

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (ministry) reconsideration decision dated December 29, 2015 which held that the appellant did not meet all of the applicable statutory requirements of Section 2 of the *Employment and Assistance Regulation* (EAR) to qualify as a person with persistent multiple barriers to employment (PPMB). The ministry was satisfied that the evidence establishes that the appellant has a medical condition, other than an addiction, that is confirmed by a medical practitioner and that, in the opinion of the medical practitioner, has continued for at least 1 year and is likely to continue for at least 2 more years. In addition, the ministry found that EAR subsection 2(3) is not applicable to the appellant on the basis of her score on the Employability Screen and her PPMB application therefore needs to be assessed under subsection 2(4).

However, the ministry was not satisfied that the medical condition is a barrier that precludes the appellant from searching for, accepting, or continuing in employment, pursuant to Section 2(4)(b) of the EAR.

PART D – Relevant Legislation

Employment and Assistance Regulation (EAR), Section 2

PART E – Summary of Facts

The evidence before the ministry at the time of the reconsideration decision included:

- 1) Medical Report- Persons with Persistent Multiple Barriers (PPMB) dated August 24, 2015, in which the medical practitioner indicated, in part, that:
 - the appellant's primary medical condition is L5-S1 discectomy with date of onset of January 3, 2004,
 - her secondary medical condition is recurrent pain and numbness of right hip, leg and foot;
 - the treatment described is exercise and heat therapy which provide temporary relief;
 - this condition has existed for 1 year and 9 months; the prognosis sets out that the expected duration of the medical condition(s) is 2 years or more.
 - the physician indicated that the medical condition is episodic in nature and the episodes have occurred since December 2013.
 - when asked to describe the nature of any restrictions specific to the medical conditions, the physician wrote "unable to sit more than 10 minutes."
- 2) Employability Screen print-out for the appellant, noting a total score of "13." Points were awarded for being on income assistance for more than 12 months in the last 3 years, having post-secondary program education, having under 3 months work experience over the last 3 years, and English as a second language; and,
- 3) Request for Reconsideration dated November 19, 2015, with attached letters from the appellant dated December 15, 2015, and from the medical practitioner dated December 10, 2015 in which the medical practitioner wrote that:
 - The appellant has recurring pain affecting her back, right hip, leg or foot on a daily but not continuous basis.
 - The appellant needs to take frequent rest breaks to ease the pain.
 - Asked if the appellant's health-related restrictions are severe enough to preclude her from searching for, accepting or continuing in employment in the foreseeable future: "(f)requency of pain will reduce with physiotherapy or massage therapy and regular exercise. She is not to lift any weight greater than 10 lbs. at present."

In her Request for Reconsideration, the appellant wrote that:

- When sitting, walking, standing, lying, or lifting, she has nerve compression symptoms.
- She rarely sits down and, if she has to, she only sits for a short time or she could not endure the pain or the numbness in her right leg and foot or she would limp.
- When she walks, she suffers pain and/or numbness in her right hip, leg and foot.
- She cannot stand and walk for a long time or the symptoms are aggravated.
- She cannot lie on her side since there is referred pain in her right hip and foot.
- She cannot bear a heavy burden.
- She has to spend much time lying down every day or alternately stand, walk and lie so the symptoms can be alleviated.
- Although she does the exercises every day, it only provides temporary relief.
- She can only take care of her daily living activities and must be very careful in case this ability is lost.
- Due to these medical limitations, she is not able to work in the foreseeable future.

Additional Information

In her Notice of Appeal dated January 6, 2016, the appellant stated that she disagrees with the

ministry's reconsideration decision.

At the hearing, the appellant stated that:

- As she wrote in her statement, sitting and walking and all kinds of movement cause her to feel nerve compression symptoms on part of her body.
- On better days, she can sit 10 to 30 minutes. On bad days, she cannot even sit.
- She feels numbness on her leg and feet and needs to lie on the bed to get relief.
- She never sits at her computer and only stands. She used to be able to sit for an hour but now it is a maximum of 30 minutes.
- She cannot carry a 4-liter jug of milk without squatting down.
- Even searching for a job is like a full-time job because it involves being at the computer for 4 to 6 hours per day, sending out hundreds of resumes and going to job interviews.
- Attending a training program usually involves sitting.
- She will often experience numbness in her leg for 24 hours after sitting or walking for long periods and this affects her whole leg.
- Her doctor said that the pain will reduce with physiotherapy and massage therapy and regular exercise, and walking is her major regular exercise since it is best for chronic back pain. She walks every day since she goes shopping every day. She can only do some of the other recommended exercises due to pain. A physiotherapist told her not to continue with an exercise if she experienced pain. She could not continue with physiotherapy because it is not affordable.
- She also applies heat and this provides temporary relief. She tried massage therapy but found it was not suitable to her since she is very thin and has no muscle and she had pain for 3 days after massage.
- She moved in October 2014 and her condition got worse after she had to pack and unpack boxes with no help.
- She is starting to get some symptoms on her left side now too.
- She has poor liver function because the 4 indicators are often abnormal on a blood test. She also has osteoporosis and this makes her very slow to recover.
- She last worked full-time in a data-processing job in the spring of 2014 but failed the performance assessment because she was taking too many breaks and her production was too low.

The ministry relied on its reconsideration decision, as summarized at the hearing. The ministry clarified at the hearing that the employment programs perform assessments to determine the type of activities an applicant is capable of to progress towards employment, even part-time, and some employers support ergonomic equipment.

Admissibility of Additional Information

The panel considered most of the oral testimony on behalf of the appellant as information that corroborates the extent of the appellant's impairment as diagnosed in the Medical Report, which was before the ministry at reconsideration. Therefore, the panel admitted this additional information as being in support of information and records that were before the ministry at the time of the reconsideration, in accordance with Section 22(4)(b) of the *Employment and Assistance Act*. The panel did not admit the information from the appellant regarding her additional medical conditions of osteoporosis and poor liver function as this information was not in support of the information and records before the ministry at reconsideration in terms of the diagnosis relating to her discectomy.

PART F – Reasons for Panel Decision

The issue on the appeal is whether the ministry reasonably concluded that the appellant did not meet all of the applicable statutory requirements of Section 2 of the *Employment and Assistance Regulation* (EAR) to qualify as a person with persistent multiple barriers to employment (PPMB); in particular, the ministry was not satisfied that the appellant's medical condition is a barrier that precludes her from searching for, accepting, or continuing in employment, pursuant to Section 2(4)(b) of the EAR.

The criteria for being designated as a PPMB are set out in Section 2 of the EAR as follows:

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
 - (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.

Under Section 2(2), the person must have been the recipient of one or more of a number of types of assistance for at least 12 of the immediately preceding 15 calendar months and also meet the requirements set out in subsection 2(3) or subsection 2(4). If the person has scored at least 15 on the employability screen as set out in Schedule E to the EAR, then the PPMB application must be assessed under Section 2(3). If the person has scored less than 15 on the employability screen as set out in Schedule E to the EAR, then Section 2(4) applies to the assessment of the application. Under Section 2(4) of the EAR, the person must have a medical condition, other than an addiction, that has been confirmed by a medical practitioner and that, in the opinion of the medical practitioner, has continued for at least one year and is likely to continue for at least 2 more years, or has occurred frequently in the past year, and is likely to continue for at least 2 more years and, in the opinion of the minister, is a barrier that precludes the person from searching for, accepting, or continuing in employment.

Ministry's position

The ministry's position is that the appellant has been in receipt of income assistance for more than 12 of the preceding 15 months and, therefore, meets the requirements of Section 2(2) of the EAR. However, the ministry argued that the evidence has not established that the appellant has met all the remaining applicable criteria of Section 2. As the appellant scored 13 on the employability screen, she must meet the requirements of Section 2(4) of the EAR. The ministry acknowledged that the appellant has a medical condition, other than an addiction, that has been confirmed by a medical practitioner and that, in the opinion of the medical practitioner, has continued for at least 1 year and is likely to continue for at least 2 more years. However, the ministry argued that the evidence does not establish that the medical condition is a barrier that precludes the appellant from searching for, accepting, or continuing in employment.

The ministry submitted that a medical condition is considered to preclude a recipient 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 activities for any length of time, except in a supported or sheltered-type work environment. The ministry argued that while it is accepted that the appellant has medical conditions that affect her employability, given the doctor's response to the questions regarding restrictions associated with her medical condition, that she cannot sit for more than 10 minutes and that she cannot lift more than 10 lbs. and that the frequency of her pain will decrease with massage and physiotherapy and regular exercise, the ministry is not satisfied that the restrictions caused by her condition preclude her from searching for, accepting, or continuing all employment, such as part-time work or participating in employment-related programs.

Appellant's position

The appellant's position is that there is sufficient evidence that the pain or the numbness in her right leg and foot is a barrier that precludes her from searching for, accepting, or continuing in employment. In her Request for Reconsideration, the appellant argued that when sitting, walking, standing, lying, or lifting, she has nerve compression symptoms. The appellant argued that she rarely sits down and, if she has to, she only sits for a short time or she could not endure the pain or the numbness in her right leg and foot or she would limp. The appellant argued that when she walks, she suffers pain and/or numbness in her right hip, leg and foot. The appellant argued that although she does the exercises every day and she applies heat therapy, it only provides temporary relief. The appellant argued that she cannot search for a job or attend a training program because both of these require sitting for long periods, which she cannot do.

Panel decision

The panel notes that it is not disputed that the appellant's physician has provided a medical opinion, in the Medical Report dated August 24, 2015, that the appellant is diagnosed with a primary medical condition other than an addiction, namely L5-S1 discectomy in January 2004, and with a secondary medical condition of recurrent pain and numbness of right hip, leg and foot. It is also not disputed that the appellant's medical condition has, in the opinion of the medical practitioner, continued for at least 1 year and is likely to continue for at least 2 more years.

Regarding the ministry's assessment of the appellant's PPMB application under EAR subsection 2(3) as opposed to subsection 2(4), there was no evidence to show that the ministry made any error in calculating the Screen score of 13. The panel therefore finds that in the circumstances of the appellant, the ministry reasonably determined that an assessment of PPMB eligibility should be made under subsections 2(1), 2(2) and 2(4) of the EAR.

Regarding whether the ministry reasonably determined that the criteria in EAR subsection 2(4) were not met, the panel notes that in describing the nature of restrictions specific to the appellant's medical condition, the physician wrote in the PPMB Medical Report: "unable to sit more than 10 minutes" and also that the medical condition is episodic in nature. In the December 10, 2015 letter, the medical practitioner provided more information that the appellant has recurring pain affecting her back, right hip, leg or foot on a daily but not continuous basis and that the appellant needs to take frequent rest breaks to ease the pain. Although the appellant stated that when she last worked in the spring of 2014 she failed the performance assessment because she was taking too many breaks, the appellant also stated that this was full-time work where she was required to type at a computer. When specifically asked to clarify if the appellant's health-related restrictions are severe enough to preclude her from searching for, accepting or continuing in employment in the foreseeable future, the medical practitioner wrote in the December 10, 2015 letter that: "...frequency of pain will reduce with physiotherapy or massage therapy and regular exercise. She is not to lift any weight greater than 10 lbs. at present." At the hearing, the appellant stated that physiotherapy is not affordable for her, massage therapy is not suitable for her as it caused pain for 3 days afterwards, but she walks every day since walking is the best form of exercise for chronic back pain and she shops every day.

The appellant also described both bad days when she cannot sit at all or only up to 10 minutes and good days when she can sit up to 30 minutes. The ministry clarified at the hearing that the employment programs perform assessments to determine the type of activities an applicant is capable of to progress towards some form of employment, possibly part-time, and some employers support ergonomic equipment. The panel finds that the ministry reasonably relied on the information provided by the medical practitioner in the Medical Report and the additional letter dated December 10, 2015 and reasonably concluded that the evidence does not demonstrate that the appellant's medical condition is a barrier that precludes her from searching for, accepting or continuing in employment, pursuant to the requirement in Section 2(4)(b) of the EAR.

Conclusion

The panel finds that the ministry's reconsideration decision was reasonably supported by the evidence and confirms the decision pursuant to Section 24(1)(a) and 24(2)(a) of the *Employment and Assistance Act*.