



### PART C – Decision under Appeal

The Ministry of Social Development and Social Innovation's (the ministry) reconsideration decision dated 17 November 2015 determined the appellant did no longer qualify as a person with persistent multiple barriers (PPMB) under section 2 (4) of the Employment and Assistance Regulation (EAR). The ministry determined that while the information provided established she had a medical condition which had continued for at least one year and was likely to continue for at least two more years, the minister was not satisfied it presented a barrier that precluded her from searching for or accepting or continuing in employment.

### PART D – Relevant Legislation

EAR section 2.

## PART E – Summary of Facts

The following evidence was before the ministry at the time of reconsideration:

- The appellant qualified for PPMB designation for two years and that designation came up for a review in September 2015.
- A 2-page Medical Report PPMB dated 3 September 2015 by the appellant's physician, a general practitioner (GP) indicated:
  - The appellant's primary medical condition: anxiety, depression.
  - Secondary medical condition: pain – chronic pain syndrome, life-long.
  - The appellant was treated through medication.
  - The expected duration of her condition was 2 years or more.
  - The medical condition is episodic in nature but the GP wrote "NA" for frequency and no information is provided for the likelihood of reoccurrence.
  - The physician left the box blank for restrictions specific to the appellant's medical condition.
  - The GP provided no additional documentation supporting the severity and restrictions of the medical condition.
  - The GP did not indicate how long he had been the appellant's GP.
- Two undated Employability Screen (ES) forms. According to the reconsideration decision, the first indicated a score of 13 and the second 10. It is stated that the first ES indicated that the appellant had none or very limited work experience (score 4) while the second indicated that she had 3 – 12 months total time spent in paid employment over the previous 3 years.
- A Client Employability Profile dated 10 September 2015 indicated the following relevant comments:
  - Employment search skills: Severe lack of employment search and planning skills examples include: inability to produce resume; lack of employer / personal references; inability to network / pursue job leads / contacts; inability to demonstrate work search activities that lead to employment.
  - Health (excluding addictions): severe health condition.
  - Disability: persistent disability, severely impacts on employment options.
- According to the ministry records, the appellant declared earnings from part time employment for the periods of June 2014 – February 2015 and July – August 2015, working for a single employer, income range \$60 to \$570 per month.
- A previous Medical Report PPMB dated 15 August 2013 by a specialist in psychiatry indicated:
  - Appellant's primary medical condition: anxiety disorder NOS, onset 1998.
  - Appellant's secondary medical condition: chronic pain syndrome (onset 2002), ADHD (onset 1997).
  - The appellant was treated through medication and therapy: medication (improved anxiety but easily destabilized); second medication (excellent response cognitively, still limited by fatigue); cognitive behavioural therapy (slow progress but only available short-term); pain clinic assessment & management programs (referral in progress).
  - The expected duration of this condition was 2 years or more.
  - The condition was episodic in nature: pain episodes are episodic and fuel increased anxiety – occurs every 2-3 months, pattern expected to continue.
  - In terms of restrictions, the specialist indicated that she was restricted in basic tasks because of pain – making bed, folding laundry, writing, putting on makeup, standing for an extended period of time, walking more than 30 minutes, cannot run, poor sleep quality and

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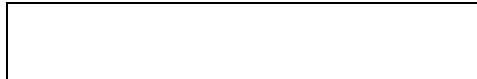
fatigue limit cognitive abilities, tires easily – anxiety limits mobility – has trouble going to public places and avoids this the majority of the time.

- The specialist had been a medical practitioner for the appellant for less than 6 months and had examined previous medical records.
- A letter dated 29 September 2015 informing the appellant that she no longer met the requirements for PPMB category for the following reasons:
  - Her ES score was less than 15;
  - “In the opinion of the minister your medical conditions do not preclude you from all forms of employment as required under [EAR] section 2(4)(b).”
- In her Request for Reconsideration dated 3 November 2015, the appellant indicated that her diagnoses were Schuermann’s kyphosis/scoliosis, fibromyalgia, chronic pain and chronic sleep disorder and that her medical practitioners believed she suffered from ankylosing spondylitis and are working on a complete diagnosis. Her GP informed her that she might never be able to hold a normal full-time job for the remainder of her life. She is unable to do even the most basic daily living tasks for a woman of her age and lists a series of symptoms preventing her from doing them. She can’t even do a part-time position where she would be required to sit-down as she can’t even sit down for a movie at the theatre. Her health is too unpredictable to hold a job and without the PPMB assistance she doesn’t know what she will do. Her illnesses have lasted over 13 years now and it affected all aspects of her life. She acknowledges that the GP’s report was done incorrectly but she stated she and her child should not suffer because of that.

At the hearing the appellant testified that the work she did was for a single employer that she has known from before the business opened and helped them to set up the store, which was about a decade ago. She works as a cashier and may help customers with boxes but it should not be too heavy as she will be days in pain, recovering. The employer has seen her health condition deteriorate but since they already had that relationship with her, decided nonetheless to give her a chance and adapted her working schedule and tasks to her needs. A ministry worker told her that it would be good for her to work once in awhile and that it would not be used against her in her dealings with the ministry. She testified that the employer accommodated her condition and she could work as little as 3 hours in one week but occasionally she might work up to 10, although normally she would not work more than 3 to 4 hours in a day, rarely up to 6 hours. The employer also accommodated her, bending the rules by creating shorter shifts for her, not having her wear steel toed shoes and while the other employees doing the same job must stand, she is allowed to sit. She said they were focusing more on socialization to help her given her medical condition acknowledging she could only work minimum hours. She stated she could not work anywhere else without having the same accommodation.

She indicated that she had provided the ministry with a medical report by the same GP in July 2015 but that she was told this report was misplaced and she went back to her GP to get a second report, dated 3 September 2015, that was filed and is part of the evidence before the ministry at reconsideration – she and the ministry did not have a copy of the first report at the hearing. She also mentioned her medical condition is episodic in nature but can be daily and she did not recall having had a good day. She described her condition as having a few good hours per day. She gets some help from her parents with her child who is now going to school. She finally testified that she did not get an interview by the ministry when she applied for a renewal of her PPMB status in 2015.

The ministry did not provide any new evidence and did not object to the additional evidence



presented by the appellant. The panel determined the additional oral evidence was admissible under s. 22 (4) of the Employment and Assistance Act (EAA) as it was in support of the records before the minister at reconsideration and provided further information about the appellant's medical condition and about her employment conditions and the special arrangements she had with her employer.

## PART F – Reasons for Panel Decision

The issue under appeal is whether the ministry's decision that determined the appellant did no longer qualify as a PPMB under section 2 (4) of the EAR was either a reasonable application of the legislation or reasonably supported by the evidence. The ministry determined that while the information provided established the appellant had a medical condition which had continued for at least one year and was likely to continue for at least two more years, the minister was not satisfied it presented a barrier that precluded her from searching for or accepting or continuing in employment.

Section 2 of the EAR states the conditions necessary to qualify as a PPMB:

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,...

(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.

At the hearing the ministry stated that its information about the appellant's employment came exclusively from the mandatory monthly reports sent by the appellant to the ministry and that it was

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unusual that the appellant was not interviewed to provide more specifics in terms of her work and her restrictions. Given the oral evidence provided, the ministry indicated that the appellant probably met the conditions for a renewal of her PPMB designation.

The appellant argued that she intended to present a PWD application but that meanwhile she asked the panel to extend her PPMB designation. She argued that she could not work anywhere else than where she works now as it would be unlikely if not impossible to have the same conditions and the same accommodations and that the only reason she could work there was because of the special relationship that had developed between her and her employer over the years – they saw her health situation deteriorating but they wanted to give her a chance to have some work to do that would also provide a level of socialization.

***Panel decision:***

First, the panel notes that 2 ES were provided, the first with a result of 13 and the second with a result of 10 – this time the ES took into account the fact that the appellant had a job from 3 to 12 months preceding the renewal. The panel notes that regardless of whether she scored 13 or 10 in the ES, she did not score 15 and therefore the ministry reasonably determined s. 2 (2) and (4) of the EAR applied.

The panel also notes that the ministry is satisfied that a medical practitioner confirmed that the appellant has a condition other than addiction that has continued for at least one year and is likely to continue for at least 2 more years. However, the ministry determined the appellant did not demonstrate that her medical conditions present a barrier that precludes her from searching for, accepting or continuing in employment. In its reconsideration decision, the ministry referred to its own policy to clarify the word “precludes” and the panel finds that 3 of the 4 factors are relevant:

- Is the focus of the work on socialization where the activities are highly supported or supervised;
- Is the recipient limited by the medical condition to very minimal hours on an infrequent basis;
- Is the recipient’s involvement very sporadic or casual.

At the hearing, the ministry indicated that if anyone of those factors was met, the appellant could be considered as being ‘precluded’ from employment.

The only issue in dispute is whether the appellant’s medical condition is a barrier that precludes her from searching for, accepting or continuing in employment as contemplated by section 2(4)(b) of the EAR. A common interpretation of the term “preclude” is “to make impossible or prevent from happening.” However, reading the legislation as a whole it is clear that the legislative intent is not to interpret “preclude” in such a literal fashion, since the earnings exemption in section 3(6)(d) of EAR Schedule B anticipates that a PPMB may earn some employment income. The ministry’s policy – as mentioned above -acknowledges this less stringent interpretation of “preclude”.

At reconsideration, the ministry was aware that the appellant was already a beneficiary of a PPMB designation since 2013 and that she had been working. In fact the monthly reports showed that she had an income range of \$60-\$570/month and that she worked sporadically – for instance she did not work between February and July 2015. If the ministry had interviewed the appellant, as it appears to be the usual practice, it would have known that her work was extremely limited (which is corroborated by her income range that is also extremely limited) and that her medical condition limited her to

working only a few hours per week with special arrangements exempting her from wearing steel toed shoes and allowing her to sit, benefiting from special circumstances because of the willingness of the employer to maintain her employment in order to support her socialization.

The ministry also commented on the fact that the GP did not describe the nature of any restrictions specific to the appellant's medical condition. In fact, the GP did confirm the earlier diagnoses in the 2013 medical report and added "life-long" and nothing suggested that her condition had improved from what the ministry already had on file with the specialist's report of 2013. Further there is an important inconsistency in the GP's report where he indicated that her condition was periodic in nature but wrote "NA" when asked about the frequency. The panel cannot speculate as to the GP's disposition to complete that form and more information would have been desirable but the ministry did not contact the appellant to discuss that issue. On 10 September 2015, the ministry generated a "Client Employability Profile" (a few days after the GP's report was received at the ministry's office on 8 September 2015) indicating that the appellant had a "severe lack of employment search and planning skills", that she had a "severe health condition" and that her "persistent disability severely impacted on employment options" – the panel finds this is inconsistent with concluding that there was no evidence or restrictions.

Section 2 (4)(b) of the EAR, unlike subsection (a) does not require that a medical practitioner provide an opinion as to whether an applicant is precluded from searching for, accepting or continuing in employment and the panel notes it is reasonable for the ministry to look at the medical report to get information as to the appellant's employability but the ministry must also look at the whole evidence, not only at that one medical report. For instance and as mentioned above, the evidence showed there were no changes in the health condition of the appellant and the GP's report is consistent with that.

With the benefit of having more information from the appellant that corroborates the information already in the ministry's file, the panel finds that the evidence provided by the appellant is consistent with the 3 factors mentioned above and considered by the ministry to comply with the definition of "precludes" in the legislation. An income of \$60/month or even \$575/month is certainly an indication of a sporadic employment and the appellant indicates that this is a job situation where the employer is bending the rules to help one of its long time employee to cope with her medical condition and have an opportunity to interact not only with her co-workers but also with the public when she is at the cash register. Consequently, the panel finds the ministry's opinion determining that the appellant did not demonstrate that her medical conditions present a barrier that precludes her from searching for, accepting or continuing in employment, was unreasonable.

Based on the foregoing rationale, the panel finds the ministry's decision was not reasonably supported by the evidence and rescinds the decision. Therefore, the ministry's decision is overturned in favour of the appellant.