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PART C – Decision under Appeal

The appellant appeals the reconsideration decision of December 11, 2013 in which the Ministry of Social Development and Social Innovation (ministry) denied the appellant's application for renewal of her qualification as a person with persistent multiple barriers to employment (PPMB) under section 2(4) of the *Employment and Assistance Regulation* on the basis that in the minister's opinion, the appellant's medical conditions do not preclude her from searching for, accepting or continuing in all types of employment.

PART D – Relevant Legislation

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

EAAT003(10/06/01)

PART E – Summary of Facts

The evidence before the Ministry at the reconsideration included the following documents:

- Copy of 2 page form, Medical Report – Persons with Persistent Multiple Barriers, completed by the appellant's physician on August 14, 2013 ("PPMB Form");
- Copy of 1 page Ministry Employability Screen for the appellant, not dated, showing a total score of 11 ("E Screen"); and
- In her request for reconsideration dated November 22, 2013, the appellant wrote, "Please see attached additional information from my doctor" and attached a 1-page letter from her advocate to her physician dated November 22, 2013, signed by the appellant's physician and dated November 29, 2013 ("November Letter"). The November Letter is described below.

In the PPMB Form, the appellant's physician identified her primary medical condition as fibromyalgia with an onset of March 13, 2006. The appellant's physician identified her secondary medical condition as chronic back pain, but did not provide the date of onset. The appellant's physician wrote that the appellant was on several medications for her medical conditions and that her outcome was "stable with treatment." The appellant's physician indicated that the expected duration of the appellant's medical conditions was 2 years or more. The appellant's physician also indicated that her medical conditions are episodic in nature, occurring "monthly X2" and likely to recur "monthly." The appellant's physician indicated on the PPMB Form that the restrictions specific to the appellant's medical conditions were "not significant. Unable to move around during an episode of pain."

In the November letter, the appellant's physician has written the comment, "chronic pain disorder. Back pain. Fibromyalgia." In addition, on the November Letter, the appellant's physician has checked "Yes" (as opposed to "No") in response to the question whether the physician agrees or disagrees with the following series of statements regarding the appellant's restrictions to employment:

- [The appellant] states her condition [is] not episodic, she states she is in constant pain 24/7.
- [The appellant] states she cannot sit for longer than 15-20 minutes due to back pain. She needs to get up and stretch for about 10 minutes to relieve pressure on her back.
- [The appellant] states she cannot stand longer than 30 minutes due to back pain.
- [The appellant] states she cannot lift more than 10 pounds with no repetition due to back pain.
- [The appellant] states she has been suffering with unpredictable bowel urgencies for years, this contributes to her inability to work.

In her Notice of Appeal, the appellant wrote that she disagrees with the reconsideration decision "because if I was to go and look for a job and an employer asks me if I have any barriers I will have to tell him/her I can't lift anything over 10 lbs, sit for longer than 15 mins or stand longer than 30 mins without being in a lot of pain or if I get sick have to miss work for a week or two."

The appellant attended the hearing with an advocate – a lawyer who represents the appellant in other matters. At the hearing, the appellant provided her verbal authorization for the advocate to represent her and verbally consented to the release of information to her advocate.

At the hearing, the appellant submitted several pages from 2 separate "parenting capacity assessment" reports, one prepared in 2005 and the other prepared in 2012. The appellant and her advocate argued that these reports contained confirmation from 2 different psychologists that the appellant has cognitive disabilities, which disabilities preclude her from searching for, accepting or

continuing in employment, and are relevant to a consideration of whether the appellant qualifies for PPMB designation. The appellant and her advocate agreed that the reports had not been previously provided to the ministry. The ministry objected to the admission of these 2 reports on the basis that the information in the reports about the appellant's cognitive disabilities was not before the minister at the time the decision being appealed was made and amounts to new information presented at the appeal hearing to the ministry for the first time.

The *Employment and Assistance Act* requires in section 22(4) that a panel may only admit as evidence information and records that were before the minister when the decision being appealed was made (subs. 22(4)(a), and oral and written testimony in support of the information and records that were before the minister when the decision being appealed was made (subs. 22(4)(b)). The panel finds that the information in the two reports does not meet the requirements of subs. 22(4)(a) as the information was not before the minister at the time the decision being appealed was made and, further, that it does not meet the requirements of subs. 22(4)(b) as it is not testimony in support of information that was before the ministry at the time the decision under appeal was made. Accordingly, the panel does not admit as evidence the two "parenting capacity assessment" reports submitted by the appellant.

At the hearing, the appellant also provided the panel with 26 pages of information about fibromyalgia she had downloaded from Internet websites. The appellant argued that the information helps explain her symptoms and the effect her fibromyalgia has on her ability to work. The ministry objected to the admission of this information on the basis that it was not before the minister at the time the decision being appealed was made. In the reconsideration decision, the ministry acknowledges that the appellant's physician identified fibromyalgia as her primary medical condition on the PPMB Form. The panel finds that the appellant's information about fibromyalgia from the Internet is in support of information that was before the minister at the time the decision being appealed was made, as set out in subs. 22(4)(a) of the *Employment and Assistance Act*. However, as the information is general information and is not descriptive of the appellant's fibromyalgia and the specific impact and effects it has on her, the panel gives the information less weight than the evidence provided by the appellant's physician in the PPMB Form and the November Letter. Upon questioning by the panel, the ministry confirmed that decision-makers on PPMB applications are familiar with the effects and symptoms of fibromyalgia.

At the hearing, the appellant told the panel that she has been on assistance for at least 20 years, that she only went off assistance when she was living with a boyfriend who financially supported her, but that relationship has ended. The appellant told the panel that she has previously qualified for PPMB designation. She said that she had moved to a new physician in the past year, but had been unable to pay her previous physician to transfer her medical records to her new doctor. For this reason, the appellant said that the information her physician used to complete the PPMB Form was limited.

The panel makes the following findings of fact:

- The appellant has been a recipient of income assistance for at least 12 of the last 15 months;
- The appellant's physician has confirmed that she suffers from the medical conditions of fibromyalgia and chronic back pain; and
- The appellant's physician has confirmed that her medical conditions have continued for one year and are likely to continue for at least two more years.

PART F – Reasons for Panel Decision

The issue on this appeal is the reasonableness of the Ministry's reconsideration decision of December 11, 2013, denying the appellant's application for renewal of her qualification as a person with persistent multiple barriers to employment under section 2 of the *Employment and Assistance Regulation* ("EAR") on the basis that the appellant's medical conditions do not preclude her from searching for, accepting or continuing in all types of employment.

Section 2 of the EAR governs the requirements to qualify as a person with persistent multiple barriers (PPMB) to employment. Under subsection 2(1), in order to qualify as a PPMB to employment, a person must meet the requirements set out in subsection 2(2) and subsection 2(3) or 2(4). Subsection 2(2) requires that the applicant must be a recipient for at least 12 of the immediately preceding 15 calendar months of income assistance or hardship assistance under the *Employment and Assistance Act* (subs. 2(2)(a)). Subsections 2(3) and 2(4) provide the following:

(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.

Submissions

The appellant argued that the information in the PPMB Form completed by her new family physician was not based on her complete medical history and records (because she could not afford to pay to transfer her medical records to her new physician). The appellant said that the information in the November Letter completed by her physician was a more accurate reflection of the restrictions

caused by her medical conditions. She told the panel that as a result of her fibromyalgia and chronic back pain, she is in constant pain, she cannot sit for longer than 15 minutes, she cannot stand for longer than 30 minutes, and she has no idea what sort of job she could perform. She told the panel she has never had paid employment in her life and she does not understand why the ministry did not consider this and the fact she had PPMB designation when it made its reconsideration decision. She stated that her medical conditions today are no different than they previously were when the ministry accepted her for PPMB designation.

The ministry stood by its reconsideration decision, and that in the minister's opinion, the appellant's medical conditions do not preclude her from maintaining all types of employment, so she does not meet the requirements of subs. 2(4)(b) of the EAR. In the reconsideration decision, the ministry referred to the information that the appellant's medical conditions are episodic, occurring twice per month, provided by the appellant's physician in the PPMB Form. The ministry referred in the reconsideration decision to the November Letter, "with your reconsideration request is a letter prepared by your advocate which [the appellant's physician] check-marked and commented 'chronic pain disorder, back pain, fibromyalgia.' Restrictions include [the list of statements from the appellant reproduced earlier in these reasons]." The ministry set out the statements from the November Letter with which the appellant's physician agreed. However, the ministry concluded in the reconsideration decision that "as the restriction to employment is related to chronic pain for which remedial measures are in place and as [the appellant's physician] confirms that you are stable with treatment, in the minister's opinion, your medical conditions and resultant restrictions do not preclude you from searching for, accepting or continuing in all types of employment." In response to questions from the panel about the information in the November Letter and that the appellant's physician indicated that he agreed with the statements, the ministry's representative argued that the information was "contradictory to [the physician's information in the] PPMB Form" and that the ministry at reconsideration gave more weight to the information in the PPMB Form. The ministry's representative agreed that the appellant had previously qualified for PPMB designation, prior to the August 2013 application and PPMB Form prepared by her new family physician. Upon questioning by the panel, the ministry confirmed that a client's previous medical records were part of the client's file and the decision-maker should review them as part of the PPMB renewal application.

Panel's Analysis and Decision

The ministry found that the appellant met the requirement of subs. 2(2) of the EAR as she has been in receipt of assistance for at least 12 of the previous 15 months. The appellant did not challenge her score of 11 on the E Screen at reconsideration or on appeal. Given that the appellant did not qualify for consideration under subs. 2(3) of the EAR (which requires a score of 15 or higher on the E Screen), the ministry considered her application for renewal of PPMB designation under subs. 2(4) of the EAR. The ministry was satisfied that the information from the appellant's physician in the PPMB Form confirms that she has a medical condition that has lasted at least 1 year and is expected to last at least another 2 years and she met the requirement of subs. 2(4)(a) of the EAR.

In considering whether the appellant met the requirement of subs. 2(4)(b) – that is, whether her medical conditions are a barrier that precludes her from searching for, accepting or continuing in employment, the ministry relied on the information in the PPMB Form completed by the appellant's physician in August 2013. The ministry referred to the information from the appellant's physician in the November Letter in the reconsideration decision. However, the ministry did not address that in

the November Letter prepared subsequent to the PPMB Form, by checking "yes" instead of "no" beside the list of statements about the restrictions caused by her medical conditions, the appellant's physician has confirmed and agreed with the appellant's statements, in particular that her condition is not episodic and causes her constant pain ("pain 24/7") and restricts her ability to perform certain basic tasks like sitting and standing.

Accordingly, the panel finds that, as set out in the November Letter, the appellant's physician confirmed the following information: that the appellant's medical conditions are *not* episodic in nature, but cause her pain "24/7"; that the appellant cannot sit for longer than 15-20 minutes due to her chronic back pain; that the appellant cannot stand longer than 30 minutes due to her back pain; that the appellant cannot lift more than 10 pounds with no repetition due to her back pain; and that the appellant has suffered from unpredictable bowel urgencies for years which contributes to her inability to work. The panel finds that the information in the November Letter from the appellant's physician, which was before the ministry at reconsideration, is evidence that the appellant's medical conditions are a barrier that precludes her from searching for, accepting or continuing in employment.

The panel finds that the evidence does not reasonably support the ministry's determination that the appellant's medical conditions do not preclude her from searching for, accepting or continuing in employment as required by subsection 2(4)(b) of the EAR. Accordingly, the panel rescinds the reconsideration decision of December 11, 2013.