

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (ministry) reconsideration decision dated August 29, 2016 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 renew her status 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 appellant did not attend the hearing. After confirming that the appellant was notified of the date and time of the hearing, the hearing proceeded in the absence of the appellant as allowed under section 86(b) of the Employment and Assistance Regulation.

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

- 1) Medical Report- Persons with Persistent Multiple Barriers (PPMB) dated May 3, 2016, in which the medical practitioner indicated, in part, that:
 - the appellant's primary medical condition is chronic low back pain (LBP) with date of onset of 2004;
 - the appellant's secondary medical condition is "anxiety and depression- more than 10 years" and "learning disability;"
 - the treatment described "previous surgery 2004" and no outcome provided;
 - this condition has existed "since 2004"; 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 "permanent" and not episodic in nature;
 - when asked to describe the nature of any restrictions specific to the medical conditions, the physician wrote "avoid heavy lifting and prolonged labour."
- 2) Employability Screen print-out for the appellant, noting a total score of "12." Points were assigned for being on income assistance for more than 12 months in the last 3 years, having a lower level of education and none or very limited work experience; and,
- 3) Request for Reconsideration dated August 25, 2016, with letters dated August 25, 2016 from the appellant and from the physician who completed the Medical Report.

In her Request for Reconsideration letter, the appellant wrote that:

- She is only able to work "for a couple of hours a day."
- It is necessary that she still be allowed to earn \$500 per month.
- She still and will always suffers from consistent nerve pain, arthritis, fatigue, and muscle weakness.
- She still has depression and anxiety and she also has a learning disability and BPD [Borderline Personality Disorder].

In her letter dated August 25, 2016, the physician who completed the Medical Report wrote that:

- The appellant has multiple barriers to employment in addition to her chronic back pain.
- She had surgery on her back in 2004 for prolapsed disc but within a year or so her back pain recurred and she has been unable to do anything very physical without flaring those symptoms, despite using anti-inflammatory medication and pain medication. She had to stop the anti-inflammatory medication because it caused stomach pain due to gastritis.
- In addition to the back pain, the appellant also has chronic pain from fibromyalgia, making employment at both physical and non-physical work unlikely.
- The appellant also has a learning disorder and has attempted training programs in the past which have been unsuccessful in trying to upgrade her skills to make her more employable.
- The appellant also has a serious anxiety problem including panic attacks and chronic anxiety despite taking medication.

Additional Information

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In her undated Notice of Appeal received by the tribunal on September 13, 2016, the appellant stated that she disagrees with the ministry's reconsideration decision and wrote that:

- She can only dust the kitchen, vacuum, garbage.
- Further diagnosis needs to be done.
- Updated medical information will be faxed when ready re: BPD, arthritis (knees and shoulders), fibromyalgia.

The ministry relied on its reconsideration decision, as summarized at the hearing. The ministry stated at the hearing that no further information was received by the ministry from the appellant, but she is able to re-apply if she has updated medical information, as referred to in her Notice of Appeal.

Admissibility of Additional Information

The ministry did not raise an objection to the admissibility of the appellant's information in her Notice of Appeal and the panel considered the information as corroborating the extent of the appellant's impairment as referenced by the appellant in her Request for Reconsideration, which was before the ministry at reconsideration. Therefore, the panel admitted this additional written 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*.

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, as required under 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 12 on the employability screen, she must meet the requirements of section 2(4) of the EAR to qualify for ongoing designation as a PPMB. 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, as required under section 2(4) of the EAR.

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. As set out in the reconsideration decision, the ministry noted that when determining whether a person is employed in a supported or sheltered-type work environment, the factors considered by the ministry are if the focus of the work is on socialization where the activities are highly supported or supervised; if the recipient is limited by the medical condition to very minimal hours on an infrequent basis; if the recipient's involvement is very sporadic or casual; or the work is more likely to be considered volunteering and compensation is minimal.

The ministry argued that while it is accepted that the appellant has medical conditions that affect her employability, the doctor's response to the questions regarding restrictions associated with the appellant's medical condition, that she needs to "...avoid heavy lifting and prolonged labour", was not sufficient evidence that the restrictions caused by her condition preclude her from searching for, accepting, or continuing in employment. The ministry wrote that while the physician indicated in her letter dated August 25, 2016 that the appellant also has chronic pain from fibromyalgia "making employment at both physical or non-physical work unlikely," as well as a learning disorder, a serious anxiety problem and chronic anxiety, the evidence that the ministry obtained from the appellant's employer shows that the appellant is able to work regular part-time hours as a sub-contractor doing labour-intensive work. The ministry wrote in the reconsideration decision that the appellant has been declaring regular monthly earnings since May 2012 and the appellant's employer confirmed with the ministry that the appellant engages in project work which entails heavy maintenance such as carpet cleaning, pressure washing, and other heavy-duty maintenance. The ministry determined that the

appellant has not provided any information to indicate that her employment is in a supported or sheltered-type work environment.

Appellant's position

The appellant's position is that she is only able to work "for a couple of hours a day," that it is necessary that she still be allowed to earn \$500 per month, and she will always suffer from consistent nerve pain, arthritis, fatigue, and muscle weakness. The appellant wrote that she also has depression and anxiety and a learning disability and BPD. The physician who completed the Medical Report wrote in the letter dated August 25, 2016 that the appellant has multiple barriers to employment in addition to her chronic back pain and that her chronic pain from fibromyalgia makes employment at both physical and non-physical work unlikely.

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 May 3, 2016, that the appellant is diagnosed with a primary medical condition other than an addiction, namely LBP, which she has had since 2004, and her secondary medical condition is "anxiety and depression- more than 10 years" and "learning disability." The physician who completed the Medical Report wrote in her letter dated August 25, 2016 that, in addition to the back pain, the appellant also has chronic pain from fibromyalgia, a learning disorder, a serious anxiety problem including panic attacks and chronic anxiety despite taking medication. Although the appellant wrote in her Notice of Appeal that further diagnosis needs to be done and that updated medical information will be faxed when ready regarding her BPD, arthritis (knees and shoulders), and fibromyalgia, there was no additional medical information provided on the appeal. However, as confirmed by the ministry at the hearing, it is not disputed that the appellant's medical conditions have, in the opinion of the medical practitioner, continued for at least 1 year and are likely to continue for at least 2 more years.

Regarding the ministry's assessment of the appellant's PPMB application under EAR subsection 2(4) as opposed to subsection 2(3), there was no evidence to show that the ministry made any error in calculating the Screen score of 12. The panel therefore finds that in the circumstances of the appellant, the ministry reasonably determined that an assessment of PPMB eligibility is to 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: "...avoid heavy lifting and prolonged labour" and also that the medical condition is not episodic in nature and is "permanent." The physician added, in the letter dated August 25, 2016, that the appellant has been unable to do anything very physical without flaring symptoms of low back pain despite using pain medication, and that the appellant also has chronic pain from fibromyalgia, which makes employment at both physical and non-physical work unlikely, and a learning disorder affecting training programs, which have been unsuccessful in upgrading her skills to make her more employable. The panel notes that the appellant wrote in her Request for Reconsideration that she is only able to work "for a couple of hours a day," that it is necessary that she still be allowed to earn \$500 per month, but she did not dispute the ministry's information that she has been declaring regular monthly earnings since May 2012 and that she engages in project work which entails heavy maintenance such as carpet cleaning, pressure washing, and other heavy-duty maintenance.

While the physician wrote in the letter that the appellant has multiple barriers to employment in addition to her chronic back pain and that her chronic pain from fibromyalgia makes employment at both physical and non-physical work unlikely, the evidence shows that the appellant is employed in physical work and has been regularly employed on a part-time basis for several years.

The appellant did not provide information that she is supervised in her work, or that she works very minimal hours on an infrequent or sporadic basis, or that her compensation is minimal. The panel finds that the ministry reasonably relied on the information provided by the appellant's employer, which was not disputed by the appellant, 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*. The appellant's appeal, therefore, is not successful.