

### PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation's (the ministry's) reconsideration decision of May 16, 2014 in which the ministry denied the appellant's request for qualification as a person with persistent multiple barriers to employment (PPMB) because:

- the ministry determined that Section 2(4)(a) of the Employment and Assistance Regulation (EAR) was not met, as the appellant's doctor indicated that the expected duration of the appellant's medical condition is less than 2 years;
- the ministry also determined that Section 2(4)(b) of the EAR was not met, in that in the opinion of the ministry the information provided did not establish that the appellant's medical condition is a barrier that precludes the appellant from searching for, accepting or continuing in employment.

### PART D – Relevant Legislation

Section 2, EAR.

## PART E – Summary of Facts

The information before the ministry at the time of reconsideration included the following:

- An undated Employability Screen for the appellant indicating a total score of 9. The screen indicates age: 25-49 inclusive; apart from current application, number of times on income or social assistance anywhere in Canada in the last 3 years: never; total time on income or social assistance in the last 3 years: more than 12 months; highest level of education completed: grade 10-12; total amount of time in paid employment over the last 3 years: 3-12 months; literacy level: good working knowledge of English. The screen indicates that a score from 0-14 signifies "Expected to work: immediately employable/employable with short-term interventions."
- A Medical Report – Persons with Persistent Multiple Barriers (MR-1), completed by the appellant's physician January 20, 2014.
  - primary medical condition is severe lumbar back pain, date of onset 2 years ago.
  - secondary medical condition is ADHD [Attention Deficit Hyperactivity Disorder], date of onset "two months ago diagnosis."
  - treatment: "Has seen neurologist, physio, chiropractic, pain meds. Having ongoing physio."
  - outcome: "Hope for improvement, off work 6-9 months."
  - condition has existed for 2 years.
  - expected duration of medical conditions(s) is less than 2 years.
  - medical condition is not episodic in nature.
  - restrictions: "pain radiates down posterior legs" and "trouble bending and twisting."
  - physician has been the patient's medical practitioner for over 6 months.
- the appellant's Reason for Request for Reconsideration, April 14, 2014. The appellant states: "I am at [this] time requesting an extension in the time to file for reconsideration. I have had to change family Dr's and my new family doctor still to this date [has not] received my medical records and is not able to complete this with me. My last family Dr was not helping at all and the Dr who was helping refuses to fill the forms out properly because she doesn't want to be negative as she hopes this will get better in time."
- The ministry's reconsideration decision of May 16, 2014 in which the ministry stated:
  - the appellant has been a recipient of income assistance for at least 12 of the past 15 months.
  - the Employability Screen with a score of 9 [see above] is the appellant's "most recent" screen.
  - because the appellant had asked for an extension of time to file for reconsideration (see above

Reason for Request for Reconsideration, April 14, 2014), on May 15, 2014 a Reconsideration Officer contacted the appellant asking if she had additional information to provide for the reconsideration. She stated that she had not heard from the ministry and did not realize that her extended deadline was May 16, 2014. The appellant stated that she was not satisfied with the information her physician had provided (in MR-1). She was awaiting an appointment with a different physician but did not expect to provide additional physician's information in time for the May 16, 2014 deadline. The ministry states that as of the date of the reconsideration decision, May 16, 2014, no further physician's assessment regarding the appellant's medical conditions was received by the ministry.

• After the ministry's reconsideration decision, further evidence was provided:

1. the appellant provided a Notice of Appeal on May 29, 2014. In the Reasons for Appeal section of the Notice of Appeal she wrote: "I requested extension on reconsideration but only learned that it was over when I received a call [the] day before time was up. I had changed drs and needed more time to get new dr caught up on medical history. I see dr May 29. I have been in pain for 2 years and it is not improving."

2. A Medical Report – Persons with Persistent Multiple Barriers (MR-2) dated June 6, 2014 filled out by the appellant's current physician (not the physician who provided MR-1). MR-2 provides the following information about the appellant:

- primary medical condition is low back pain to legs (Code 724), date of onset 2011

- secondary medical condition is described as ADHD, anxiety disorder, [Vitamin] B12 deficiency, irritable bowel s[yn]drome]. The date of onset for these conditions not stated.

- treatment/outcome:

physiotherapy/traction can help

chiropractor/ much worse

medications/helps when med in effect, then wears off

- condition has existed for 3 years

- expected duration of medical conditions(s) is two years or more. Physician adds "uncertain, but has lasted 3 yrs so no quick cure."

- condition is episodic in nature. Physician adds "pain comes and goes – usu[ally] present.

- episodes occur 6 days per week and will continue 6 days per week.

- restrictions: "can't walk or sit or stand long periods. Can't bend over. Can't lift, push or pull."

- physician has been the patient's medical practitioner for six months or less.

The panel finds that the Reasons for Appeal contains information in support of the information and

records that were before the minister when the decision being appealed was made, in that the appellant provides an update on her efforts to find another physician to assess her medical condition and cites her appointment with the new physician on May 29, 2014; and therefore the panel finds that the information is admissible as evidence in accordance with the Employment and Assistance Act (EAA), Section 22 (4).

With respect to MR-2, the ministry at the hearing expressed a number of concerns about the admissibility of the report as new evidence for this hearing. The ministry noted that MR-2 included 3 secondary medical conditions not included in MR-1: anxiety disorder, B12 deficiency, and irritable bowel syndrome. MR-2 indicates duration of the medical condition (s) as 3 years, compared to 2 years for MR-1. In MR-2 the medical condition(s) is indicated as episodic in nature, whereas in MR-1 it is not episodic. As well, in MR-2 the expected duration of the medical condition(s) is 2 years or more with the note "uncertain, but has lasted 3 yrs so no quick cure;" in MR-1 it is less than 2 years. Another difference between the two reports alluded to by the ministry at the hearing is that the restrictions in MR-2 are indicated as: Can't walk or sit or stand long periods. Can't bend over. Can't lift, push or pull. In MR-1, the appellant's restrictions are described as pain radiates down posterior legs and trouble bending and twisting. The ministry stated at the hearing that the appeal was about the ministry's reconsideration decision and much of the information in MR-2 was not before the ministry at the time of reconsideration or contradicted that information.

The panel notes that under section 22(4) of the Employment and Assistance Act (EAA) a panel may admit as evidence (a) the information and records that were before the minister when the decision being appealed was made and (b) oral or written testimony in support of the information and records referred to in (a).

The panel finds that anxiety disorder, B12 deficiency, and irritable bowel syndrome cited in MR-2 constitute new diagnoses neither before the ministry at reconsideration nor in support of the information or records before the ministry at reconsideration. The panel therefore finds these diagnoses inadmissible as new evidence.

The panel notes that some information in MR-2 contradicts information in MR-1. (1) In MR-2 the appellant's condition has existed 3 years, not the 2 years of MR-1. (2) In MR-2 it is expected to last more than 2 years, compared with less than 2 years in MR-1. (The panel notes that MR-2 indicates the expected duration of medical condition(s) as 2 years or more, adding the comment "uncertain but has lasted 3 yrs so no quick cure.") (3) In MR-2 the appellant's condition is episodic in nature, rather than non-episodic in MR-1. Because this information (1-3) in MR-2 was not before the minister at reconsideration and is not in support of the information that was before the minister at reconsideration, the panel finds the information inadmissible as new evidence.

Regarding the information in Section 3 of MR-2 about restrictions, the panel finds the information admissible because it describes the impact of the pain cited in MR-1 on the appellant's movement.

## PART F – Reasons for Panel Decision

The issue under appeal is whether the ministry's decision to deny the appellant's request for qualification as a PPMB was a reasonable application of the legislation in the circumstances of the appellant or was reasonably supported by the evidence.

- The ministry determined that Section 2(4)(a) of the EAR was not met, as the appellant's doctor indicated that the expected duration of the appellant's medical condition is less than 2 years.
- The ministry also determined that Section 2(4)(b) of the EAR was not met, in that in the opinion of the ministry the information provided did not establish that the appellant's medical condition is a barrier that precludes the appellant from searching for, accepting or continuing in employment.

### 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*;
  - (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.
- [en. B.C. Reg. 368/2002.]

The position of the ministry in its reconsideration decision is that because the appellant's Employability Screen indicates a score of 9, the legislation applicable to the appellant is section 2(4) of the EAR. The ministry notes that the Medical Report – PPMB dated January 20, 2014 (MP-1), the physician indicates that the expected duration of the appellant's medical condition (s) is less than 2 years. The ministry therefore contends that the appellant does not meet the conditions of either 2(4)(a)(i) or 2(4)(a)(ii) of the EAR. Further, the ministry states that it is not satisfied the information in MR-1 establishes that the appellant is precluded from searching for, accepting or continuing in employment as required under section 2(4)(b). The ministry takes this position because it contends that MR-1 does not explain the severity of the pain in the appellant's legs or the severity of her issues with bending and twisting.

At the hearing, the ministry representative repeated the arguments in the reconsideration decision.

The position of the appellant is to rely on the information in MP-2, which indicates an expected duration of her condition as greater than 2 years, describes her pain as usually present and describes her restrictions as "Can't walk or sit or stand long periods. Can't bend over. Can't lift, push or pull." She stated at the hearing that in her opinion the physician who completed MP-1 was not as familiar with her medical conditions as her new physician, who completed MP-2. She stated that attempts by her current physician to determine the underlying causes of her back pain are ongoing. An MRI scan has been scheduled, as well as an appointment with a neurologist. The appellant also stated that the medication she takes to relieve her pain is not very effective. Because of pain in her back and legs she has trouble getting out of bed in the morning and experiences severe muscle spasms that make it difficult to drive and to perform day -to-day tasks. She states that she is in constant danger of tripping and falling due to the spasms. Her feet get numb and her pain is like pins and needles; it is always there, but some days are worse than others.

The panel notes that the evidence shows the appellant has an Employability Screen score of 9, and therefore the panel finds to be reasonable the ministry's decision to apply section 2(4) of the EAR.

With respect to section 2(4)(a) of the EAR, MP-1 indicates that the expected duration of the appellant's medical condition is less than 2 years. MP-2 indicates an expected duration of the appellant's medical condition as 2 years or more, with the comment "uncertain, but has lasted 3 yrs so no quick cure." As noted above, the panel finds the evidence in MR-2 regarding duration as

inadmissible. The panel notes that 2(4)(a) of the EAR requires that the medical condition in the opinion of the medical practitioner "is likely to continue for at least 2 years or more." The panel therefore finds to be reasonable the ministry's decision with respect of 2(4)(a) of the EAR.

The panel wishes to point out that had the information in MR-2 on duration been admissible, it would have had to meet the requirement in 2(4)(a) of the EAR that the medical condition is "likely to continue for at least two more years." The panel notes that the physician's statement in MR-2 indicates that the expected 2 years or more duration of the appellant's medical condition is "uncertain." Given that statement, it is unclear as to whether the information in MR-2 on duration, even if it had it been admissible, would have met the requirement of 2(4)(a) of the EAR.

With respect to 2(4)(b) of the EAR the panel notes that both MP-1 and MP-2 address the restrictions caused by the appellant's low back pain, not by her ADHD. No information is provided in either report about the limitations caused by the appellant's ADHD. MP-1 states the limitations in these terms: Pain radiates down posterior legs and trouble bending and twisting. MP-2 states that the pain is episodic in nature, occurs 6 days per week and will continue 6 days per week. The limitations are: Can't walk, sit or stand long periods. Can't bend over. Can't lift, push or pull. Both reports indicate that the patient is on medications. MP-2 states that traction can help and that the medications "help when in effect but wears off" but there is no indication of the extent to which these treatments help, in particular with walking, sitting, standing, bending, lifting and pushing, or how long medications are effective before they wear off. The panel notes that MP-1 and MP-2 do not provide documents that support the severity and restrictions of the medical conditions as requested under Part 4 of the medical assessment. Given the above, the panel finds to be reasonable the ministry's determination that the information provided does not establish that the appellant's medical condition(s) presents a barrier that precludes her from searching for, accepting or continuing in employment, and therefore finds to be reasonable the ministry's determination that the appellant does not meet the requirements of 2(4)(b) of the EAR. As the panel finds the ministry's determination to be reasonable that the appellant does not meet the requirements of 2(4)(a) or of 2(4)(b) of the EAR, the panel confirms the ministry's decision to deny the appellant's request for qualification as a person with persistent multiple barriers to employment.