walk more than 2 blocks without stopping due to coughing or dyspnea. She finds that she must limit her activity to preserve her energy. The information in both letters is corroborated by the oral evidence provided by the appellant when she explains that she suffers from bronchitis infections at least 3 times a year and that affects her for approximately 3 to 4 weeks each time, that she is slow in her movements due to a lack of energy caused by oxygen deficiency, she requires frequent rest breaks or is exhausted and that she cannot leave her home on days when the pollution and pollen levels are high.

The legislation requires that in order to qualify for the designation of a Person with Persistent Multiple Barriers an individual must meet specific requirements as outlined in the legislation. The Ministry concedes that the appellant meets the requirements of section 2 (2) (a) and (4) (a). The Panel finds that, considering the physician's letters dated Oct. 23, 2013 and Nov. 29, 2013 and the appellant's oral evidence, the ministry's determination that the appellant's medical condition, namely COPD, does not preclude her from searching for, accepting or continuing in employment was not reasonable.

Conclusion

The panel finds that the ministry's reconsideration decision, which denied the appellant's request for a Person with Persistent Multiple Barriers qualification because the requirements of Section 2 (4) (b) of

the EAR were not met, was not reasonably supported by the evidence. The panel rescinds the ministry's decision. Therefore, the decision is overturned in favour of the appellant.