

PART C – Decision under Appeal

The decision under appeal is the reconsideration decision of the Ministry of Social Development and Social Innovation (“the ministry”) dated 26 November 2015 that held that the appellant was not eligible for qualification as a person with persistent multiple barriers to employment (PPMB). The ministry determined that the appellant’s employability screen score (ESS) was less than 15 and therefore assessed his PPMB eligibility under sections 2(2) and 2(4) of the Employment and Assistance Regulation (EAR). The ministry found that the appellant met the requirements of sections 2(2) and 2(4)(a). However, the ministry was not satisfied that the information provided established that the appellant met the criterion set out in section 2(4)(b) of the EAR, that to qualify for PPMB a person must have a medical condition, other than an addiction, that in the opinion of the minister is a barrier that precludes the person from searching for, accepting or continuing in employment.

PART D – Relevant Legislation

Employment and Assistance Regulation (EAR), section 2.

PART E – Summary of Facts

The evidence before the ministry at reconsideration included the following:

1. The appellant's Employability Screen, showing a score of 6.
2. Medical Report – PPMB, completed by a general practitioner (GP), dated 12 August 2015, who indicates that she has known the appellant for less than 6 months. The GP provides the following information:
 - Primary medical condition: anxiety disorder, with onset 1999.
 - Treatment: [Anti-anxiety medication]; outcome: some early benefit. Cognitive behavioral therapy; outcome: has not yet started.
 - How long has this condition existed? 16 years.
 - Prognosis: expected duration of medical condition – 2 years or more.
 - The medical condition is not episodic.
 - Restrictions: "Significant difficulty in social settings; easily overwhelmed."
3. The appellant's Request for Reconsideration dated 11 November 2015. Under Reasons, the appellant writes that he can barely be in public with strangers without having panic attacks. Going out looking for employment at this time does not help the management of his conditions. PPMB can help him get out of the 10+ year pattern of homelessness and depression and give him freedom and tools to get into normal decent living conditions. The appellant also took issue with some of the individual scores in his ESS. [Panel note: at reconsideration, the ministry stated that assuming his statements were accurate and that the answers on his ESS are adjusted to reflect the changes, his score would have still been less than 15.]

In his Notice of Appeal, dated 11 December 2015, the appellant writes under Reasons for Appeal: "I can barely get out of my house with my stress."

Before the hearing, the appellant submitted a letter dated 07 January 2016 from a nurse practitioner (NP) in support of the appellant's appeal. The NP writes that she first met the appellant in January 2014 at [a mental health emergency shelter/supportive housing facility] where she provides primary health care services as an NP. She writes:

"[The appellant] presented with complaints of general anxiety, trouble sleeping often waking angry and anxious, an inability to concentrate and focus, low energy and feelings of depression and low mood.....

He is diagnosed with generalized anxiety disorder – compounded by a history of Attention Deficit Hyperactivity Disorder (ADHD) and components of Post-Traumatic Stress Disorder (PTSD). He continually scores in the severe range in the GAD-7."

The NP writes that the appellant continues to be a client. Over the past year as the appellant settled into the supportive housing environment at the mental health emergency shelter, a more complete picture has emerged. She goes on to write:

[Redacted]

“ [The appellant] has experienced short periods of employment. However the difficulties he experiences adapting to changing circumstances and coping with the introduction of additional stressors results in overwhelm; this, coupled with trouble concentrating and focusing and the limited ability to problem solve make it difficult to maintain employment.

The appellant attempted [an employment program]. However he soon left the program. He experiences difficulty maintaining structure and schedule, and in making and keeping appointments. He has trouble concentrating, quickly feeling overwhelmed when thinking of all the things he has to do, his mind races, he feels that it's too much, and he runs away from the situation. He then worries, over analyzing his behaviour creating frustration and further heightening his anxiety.

Presently, the appellant is on [an anti-anxiety medication]. Support is key to the success he has experienced. With the support and encouragement of the [mental health emergency shelter] support staff and myself, he is engaging in [a mental health self-help] program. He is living in a supportive, transitional housing community.... and continues to benefit from the ongoing support from outreach workers, shelter staff and myself.

[The appellant] shows strong technical skill with [type of work]. However, he requires a supportive environment and long-term planning in order to be gainfully employed with any success. For example, with support, guidance and encouragement of staff, he has been successful (in the short term) in [type of work] on a fee for service basis for people with whom he has an ongoing relationship and in whom he has learned to trust.”

At the hearing, the appellant provided background to his present circumstances, explaining that his mental health issues began with a traumatic accident 16 years ago when he was a teenager. He had spent some time in a psychiatric hospital and was homeless and without work for many years. He feels fortunate that he was able to obtain and maintain a home in the supportive housing environment at [the mental health emergency shelter/supportive housing facility] where he has lived for the past year. There, he feels that he is receiving the support and treatment he needs to eventually move on and become gainfully employed. He described how his condition has improved, stating that a year ago he would not have been able to participate in something like the hearing without becoming very agitated, ending up screaming and yelling. One change he noted is that he now has the ability to ask for help.

The appellant's advocate, who is an outreach worker at the facility, described the appellant's treatment program, including his medication regime and his participation in a distant-learning life-skills program, noting the progress the appellant has made compared to a year ago while still needing to overcome the restrictions described in the NP's letter.

The ministry stood by its position at reconsideration.

Admissibility of new information

The ministry did not object to the new information in the NP's letter of 07 January 2016.

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Notwithstanding the ministry's position, the panel must be guided by section 22(4) of the *Employment and Assistance Act*, which states:

- 22(4) In a hearing referred to in subsection (3), a panel may admit as evidence only
- (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 paragraph (a).

Section 22(4) is designed to strike a balance between a pure appeal on the record of the ministry decision and a hearing *de novo* (a completely new hearing). It contemplates that while a party may wish to submit additional evidence to the panel on the appeal, the panel is only empowered to admit (i.e. take into account in making its decision) "oral or written testimony in support of" the record of the ministry decision; it provides appellants with a limited opportunity to augment their evidence on appeal but it does not provide them with a hearing *de novo*, as the panel is tasked with assessing the reasonableness of the ministry's decision. If the additional evidence substantiates or corroborates the information and records before the minister at the reconsideration stage, the evidence should be admitted; if it does not, then it does not meet the test of admissibility under s. 22(4)(b) of the *Employment and Assistance Act* and should not be admitted.

The panel finds that the information regarding the appellant's diagnoses and restrictions set out in the NP's letter is not in support of the information before the ministry at reconsideration. The NP's information that ADHD and components of PTSD compound the appellant's anxiety disorder was not before the ministry. The information before the ministry regarding his restrictions was the GP's somewhat vague description: "Significant difficulty in social settings; easily overwhelmed" and the appellant's statement in his Request for Reconsideration that he can barely be in public with strangers without having panic attacks. By comparison, the NP wrote that:

- "the difficulties he experiences adapting to changing circumstances and coping with the introduction of additional stressors results in overwhelm; this, coupled with trouble concentrating and focusing and the limited ability to problem solve make it difficult to maintain employment" and
- "He experiences difficulty maintaining structure and schedule, and in making and keeping appointments. He has trouble concentrating, quickly feeling overwhelmed when thinking of all the things he has to do, his mind races, he feels that it's too much, and he runs away from the situation. He then worries, over analyzing his behaviour creating frustration and further heightening his anxiety."

The panel finds that these statements cannot be said to corroborate or substantiate the information before the ministry, as they go beyond, or introduce new details and restrictions different from, that which was provided to the ministry at reconsideration. Pursuant to section 22(4) of the EAR, the panel therefore does not admit the NP's letter as evidence.

The panel accepts the testimony of the appellant and his advocate as background to the appellant's PPMB application.

PART F – Reasons for Panel Decision

The issue in this appeal is whether the ministry was reasonable in determining that the appellant did not qualify for PPMB because he did not meet the criterion set out in section 2(4)(b) of the EAR. More specifically, the issue is whether the ministry's decision, which held that the information provided did not establish that the appellant has a medical condition, other than an addiction, that in the opinion of the minister, is a barrier that precludes him from searching for, accepting or continuing in employment, is reasonably supported by the evidence or is a reasonable application of the legislation in the circumstances of the appellant.

The relevant legislation is from the EAR:

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*[not applicable to this appeal]*
- (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.

The position of the ministry, as set out in the reconsideration decision, is that while it accepts that the appellant has a medical condition that affects his employability, the restrictions caused by his medical condition do not preclude his ability to search for, accept or continue in employment and therefore the ministry is unable to approve his application for PPMB.

The appellant's position is that the evidence clearly demonstrates that his anxiety disorder precludes him from employment and that the ministry was unreasonable in finding him not eligible for PPMB qualification.

Panel decision

In the reconsideration decision, the ministry noted the restrictions as reported by the GP: “Significant difficulty in social settings; easily overwhelmed” and acknowledged that his medical condition affects his employability. The ministry then determined that in its opinion the appellant’s medical condition does not preclude his ability to search for, accept or continue in employment. The panel notes that in reaching this opinion, the ministry provided no reasons or explanation.

At issue is the PPMB criterion set out in section 2(4)(b) of the EAR that the appellant has a medical condition, confirmed by a medical practitioner, that in the opinion of the minister, precludes him from searching for, accepting or continuing in employment. The panel notes that 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 cited in the reconsideration decision -- acknowledges a less stringent interpretation of “preclude” by adding the proviso that “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 did not canvas the possibility that this broader interpretation of this criterion applied to the appellant. The GP has described the appellant’s restrictions as: “Significant difficulty in social settings; easily overwhelmed.” Considering the context that this was provided in a Medical Report – PPMB, the panel considers it reasonable to infer that the “social settings” includes personal interactions typical of a work environment. In the panel’s view, considering that any type of work involves some personal interaction and daily stresses, these restrictions describe a person who would be able to work only in a supported or sheltered-type environment.

The panel therefore finds that the ministry was not reasonable in determining that in its opinion the appellant’s medical condition does not preclude (as interpreted with the “except in a supported or sheltered-type work environment” proviso) his ability to search for, accept or continue in employment.

Based on the foregoing, the panel finds that the ministry decision to deny the appellant qualification as PPMB was not reasonably supported by the evidence. The panel therefore rescinds the ministry’s decision.