

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (“the Ministry”) reconsideration decision dated November 5, 2015 in which the Ministry found that the Appellant does not qualify 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 applicable section for assessment of the PPMB application is subsection 2(4) because the Appellant’s Employability Screen score is 14. The Ministry also found that while the Appellant met the criteria under subsections 2(2) and 2(4)(a), she 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 included the following documents:

1. A Request for Reconsideration signed by the Appellant on October 24, 2015 in which she stated she has limited use of her right hand due to a contusion, and the plastic surgery she had in 2014 did not help. Further, the plastic surgery she had on her face will take at least five years to completely heal and causes her severe anxiety. She also has memory loss from the head injury that affected her face, and she knocked out her front tooth and has dentures that do not fit well and are constantly loose. She takes medications for diabetes, high blood pressure and anxiety, and she has arthritis in her left hand which leaves her in constant pain and makes it hard to use that hand for everyday tasks.

2. An x-ray report for examination date March 3, 2015 “left wrist”, describing a shortened distal ulna and small bone erosions. No other abnormality is noted and an early erosive arthritis is suspected.

3. Four *Medical Reports – Employability* completed by the Appellant’s family physician and containing the following information. In all of these reports, the medical condition was described as “severe”, and the expected duration is more than two years. In all of the reports, as well, the conditions were described as not episodic in nature but also with “continuously persistent” episodes that are likely to recur with “persistent frequency” due to “persistent problems” and “persistent hand pain”.

(a) September 12, 2014:

- Primary medical condition: "right palm neuralgia", date of onset, May 2014.
- Secondary medical condition: "severe anxiety", date of onset, 2009.
- Prognosis: "The patient is unable to work for more than 2 years".
- Restrictions specific to the medical conditions are described as, "can't use right hand, can't concentrate and poor memory".

(b) April 8, 2014:

- Primary medical condition: "right hand contracture", date of onset, 2011.
- Secondary medical condition: "depression and anxiety", date of onset, 2012.
- The medical conditions are described as “severe”.
- Restrictions specific to the medical conditions are described as, "can't use left [*sic*] hand, anxiety and crying spells, withdrawn".

(c) June 5, 2012:

- Primary medical condition: "right face deformed", date of onset, 2012.
- Secondary medical condition: "right hand contracture", date of onset, 2008.
- Restrictions specific to the medical conditions are described as, "depressed, withdrawal, and anxiety plus pain of right hand".

(d) May 6, 2010:

- Primary medical condition: "right hand contracture and pain", date of onset, 2008.
- Secondary medical condition: "severe hypertension", date of onset, 2008.
- The medical conditions are described as “severe”.
- Restrictions specific to the medical conditions are described as, "right hand, palm contraction results in pain".

4. A *Medical Report – Persons with Persistent Multiple Barriers* (“PPMB medical report”) signed by the Appellant’s family physician on November 10, 2014, that stated the following:

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- Primary medical condition: "right palm contractured - pain", date of onset, May 2014.
 - Secondary medical condition: "severe anxiety and depression", date of onset 2009.
 - Treatment: "right palm operated", May 2014, "worse pain". Depression and anxiety: medications (listed) with the comment, "not helpful so far".
 - The conditions have existed for more than five years and are expected to continue for two years or more.
 - Additional comments, "none".
 - The physician checked that the medical conditions are not episodic in nature and he also indicated that episodes are "persistent" and likely to occur "anytime".
 - Restrictions specific to the noted medical conditions: "cramps of right hand and arms, anxious and depressed, can't use right hand and can't sleep."
 - Additional information that supports the severity and restrictions of the medical conditions: "persistent problems".

5. The Appellant's undated *Employability Screen*, indicating a total score of 14. Points were awarded for being on income assistance for more than 12 months in the last 3 years, having less than Grade 10 education, and having no or very limited work experience.

6. The Ministry's PPMB denial letters of September 22 and November 5, 2015, informing the Appellant that she does not qualify for the PPMB category, will be expected to look for employment. The Ministry will work with her to develop an Employment Plan.

7. Information from the Ministry reconsideration record stating the Ministry policy regarding *Clarification of "Precludes"*.

Additional submissions

With the consent of both parties, the appeal proceeded by way of a written hearing pursuant to section 22(3)(b) of the *Employment and Assistance Act*. In an e-mail to the Tribunal, the Ministry stated that its submission for the appeal will be the reconsideration summary.

In her Notice of Appeal dated November 19, 2015, the Appellant further described her medical conditions stating that she has high blood pressure (not low, as noted by the Ministry). She stated that the contusion on her right hand will get worse to the point where she cannot use that hand, and she also has constant pain from arthritis in her left hand.

The panel finds that the Appellant's submission substantiates the medical reports that reference her high blood pressure and problems with both of her hands. The panel admits her submission 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.

PART F – Reasons for Panel Decision

The issue in this appeal is whether the Ministry reconsideration decision of November 5, 2015 which found that the Appellant does not qualify for the PPMB qualification pursuant to section 2 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 Ministry found that the applicable section for assessment of the PPMB application is subsection 2(4) because the Appellant's Employability Screen score is 14. The Ministry also found that while the Appellant met the criteria under subsections 2(2) and 2(4)(a), she 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 that are 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, the criteria in EAR subsection 2(2) must be satisfied. The Ministry accepted that the criteria in subsection 2(2) are met, noting that the Appellant has been on income assistance for at least twelve of the immediately preceding fifteen 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. The Ministry determined that the Appellant's Screen score is 14, and therefore found that the applicable section for assessment of the PPMB application is subsection 2(4) [rather than 2(3)]. The panel notes that the legislation states that the requirements of subsection 2(3) apply "if (a) the minister (i) has determined that the person scores at least 15 on the employability screen set out in Schedule E". The Appellant does not dispute her score of 14 on the Screen and the panel finds that the Ministry reasonably determined that the applicable section for assessment of the PPMB application is EAR subsection 2(4).

Subsection 2(4)

Regarding the requirements in EAR subsection 2(4), the Ministry accepted that subsection 2(4)(a)(i) was met because the physician has confirmed the onset and duration of the Appellant's medical conditions [as continuing for at least one year and likely to continue for at least two more years]. The panel notes that the Ministry made a typographical error in the final paragraph of the reconsideration decision, stating that subsection 2(4)(a) was not met when it was already accepted that the criteria for duration of the medical condition were met.

Regarding the Ministry's determination that subsection 2(4)(b) ["precludes" employment] is not met, the panel provides the following analysis:

The Appellant submits that she requires PPMB assistance because she has diabetes, high blood pressure and limited use of her right hand "that will only get worse". She argued that she suffers "constant pain" from arthritis in her left hand which makes it hard to do everyday tasks. As well, she has severe anxiety, memory loss, and dental problems, from the injury to her face.

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, or 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 referenced policy that guides its assessment of whether the client's employment is minimal or insignificant as to effectively preclude employment. The panel notes that there is no evidence that the Appellant is currently working and the Appellant did not make any arguments on that basis.

The Ministry noted that it has some discretion in determining whether the medical conditions are a barrier that precludes the person's ability to search for, accept, or continue in employment; however, the Ministry relies on information from medical practitioners in making the determination, in particular, descriptions of an applicant's restrictions specific to their medical condition. The Ministry submits that such explanation is "helpful in assessing why a client is unable to work and what type of work a client can or cannot do." The Ministry cites the following arguments for not having the opinion that the Appellant's medical conditions serve as a barrier that precludes her from searching for, accepting or continuing in employment:

- In the PMMB medical report, the physician states that the Appellant cannot use her right hand but does not indicate any restrictions with the use of her left hand.
- In the PPMB medical report, the physician does not describe the nature of restrictions related to anxiety and depression.
- The conditions/symptoms of memory loss, diabetes, and arthritic pain in her left hand (as reported by the Appellant) are not described by the physician in the PPMB medical report. Further, the physician does not speak to an accident that resulted in damage to her face and memory loss. The Appellant, as well, does not describe her employment restrictions relating to anxiety, memory loss, diabetes, and left hand pain.
- The x-ray report does not describe any restrictions resulting from "suspected" arthritis in the left wrist, and additional information from her physician was not provided for the reconsideration.
- None of the medical reports confirm whether the Appellant is right or left handed, and it is therefore difficult to establish that she is precluded from employment due to limitations with her right hand.
- The information in the original PPMB application and the Request for Reconsideration do not establish that the Appellant's medical conditions preclude her from searching for, accepting, or continuing in all types of employment, including light physical labour, sedentary work, or a work program that will help her overcome her barriers to 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.

Regarding the Appellant's hand problems, the panel finds as fact that the medical reports provided (for the reconsideration and subsequent appeal), indicate that the Appellant has a condition in both her right and left hands. The PPMB and Employability medical reports consistently describe "contracture" or "neuralgia" with her right palm or hand, while the x-ray report describes "small bone erosions" in her left wrist. The physician's evidence is that she cannot use her right hand and the Appellant's evidence is the pain in her left hand is getting worse to the point where she will not be able to use that hand. However, there is no evidence that she cannot use her left hand at the present time.

Regardless of whether the Appellant is right or left-handed, the panel finds that the Ministry reasonably determined that the information regarding her hand problems does not tie in with whether

she is precluded from all forms of employment. While the physician describes her right wrist problems as persistent and severe, he provides no corresponding description of the level of pain in her left hand, and he does not indicate whether she can do any work activities with that hand or any work activities that do not require the frequent use of her hands. The panel would not reasonably expect an x-ray report to contain that level of description; however, as noted by the Ministry no further medical reports were provided for the reconsideration (and no further medical information was submitted for the appeal despite the Appellant's submission that her left hand is getting worse).

The panel notes that only the x-ray report contains recent information and all of the other medical reports are from 2014 or earlier. Typically, outdated medical information will affect the weight that the panel accords it. However, the medical reports from 2010 to 2014 contain the only information that is available regarding restrictions, excepting the Appellant's statement on reconsideration that the "constant pain" in her left hand makes it difficult to use that hand for "everyday tasks". Further, the Ministry indicates that all of the reports, from 2010 to 2014, were reviewed for the reconsideration.

In the 2014 Employability medical report, the physician wrote that "patient is unable to work for more than 2 years" but did not specify whether this limitation applies to all types of work or whether the Appellant is capable of doing any of the activities specified in EAR subsection 2(4)(b) which also include "searching for" and "accepting" employment. Regarding the Appellant's diabetes and high blood pressure, only the latter is referenced by the physician [May 2010 Employability medical report] and there is no information as to how these conditions preclude the Appellant from searching for, accepting, or continuing in employment, especially given her evidence that she takes medication for the purpose of controlling these conditions.

Regarding the Appellant's depression/anxiety and memory loss, while the Ministry submitted that the physician does not make reference to the Appellant's facial deformity or restrictions regarding her reported memory loss, the panel notes that the physician does specifically cite "poor memory" as a restriction [September 2014 Employability medical report] and he also referenced "right face deformed" as the primary medical condition in the June 2012 Employability report. The physician's information consistently cites severe anxiety and describes mental restrictions including:

- "can't sleep" and medications for depression and anxiety "not helpful so far" [PPMB medical report]
- "can't concentrate and poor memory" [September 2014 Employability report]
- "depressed, withdrawal, and anxiety" [June 2012 Employability report]
- "anxiety and crying spells, withdrawn" [April 2014 Employability report].

However, as with the Appellant's hand problems, none of the restrictions are tied in with how her conditions preclude her from searching for, accepting or continuing in any type of employment. For example, there is no information about whether she can search for or work in a part-time light duty job that does not require significant memory, concentration, or social interaction. The panel therefore finds that the Ministry reasonably determined that the Appellant's medical condition does not preclude her from searching for, accepting, or continuing in all types of employment. The panel further finds that that the Ministry reasonably held the opinion under EAR subsection 2(4)(b) that the Appellant's medical conditions do not meet the criteria of "precludes" employment.

Conclusion

The panel finds that the Ministry decision that found the Appellant does not qualify 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.