

PART C – Decision under Appeal

The decision under appeal is the Ministry's Reconsideration Decision dated November 6, 2013, which held that the Appellant is not eligible for designation as a Person with Persistent Multiple Barriers to Employment (PPMB). The Ministry found that the Appellant had been on assistance for at least 12 of the past 15 months, meeting the requirement of section 2(2) of the Employment and Assistance Regulation (EAR). The Ministry found that the Appellant scored less than 15 on his employability screen; therefore under the provisions of section 2(4), EAR, he must have a medical condition, other than an addiction, confirmed by a physician, which has continued for at least 1 year and is expected to last for at least another 2 years and which, in the opinion of the minister is a barrier that precludes him from searching for, accepting or continuing in employment. The Ministry found that although the Appellant's physician confirmed that the Appellant's medical condition has continued for at least 1 year and is likely to continue for at least 2 more years, the medical conditions and restrictions reported by the Appellant's physician did not establish that he has 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

Information before the Ministry at Reconsideration included:

- A copy of a questionnaire completed by the Appellant's physician, dated October 31, 2013, in which the physician reports that the Appellant can sit for 30 minutes usually, needs to move around, but then can sit down again; can stand for approximately 30 minutes then must lie down"; takes prescription drugs that can cause drowsiness and the Appellant complains of sleepiness while taking these drugs; "can walk for one block without rest must slow down and then continue; that he complains of sciatic-type pain up to 8/10 in severity, ranges 6 to 8/10"; and that it seems that the Appellant's "pain is unpredictable such that he would likely have some absenteeism from work due to pain".
- A copy of a letter from the Appellant's representative dated November 5, 2013, in which she states that the Appellant agrees that his employability score is less than 15 but argues that the Appellant's medical condition including the unpredictability and severity of his pain and significant mobility restrictions, precludes him from continuing in any employment.
- The Appellant's Medical Report – Persons with Persistent Multiple Barriers, dated July 4, 2013, in which a physician states that the Appellant's primary medical condition is mechanical lower back pain that has existed for 30 years and has an expected duration of 2 years or more; that the medical condition is not episodic in nature, and listing restrictions with bending, lifting, carrying, straining the lower back, with a comment "He ideally needs rehabilitation but he is restricted by funds".
- A copy of the Appellant's Employability Screen, undated, with a score of 14 indicating that the Appellant's education is less than grade 10 and that his work experience is limited
- A copy of the Ministry's letter to the Appellant dated September 18, 2013, advising him that his application for PPMB had not been approved.
- A copy of the Appellant's Request for Reconsideration, dated October 11, 2013.

In his Notice of Appeal dated November 15, 2013 the Appellant states that he disagrees with the Ministry's decision as it is not reasonably supported by the evidence.

At the hearing, the Appellant stated that he does not dispute his employability screen score of 14, agreeing that his application must meet the requirements of section 2(4), EAR.

The Appellant argued that the Ministry's determination that the Appellant's pain and likely absenteeism from work could pose a barrier for him to continue in employment, but does not pose a barrier for him to search for or accept employment is unreasonable because the legislation states that the barrier precludes the person from searching for, accepting or continuing in employment, therefore any one of the three criteria is sufficient. The Appellant argued that "absenteeism", the word used by the physician, means a pattern, but the Ministry emphasized the words "some absenteeism". The Appellant argued that a pattern of absenteeism would preclude him from continuing in employment, particularly as a new employee. The Appellant stated that his physician listed several restrictions: bending, lifting, carrying and standing, which would affect the type of work he can do, and that he is 55 years of age with a grade 10 education and no training for any type of desk job.

In reply to a question from the Panel, the Appellant stated that he has been on income assistance for 9 years, and worked in construction until his sciatic pain occurred. The Ministry responded that the Appellant was assessed under section 2(4), EAR due to an Employability Screen score of 14, and that his medical conditions do not preclude him from searching for accepting or continuing in employment. The ministry relied on its reconsideration decision and did not introduce further evidence in their oral submission.

In reply to questions from the Panel, the Ministry stated that only one criterion has to be met of the three listed in section 2(4)(b).

The panel made the following findings of fact:

- The Appellant has been on assistance for at least 12 of the past 15 months, as required under section

2(2), EAR.

- The Appellant scored 14 on his employability screen; therefore his application must be considered under section 2(4), EAR.
- The Appellant's physician has confirmed that the Appellant's medical condition is mechanical lower back pain.
- The Appellant has restrictions with several aspects of physical activity, including bending, lifting, carrying and straining the lower back.
- The Appellant would likely have some absenteeism from work due to pain.
- The Appellant's pain is not episodic in nature: The Ministry, in the Reconsideration Decision, stated that the Appellant's pain is unpredictable, meaning that it is episodic; however, the Appellant's physician checked the box on the Appellant's Medical Report – PPMB indicating that the condition is not episodic.
- The Ministry, in the Reconsideration decision, stated that absenteeism could pose a barrier for the Appellant to continue in employment.

PART F – Reasons for Panel Decision

The issue in this appeal is the reasonableness of the Ministry's Reconsideration Decision dated November 6, 2013, which held that the Appellant is not eligible for designation as a Person with Persistent Multiple Barriers to Employment (PPMB).

Legislation

EAR

- 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 is that he meets the criteria for qualification as a PPMB because the Ministry's decision is not reasonably supported by the evidence. Specifically, the Appellant argued that he meets one of the three criteria for designation; that he is unable to continue in employment due to a pattern of absenteeism as a result of pain.

The Ministry's position is that the Appellant's medical condition does not preclude him from searching for, accepting or continuing in all types of employment.

With respect to the legislative criteria, the Panel finds that the Ministry did not reasonably apply the criteria stated in section 2(4)(b), EAR. That section states that an applicant's medical condition, in the opinion of the minister, is a barrier that precludes the person from searching for, accepting or continuing in employment. The Ministry acknowledged in the Reconsideration Decision that the Appellant's absenteeism due to pain could pose a barrier for him to continue in employment, then expanded the criteria to state that it does not pose a barrier to searching for or accepting employment. The panel finds that the Ministry's finding is unreasonable because if the Appellant has a barrier that precludes him from "continuing in employment" the legislative criteria is met. The Ministry stated that they interpreted the physician's comment that the Appellant's pain is unpredictable to mean that it is episodic; however the physician specifically indicated in the PPMB medical report that the Appellant's condition is not episodic. The Panel finds that this is not a reasonable conclusion, given the physician's comment to the contrary.

The Panel finds that the Ministry's decision that the Appellant does not meet the criteria in section 2, EAR for designation as a PPMB was not reasonably supported by the evidence. The Panel therefore rescinds the Ministry's decision.