

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (“the Ministry”) reconsideration decision dated October 19, 2015 in which the Ministry found that the Appellant is ineligible for the Persons with Persistent Multiple Barriers to employment (“PPMB”) qualification pursuant to section 2 of the Employment and Assistance Regulation (“EAR”). The Ministry found that the PPMB application cannot be considered under EAR subsection 2(3) because the Appellant’s Employability Screen score is 8. The Ministry found that while the Appellant met the criteria under subsections 2(2) and 2(4)(a), he does not meet the criteria in EAR subsection 2(4)(b) which requires: *In the opinion of the minister, (the medical condition) is a barrier that precludes the person from searching for, accepting or continuing in employment.*

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 the following:

1. A Request for Reconsideration signed by the Appellant on September 29, 2015 with attached information as follows:

A letter from an advocate to the Appellant's family physician, dated September 29, 2015 with a questionnaire filled out and signed by the physician on October 1, 2015 ("the questionnaire"). The physician answered "yes", the Appellant has the following restrictions to employment:

- Unable to sit for longer than one hour due to pain in hips and back.
- Standing limited less than one hour, pain in back.
- No repetitive bending, due to pain in hips and back.
- Unable to lift, twist or carry due to back pain, "less than 10 lbs."
- Due to diabetes, suffers from chronic fatigue, frequent bladder urgencies.

2. A *Medical Report – Persons with Persistent Multiple Barriers* ("PPMB medical report") signed by the Appellant's family physician on July 9, 2015, that stated the following:

- Primary medical condition: chronic back pain, date of onset, 14 years ago.
- Secondary medical condition: Type II diabetes, date of onset, 12 years ago.
- Treatment and Outcome: medications (listed), "diabetes stable".
- The medical condition has existed for 14 years, is expected to continue for 2 years or more, and is not episodic in nature.
- Restrictions specific to the noted medical condition: "cannot bend, lift or twist" and "can only sit approximately 20 minutes".

3. The Appellant's undated Employability Screen, indicating a total score of 8. Points were awarded for being on income assistance for more than 12 months in the last 3 years and spending from 3-12 months in paid employment over the last 3 years.

4. The Ministry's PPMB denial letter dated September 16, 2015, informing the Appellant that he no longer meets the PPMB category. The Ministry advised that the reduction in his income assistance will take effect on his December cheque and the Ministry will work with him to develop an Employment Plan.

5. Information from the Ministry reconsideration record stating that the Appellant has been employed part-time since November 2014 and has been declaring income ranging from \$120 - \$495 per month from December 2014 through October 2015.

### *Additional submissions*

The Appellant stated that his advocate was unable to attend the hearing but assisted with his submission. In his Notice of Appeal of November 2, 2015, he said that he has to call in approximately one third of the time to let them know he cannot work (approximately 3 times per month according to his oral testimony). He testified that his back goes into spasms if he sits or stands or walks for any length of time, or lifts over 10-15 pounds. He is only able to work 3 hours per day 3 days per week and has never broken the \$500 dollar mark to have his income assistance reduced.

He testified that his medication makes him too drowsy to go to work and he cannot switch pain medications as it would interfere with his diabetes medication. He works on a commission basis and cannot make up missed days as the schedule is pre-set. He explained that it takes at least 4 years to build a steady stream of income and it is going to take more time than he thought to get off of income assistance. In addition to this testimony, both the Appellant and Ministry provided information and argument regarding a supported or sheltered type of work environment.

*Admissibility*

The panel finds that the testimony regarding medications causing restrictions to employment was not before the minister at reconsideration. While the physician noted that the Appellant is taking medications, he provided no information about side effects resulting in restrictions. The panel also finds that information and argument regarding a supported or sheltered work environment, was not before the minister at reconsideration. While the Ministry noted in the reconsideration decision that it may make an exception for a “supported or sheltered type of work environment”, there was no information or assessment provided, and there is no exception in the legislation for supported or sheltered work.

With the exception of those statements, the panel admits the balance of the testimony under section 22(4)(b) of the *Employment and Assistance Act* as evidence in support of the information and records that were before the minister at the time the decision being appealed was made. The panel finds that the Appellant’s testimony provides details about his part-time employment, corroborating the Ministry’s information that the Appellant has been working part-time since 2014.

## PART F – Reasons for Panel Decision

The issue in this appeal is whether the Ministry reconsideration decision of October 19, 2015, finding that the Appellant is ineligible for the PPMB qualification pursuant to section 2 of the EAR because the criteria in subsections 2(3) and 2(4)(b) were not met, was reasonably supported by the evidence or was a reasonable application of the applicable enactment in the circumstances of the Appellant. The Ministry found that the PPMB application cannot be considered under EAR subsection 2(3) because the Appellant's Employability Screen score is less than 15. The Ministry also found that he does not meet the criteria in EAR subsection 2(4)(b) which requires: *In the opinion of the minister, (the medical condition) is a barrier that precludes the person from searching for, accepting or continuing in employment.*

The sections of the legislation relevant to the issue on 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

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,

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- (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.

***Subsection 2(2)***

In order for a client to be eligible for the PPMB qualification or renew their status as PPMB, the criteria in EAR subsection 2(2) must be satisfied. The Ministry accepted that the criteria in subsection 2(2) are met as the Appellant has been on income assistance for at least 12 of the immediately preceding 15 calendar months.

***Subsection 2(3)***

In addition to meeting subsection 2(2), the person must meet the requirements set out in subsection 2(3) **or** 2(4) depending on the client's Employability Screen score. In the reconsideration decision, the Ministry determined that the Appellant's Screen score is 8, and therefore found that the PPMB application cannot be considered under EAR subsection 2(3). While the Appellant expressed concern that the Ministry did not contact him to fill out the Screen, he does not dispute the score. He noted that his Screen score is more accurately 7 as he had a previous job and had worked for more than 12 months over the last 3 years. As there is no evidence or argument that the Screen score was calculated incorrectly, the panel finds that the Ministry reasonably determined that the Appellant's PPMB application cannot be assessed under subsection 2(3).

At the hearing, the Ministry argued that even with a Screen score of less than 15 pursuant to EAR clause 2(3)(a)(i), it assessed the Appellant's PPMB application under subsections 2(3)(b) and (c) as well as subsection 2(4). The Ministry argued that it found that the Appellant's medical condition does not "seriously impede" employment under subsection 2(3)(b) or "preclude" employment under subsection 2(4).

The panel notes that subsection 2(3) is not under consideration if the Employability Screen score is less than 15. Further, the reconsideration decision does not make any findings under subsections 2(3)(b) and (c). As the panel's jurisdiction is to review the reasonableness of the reconsideration decision, the Ministry's arguments regarding "impedes" employment are precluded from consideration by the panel.

***Subsection 2(4)***

Regarding the requirements in EAR subsection 2(4), the Ministry accepted that clause 2(4)(a)(i) was met as the physician has confirmed the onset and duration of the Appellant's medical conditions. Regarding the Ministry's determination that subsection 2(4)(b) ["precludes" employment] is not met, the panel's analysis follows:

The Appellant argued that even though he is working, he is restricted to part-time work with a supportive employer who understands his pain and has no plan to release him when he has to call in sick. He and his doctor do not think he can work in a salaried job due to the number of times he calls in sick. He understands that the Ministry will cut him off of income assistance if he is fired from a job (for any reason) and he is concerned about losing his PPMB status as he does not get medication

coverage on regular income assistance. He acknowledges that the Ministry had his doctor's medical report and list of restrictions, but he does not see how the Ministry can make a fair decision about his capacity to work when they never called his doctor or his employer for more information.

The Ministry submitted that the test under subsection 2(4)(b) is for the medical condition and subsequent restrictions to preclude the client from searching for, accepting, and continuing in employment when, "as a result of the medical condition, the recipient is unable to participate in any type of employment for any length of time, except in a supported or sheltered type work environment." The Ministry acknowledged the doctor's list of restrictions but argued that the Appellant is not precluded from employment activities as he has been employed part-time since November 2014 and is declaring income from this employment.

At the hearing, the Ministry explained that due to privacy concerns, the decision-maker does not call the client's doctor or employer to discuss the client's restrictions. The Ministry bases its decision on the PPMB medical report and other information from the doctor. The Appellant has the opportunity to ask the doctor to provide additional information to establish that his medical restrictions preclude him from all forms of employment.

#### *Panel's decision*

EAR subsection 2(4)(b) requires the minister to have the opinion that the medical condition is a barrier that precludes the client from searching for, accepting or continuing in employment. The panel finds that the Ministry's position that the client must be precluded from "all forms of employment" is a reasonable application of the legislation as subsection 2(4)(b) does not differentiate between different types of employment such as full-time or part-time work. However, the Ministry's exception for a "supported or sheltered type of work environment" is not defined in the EAR, is not part of the legislative test, and there is no requirement under the legislation for the Ministry to assess whether the client is working in a supported or sheltered environment.

The Ministry's information that the Appellant is working part-time was corroborated by the Appellant who provided detailed information about his part-time work schedule and accommodations from his employer for the restrictions identified by his doctor. For example, the Appellant is not required to sit or stand for long periods or lift heavy items and his employer does not ask him to put in more hours than he is capable of doing. The Appellant has been with his current employer for a year and although he calls in sick approximately 3 times per month, the evidence is that he continues to work. Furthermore, there is no medical information to suggest that he is precluded from continuing in his position. The panel therefore finds that the Ministry reasonably determined that the Appellant's medical condition does not preclude him from searching for, accepting, or continuing in employment as required under EAR subsection 2(4)(b).

#### *Conclusion*

The panel finds that the Ministry reconsideration decision that found the Appellant ineligible for the PPMB qualification, was a reasonable application of section 2 of the EAR in the circumstances of the Appellant. The panel confirms the reconsideration decision.