

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (“the Ministry”) reconsideration decision dated May 26, 2015 finding that the Appellant no longer qualifies as a Person with Persistent Multiple Barriers to employment (“PPMB”). While the Ministry found that the PPMB application met the requirements for length of time on income assistance and duration of medical condition, the Ministry was not satisfied that two of the criteria in section 2 of the Employment and Assistance Regulation (EAR) were met:

1. Subsection 2(3)(b)(ii): In the opinion of the minister, the (Appellant’s) medical condition is a barrier that seriously impedes her ability to search for, accept, or continue in employment;
and
2. Subsection 2(3)(c): The (Appellant) has taken all steps that the minister considers reasonable for (her) to overcome the barriers referred to in paragraph (a) of section 2(3).

PART D - Legislation

Employment and Assistance Regulation - EAR - section 2

PART E – Summary of Facts

The evidence before the Ministry at the reconsideration consisted of:

1. Information from the Ministry's records indicating the Appellant was previously approved for PPMB assistance in 2007; her family physician assessed her as unable to work until her most recent PPMB medical report of February 6, 2015. The Ministry noted she had taken English classes from 2003-2006.
2. Three Ministry PPMB checklists all indicating the Appellant had been on income assistance for twelve of the last fifteen months; she had an Employability Screen score ("the Screen") of seventeen; and a medical practitioner had confirmed a medical condition that has continued for at least one year and is likely to continue for two years or more. The Ministry check marked "No" to "Ministry medical consultant consulted?"
 - On the April 22, 2015 checklist the Ministry check marked that the Available Interventions section was left blank.
 - On the September 15, 2009 checklist and under Available Interventions, the Ministry indicated the Appellant tried a community assistance program from 2003-2005, and activities towards independence and a hiring solutions program in 2006-2007. The Comments section was left blank.
 - On the 2007 checklist, the Ministry reported that the Appellant attended English classes from 2003-2006. She was also in an employment program in 2007 but "states she is not able to attend due to health problems."
3. Five PPMB Medical Reports signed by the Appellant's family physician:
 - February 4, 2015 indicating the Appellant has GERD and Migraine headache and is taking medication for both conditions. Her conditions have existed for fourteen years, are expected to last at least two more years, and are not episodic. Under Restrictions specific to these medical conditions, the physician wrote "She may do a light duty job".
 - May 2, 2013 indicating the Appellant has Reflux esophagitis since 2001 and Migraine headache since 2005. The physician listed the medications she was prescribed with the comment "not improved" under treatment outcome. The restriction specific to her medical conditions was "unable to work".
 - June 17, 2011 indicating the Appellant had Migraine headache since 2005 and high blood pressure since 2007. Her headaches were reported as recurrent, hypertension was stable, and Gastritis and GERD were not improved. The restriction specific to her medical condition was "unable to work".
 - September 9, 2009 indicating the Appellant had Migraine headaches since 2005, high blood pressure since 2007 and Gastritis since 2001. She was to have a gastroscopy on September 21, 2009; her hypertension was reported as stable; and her Migraines were recurrent. The restriction specific to her medical condition was "unable to work".
 - November 2, 2007 (completed by a different family physician), indicating the Appellant had gastric pain since 2006; neck and arm pain from spondylosis; elevated cholesterol; allergies; and [illegible]. She was prescribed anti-inflammatories and painkillers, and her "neck and gastric" prevented her from working.

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4. The Appellant's undated Employability Screens, each indicating a total score of seventeen. Points were awarded for being an income assistance recipient for more than twelve months; having less than a Grade ten education; having no or very limited paid employment over the past three years; and having English as a second language (ESL) or being in need of English skills training.

5. Four Client Employability Profiles:

- February 10, 2015 indicating the Appellant had been unemployed for over three years; she has a severe lack of employment search and planning skills; she has Grades zero-nine education and a severe health condition and persistent disability, all of which severely limit her employment options. Factors affecting her employment options include her "functional literacy ability" and some difficulty communicating and resolving conflicts. Areas where she has no employment limitations include adequate transportation and shelter. Under Comments, the Ministry wrote "see med doc".
- May 2, 2013 indicating the same employment limitations as the February 2015 Profile except the Appellant was "Unable to speak, read or write English", severely limiting her employment options. The Comments section was left blank.
- September 15, 2009 indicating the same limitations as the May 2013 Profile except that a lack of work skills, less than one year work experience, and a lack of adequate child care all affect the Appellant's employment options. The Ministry commented that the Appellant had less than six months of work experience obtained when she was a teenager and the type of work she did then is not suitable for her medical conditions. Further, she had no resume, references, or job search skills. She had completed Grade seven and taken ESL courses but always required interpretation assistance when interacting with the Ministry. The Ministry recommended that she register in ESL classes to allow easier communication with various institutions.
- November 30, 2007 indicating the same limitations as the 2013 Profile, with the notation "ESL" in relation to difficulty communicating and resolving conflicts. The Comments section was left blank.

6. Four letters from the Ministry to the Appellant dated May 7, 2013, June 30, 2011, September 16, 2009, and November 30, 2007, indicating she was approved for PPMB benefits each time.

7. A letter from the Ministry to the Appellant dated June 1, 2011, listing her medical condition as Gastritis with gastroesophageal reflux, and describing any resulting restrictions as "N/A".

8. A Request for Reconsideration, signed by the appellant on May 4, 2015 in which she stated:

- She has limited English with no Canadian experience.
- She is very sick and cannot work.
- She cannot even handle light duty work due to her fall in March 2015.

9. A referral for the Appellant to see a surgeon, dated November 29, 2013.

10. An Emergency/Ambulatory Care Clinical Record dated May 3, 2014. The reason for the Appellant's visit was "post-op polyp removal-intestine, does not feel well". Comments were "fever, looks unwell".

11. A letter from the Appellant's family physician dated May 11, 2015 stating that the Appellant has frequently visited the office since March 2014 to seek treatment for her headache, neck pain, and right arm pain.

12. Pharmacy receipts from April and May 2015 for several prescription medications.

13. An Xray/scan image [with illegible note].

14. A letter from the Ministry to the Appellant dated April 22, 2015, stating that she no longer meets the requirements for PPMB and will be expected to find work.

Procedural matters

The Appellant attended the hearing with an interpreter, as well as a friend for whom she provided a Release of Information to act as her advocate. The advocate was willing to act as the Appellant's interpreter and the interpreter suggested that she could be excused if the advocate would be assuming that role. The panel asked to retain the interpreter as she was an independent party who did not have an interest in the decision. The panel called two recesses during the hearing due to the Appellant's illness and need to vomit. During one of the recesses, a panel member obtained a fan to increase air circulation in the room to make the Appellant more comfortable. The panel informed the Appellant of her ability to ask for an adjournment due to her illness and the Appellant chose to continue with the hearing.

Appellant's additional evidence

In her Notice of Appeal dated June 1, 2015 (the Appellant noted that her daughter filled it out), she stated that her life has been difficult for many years due to chronic Migraine. Symptoms that make her incapable of working include her constant headaches and numbness/weakness in her arms and legs making it difficult to carry or grasp even light objects. Medications are prescribed but they do not help, thus causing her to suffer chronic stress which impacts her health by causing high blood pressure which she has regular check-ups for. She does not understand why she does not qualify for PPMB when her illnesses restrict her from working and taking care of herself independently.

In her oral testimony, the Appellant explained the following:

- Her most severe medical condition is Migraine (since 2005) which is constant and exacerbated by stress. It causes many symptoms including nausea, vomiting, headaches, and insomnia. She vomits every time she has a Migraine and the vomiting happens everywhere including at her doctor's office, at job interviews, and at today's hearing due to added stress. Her Migraine condition has worsened over time and has been particularly severe since she had a fall on a bus ("the bus accident") in October 2014. Since then, she has experienced more frequent headaches with pain that radiates down her neck, to her right arm and hand causing numbness in her fingers and stiffness in the mornings. She has tried a wide variety of prescription medications and takes Tylenol 3 a few times a day but medication does not really help when she is stressed. She has been admitted to hospital a few times due to vomiting, headaches, and gastric problems.
- For a number of years she has had ulcer and stomach problems including gas reflux. This combined with Migraine causes her to vomit all the time. She also has high cholesterol.

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- For many years she has had pain in her neck, shoulder, arm, hand and elbow. Her doctor has injected her elbow with medication and has recommended wrist surgery which the Appellant is afraid to have out of concern that it could make the problem worse. The bus accident aggravated her pre-existing lower back pain and caused additional pain in her back, hip, left leg, and knees. Her doctor has outlined all of these problems on a yellow form which is part of a Person with Disabilities (PWD) application that she submitted to the Ministry around May 25, 2015.
 - When she received her doctor's most recent PPMB medical report (of February 4, 2015) stating that she could do light duty work, she did not understand what he had written due to her limited English skills. When she realized what it said, she went back to the office and asked him why he had written that when she cannot work at all due to her medical conditions. Her doctor told her that the Ministry could help her find something light but that she cannot handle it anyway due to her English language barrier and lack of education. He realized she was seriously sick and cannot do light duties, and therefore filled out the PWD form with all of the information. She did not make a copy of the form and has not yet received a decision from the Ministry. She did not know that she could submit additional information prior to the reconsideration decision.
 - She has been unable to take recent English classes or attend employment programs or job interviews because she is very sick with lots of headaches every time she takes a class or looks for a job. Her illness caused her to discontinue past programs and she presents at job interviews with Migraine and vomiting. Her teachers and potential employers wonder how she can work with her medical conditions. The Ministry asked her to take training but she was unable to do so due to headaches.
 - Her doctor's office has mixed up her files on more than one occasion with other patients who have a similar name, as names in the Appellant's language group are very similar. These mix ups resulted in the Appellant being given the wrong diagnosis and the wrong prescription and she believes that when her doctor wrote that she could do light duty work, his comments were in reference to another patient and not the Appellant.
 - Her conditions are exacerbated by financial stress because the Ministry has not only denied her PPMB, it has terminated her income assistance even though she went to the Ministry office with her child acting as her translator.

The panel finds that the information regarding the Appellant's medical conditions corroborates the information and records that were before the Ministry at the reconsideration, although the only information at reconsideration relating to problems with her extremities are neck and arm pain in the 2007 medical report, with no specific references to shoulder, elbow, wrist, back, hip, leg, or knee problems. The Appellant explained that some of these problems were related to her Migraine condition while others were exacerbated by the bus accident. The 2007 medical report attributed the neck and arm pain to spondylitis. As the reconsideration record notes both Migraine and the bus accident, the panel admits all of the oral evidence of medical conditions under section 22(4)(b) of the *Employment and Assistance Act* (EAA) as evidence in support of the information and records that were before the ministry at the time the decision being appealed was made.

Regarding the PWD application; the Appellant's inability to attend English classes and employment programs/interviews due to her medical conditions; and her doctor mixing up her file with those of

other patients, the panel accepts the testimony as argument, in particular, substantiating her position in her Request for Reconsideration with respect to being unable to work due to her medical conditions and her lack of English language and employment skills.

At the hearing, the Ministry relied on its reconsideration decision and did not introduce any new evidence. The Ministry explained that the Appellant could pursue a PPMB and a PWD application simultaneously and these are two separate processes and one is not affected by a decision on the other. The Ministry further explained that PPMB qualification is for a temporary medical condition and the Ministry requires a new medical report every two years in order to determine whether the client is still going through the condition and whether there are any changes in how the condition is restricting the client from working. The Ministry explained that in making its decision regarding PPMB renewal, it considers past medical reports but assigns the greatest weight to the most recent medical information.

The panel makes the following findings of fact:

1. The Appellant's medical conditions as confirmed by a physician for her 2015 PPMB application are Migraine and gastric problems (GERD).
2. The five medical reports refer to gastric problems since 2007, and Migraine since 2009. Neck and arm pain due to spondylitis was reported in 2007 and the 2007 report stated that the Appellant was unable to work due to neck pain.
3. The 2013 and 2011 medical reports indicate that the Appellant's conditions did not improve as the result of treatment.
4. The Ministry checklist from 2007 included information that the Appellant was not able to attend an employment program due to health problems.

PART F – Reasons for Panel Decision

The issue in this appeal is whether the Ministry's May 26, 2015 decision that the Appellant no longer qualifies as a PPMB because the information provided does not establish that her medical condition is a barrier that seriously impedes her ability to search for, accept, or continue in employment and that she has taken all steps to overcome her barriers as required by subsections 2(3)(b)(ii) and 2(3)(c) of the EAR, was reasonably supported by the evidence or was a reasonable application of the applicable enactment in the circumstances of the appellant.

The sections of the legislation relevant to the issue in this appeal are set out as follows:

Employment and Assistance Regulation, section 2

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*, or
- (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 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.

In order for a client to be eligible for the PPMB qualification and renew their application, all of the criteria in section 2 of the EAR must be satisfied. The Ministry found that the Appellant met the requirements in EAR subsections 2(2)(a) and 2(3)(b)(i)(a) because she has been an income assistance recipient for at least twelve of the immediately preceding fifteen calendar months and her physician confirmed that she has had the Migraine and gastric conditions for at least a year and these are expected to continue for two or more years.

The Ministry stated that in assessing eligibility for PPMB, it could not consider new medical conditions that resulted from the Appellant's bus accident in October 2014 (neck and right arm pain) because these conditions had not lasted for a year. The panel finds this to be a reasonable interpretation of EAR subsection 2(3)(b)(i)(A) which sets out the duration criteria for a medical condition. The panel notes that although the Appellant reported that her Migraine condition causes pain that radiates down her neck and arm, only the 2007 medical report mentions neck and arm pain (due to spondylitis, not Migraine).

The Ministry determined that because the Appellant's Screen score was seventeen it assessed her application for PPMB renewal under EAR sections 2(2) and 2(3) [rather than sections 2(2) and 2(4)]. The panel finds that this was a reasonable application of the legislation which specifies in subsection 2(3)(a)(i) that where the Screen score is at least fifteen, the requirements of section 2(3) apply.

Regarding the two criteria in section 2(3) that the Ministry determined were not met, the panel's analysis is as follows:

EAR subsection 2(3)(b)(ii): In the opinion of the minister, the medical condition is a barrier that seriously impedes the person's ability to search for, accept, or continue in employment.

Ministry's position

The Ministry argued that the Appellant does not qualify for PPMB because her medical conditions do not seriously impede her ability to search for, accept, or continue in employment. The Ministry submitted that although it has some discretion in determining whether a medical condition is a barrier that seriously impedes employment, it relies on information provided by medical practitioners in making such an assessment. The Ministry argued that even though the Appellant's family physician consistently reported since 2007 that the Appellant was unable to work due to her medical conditions, the most recent report (of February 2015) assessed her as able to do a "light duty job". The Ministry argued that it reasonably gave the most weight to the 2015 medical report because the PPMB qualification is reassessed every two years and the Ministry looks at the impact of the client's current condition and symptoms in restricting their ability to work.

Appellant's position

The Appellant argued that she cannot possibly work due to her headaches, pain, and frequent vomiting which have worsened over time due to stress and since her bus accident. Whenever she has tried to look for work she could not continue due to illness. Her doctor acknowledged that she is "severely sick" by providing details of her condition in a PWD application. She believes he made an error in her most recent PPMB medical report by stating that she can do light duties when she cannot even handle those. She argued that her previous PPMB medical reports consistently stated she

could not work due to her Migraine and gastric problems and her situation definitely has not changed. She would be more than willing to work if she were feeling better but medications do not really help when she is under a lot of stress that is heightened by the financial strain of being denied income assistance.

Panel decision

EAR subsection 2(3)(b)(i) requires the minister to have the opinion that the medical condition is a barrier that seriously impedes the client's ability to work. The Ministry submitted that "impedes" means the client is unable to participate in any type of employment that would enable independence from income assistance. The panel finds this to be a reasonable interpretation of the EAR because the provision encompasses three aspects of working: looking for a job, accepting a position, and continuing to work.

The panel notes that while the 2015 PPMB medical report was inconsistent with all of the previous reports that said the Appellant could not work, the PPMB qualification is assessed every two years to reflect the client's current situation. As PPMB is not a static designation, the panel finds that the Ministry was reasonable in basing its reconsideration decision on the most recent information it was presented with. The panel further finds that the Ministry was reasonably entitled to rely on, and give significant weight to this information.

The 2015 medical report clearly stated that the Appellant could do a "light duty job" and the Appellant's information that she could not work at all was contradictory. She testified that she went back to see the physician to ask him why he wrote on her medical report that she could do light duties. She testified that he initially told her that the Ministry could help her find light duty work, but that she couldn't work due to her English and educational limitations. Upon further discussion, he filled out her PWD application, which the panel notes does not assess a person's employability. Then, after the fact, the Appellant alleged that the physician had mixed up the "Restrictions" section of her medical report with another patient's information. There is no indication that she addressed that concern with the physician when she went back to see him.

Further, although she stressed that her condition had gotten worse over time; that a bus accident had resulted in some new conditions and aggravated others; and that the medications do not really help, her physician did not indicate in his most recent report that her condition was any worse than before, or that the Appellant had experienced a fall on bus, or that she is precluded from working despite medications/ treatments. By contrast, the physician's comment that she can now do a "light duty job" (when she could not in previous PPMB assessments) suggests improvement in her condition and/or effective treatment.

On its face, the physician's statement that the Appellant's only restriction is light duty work, does not confirm that her medical condition is a barrier that seriously impedes her ability to search for, accept or continue in employment. The physician's comment "She may do a light duty job" does not describe restrictions specific to the Appellant's medical condition and the panel therefore finds that the Ministry reasonably determined that given the information provided, it could not be satisfied that the criteria in EAR subsection 2(3)(b)(ii) were met.

EAR subsection 2(3)(c): The person has taken all steps that the minister considers reasonable to overcome the barriers referred to in paragraph (a) of section 2(3):

Appellant's Position

The Appellant argued that she is unable to take steps to overcome her barriers to employment because her medical condition precludes her from searching for work and participating in employment programs and ESL classes. Whenever she attempted these activities she had to stop because of her chronic headaches, vomiting, and pain and numbness. Teachers and potential employers wonder how she can work when she is sick at her meetings with them.

Ministry's Position

The Ministry was not satisfied that the Appellant had taken all reasonable steps to overcome her barriers to employment, arguing that there was no evidence that the Appellant has participated in any activities that would move her towards independence. Regardless of the level of limitation the Appellant has with the English language, the Ministry records indicate that she has not completed any additional English training (beyond ESL classes in 2006), and she has not taken any steps to upgrade her education or vocational skills.

Panel Decision

EAR subsection 2(3)(c) requires a client to demonstrate that they have taken all reasonable steps to overcome the barriers to employment referred to in subsection 2(3)(a). These barriers are identified as the results of a Screen score of at least fifteen. The Appellant's barriers (in her score of seventeen) are her length of time on income assistance, her low educational attainment (Grade seven according to her 2009 Client Employability Profile), her very limited work experience (in a type of work that is not suitable for her health conditions), and her ESL status.

The panel notes that the only evidence to indicate she took steps to overcome her barriers is older information in the PPMB checklists from 2009 and 2007 which indicated she took some classes/programs in 2006-2007. Regarding the Appellant's position that she cannot participate in English classes or Employment activities due to her medical conditions, the only evidence to this effect prior to her testimony at the hearing, was her statement to the Ministry (2007 PPMB checklist) "not able to attend (one program) due to health problems". There is no recent confirmation from her physician that she cannot attend any type of class or program because of her medical condition or that she attempted any home study programs if she is unable to get out to classes. Further, she participated in programs in 2006-2007 despite her health conditions. As PPMB is reassessed every two years, there is an obligation on the client to take steps to overcome their barriers to employment. The panel therefore finds that the Ministry reasonably determined that the criteria in EAR subsection 2(3)(c) were not met.

Conclusion

The panel confirms the Ministry's reconsideration decision that held the Appellant is not eligible for a continuing PPMB qualification under section 2 of the EAR, finding that the decision was reasonably supported by the evidence and was a reasonable application of the applicable enactment in the circumstances of the appellant.