

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation's ("ministry") reconsideration decision dated May 12, 2017 in which the ministry denied the appellant the Persons with Persistent Multiple Barriers to employment ("PPMB") qualification under section 2 of the Employment and Assistance Regulation ("EAR"). The ministry found that the PPMB application could not be assessed under subsection 2(3) of the Regulation based on the appellant's score on the Employability Screen. While the ministry was satisfied that the appellant met the requirements under subsections 2(2) and 2(4)(a) of the EAR for length of time on income assistance and duration of his medical condition, in the ministry's opinion, the medical condition does not preclude him from searching for, accepting, or continuing in employment, as required by subsection 2(4)(b) of the EAR.

PART D - Legislation

Employment and Assistance Regulation - EAR - section 2

PART E – Summary of Facts

The evidence before the ministry at reconsideration included the following documents:

1. A Request for Reconsideration (“RFR”) signed by the appellant on April 12, 2017 with attached letter from an advocate indicating the appellant is applying to renew his application for PPMB and requests an extension of time to submit documents. The appellant also provided his argument which the panel will address in *Part F - Reasons*.
2. Information from the ministry’s record of decision including copies of PPMB denial letters dated May 12, 2017 and March 7, 2017. The appellant was advised of the denial decision on March 15, 2017, and on April 12, 2017 his request for an extension of time to submit documents was approved. On May 12, 2017 the ministry reviewed his RFR. The ministry’s original denial letter of March 7, 2017 advised the appellant that the lower rate of income assistance would take effect as of his May 2017 assistance cheque and the appellant will be expected to look for work with the ministry’s assistance in developing an Employment Plan.
3. A PPMB Medical Report signed by a general practitioner (“GP”) on October 26, 2016. The report contained the following information:
 - Primary medical condition: L4-S1 fusion (since 2011), and pain symptoms (since 2005).
 - Secondary medical condition: Hepatitis C and Type II diabetes.
 - Treatment and outcome: fusion “as above, pain improved but still present...Hep. C treated in 2015/ 2016”.
 - Prognosis: The condition has existed for 11 years, is expected to last 2 years or more, and is not episodic in nature.
 - Restrictions specific to the medical condition: “Unable to do physical work.”
4. An Employability Screen, indicating the appellant’s total score of 11. Points were awarded for being on income assistance for more than 12 months in the last 3 years, and having no or very limited work experience.
5. A PPMB Checklist prepared by a ministry adjudicator and dated March 7, 2017. The adjudicator checked that the appellant has been on income assistance for 12 of the last 15 months; has an Employability Screen score of 11; meets the duration requirements for his medical condition; and is not eligible for PPMB per the Decision Summary in which the adjudicator stated that the ministry “does not have sufficient verification of how your restrictions preclude you from searching for, accepting or continuing in employment” and therefore, the minister is of the opinion that “your medical condition is not a barrier that precludes you from searching for, accepting, or continuing in employment as required under EAR section 2(4)(b).” The adjudicator wrote that “although the physician reports unable to do physical work, there is no indication of why the applicant is unable to work in an environment that doesn’t involve physical work.” The adjudicator detailed the ministry’s argument and the panel will consider the arguments of both parties in *Part F - Reasons*.

Additional submissions

With the consent of both parties, the appeal proceeded as a written hearing pursuant to section 22(3)(b) of the *Employment and Assistance Act* (“EAA”). In an e-mail to the Tribunal, the ministry indicated its submission for the appeal will be the reconsideration summary.

In his Notice of Appeal dated May 25, 2017, the appellant stated that the reconsideration officer did not receive his additional medical documents that were deposited at the ministry office (drop box) on April 28, 2017 and he would therefore forward them to the Tribunal.

The Tribunal received the following documents:

1. Appeal submission dated June 9, 2017 in which the appellant stated his argument and provided supporting medical documents to further expand on his restrictions and limitations to employment. The appellant indicated that the ministry approved his PPMB designation from 2013 - 2015, and 2015 - 2017.
2. Two Outpatient Clinic reports from a hospital spine clinic:
 - March 1, 2011 describing the appellant’s back and leg pain and spinal conditions; recommending spinal fusion; and indicating the appellant is awaiting a surgical date;
 - October 25, 2011 describing the appellant’s continued, but reduced, pain and tingling in his legs and back soreness when he lifts or does anything active; his prescribed maintenance medication; x-ray results demonstrating good position of all of his fixation; and a physiotherapy recommendation to improve nerve pain.
3. An Operative Report dated June 2, 2011 describing the appellant’s spinal fusion surgery.
4. A hospital Discharge Summary dated June 8, 2011 describing the appellant’s post-operative course including initial improvement with physiotherapy and occupational therapy; reactions to medications; and current increased neuropathic left-leg pain to be addressed with his family doctor if no continued improvement.
5. Un-labelled x-ray images, presumably of the appellant’s spine.
6. Two PPMB Medical Reports as follows:
 - October 2, 2012 signed by a specialist in orthopedics. This report contained the following information:
 - Primary medical condition: lumbar fusion.
 - Secondary medical condition: (left blank).
 - Treatment and outcome: (left blank).
 - Prognosis and Additional comments: The condition has existed for 1 year, is expected to last for 2 years or more, and is episodic in nature [Comment: “(The appellant) had a major spinal operation. His back pain is better but he still has leg numbness and ongoing backache. He is anxious to try working at least part-time”].
 - Restrictions specific to the medical condition: (left blank).

- April 26, 2017 signed by the appellant's GP. This report contained the following information:
 - Primary medical condition: L4-S1 fusion (2011), and pain symptoms (since 2005).
 - Secondary medical condition: Hepatitis C and Type II diabetes.
 - Treatment and outcome: fusion "as above, pain decreased, still present...Hep. C treated in 2015/ 2016".
 - Prognosis: The condition has existed for 11 years, is expected to last for 2 years or more, and is not episodic in nature.
 - Restrictions specific to the medical condition: "chronic pain causes inability to do any physical work. Also prevents him from seeking employment."

7. A questionnaire completed and signed by the GP on April 26, 2017, containing the following questions and responses:

- **Q.** *What are your patient's medical conditions and what are the symptoms or health limitations that arise from these medical conditions that restrict his ability to work and search for full time employment?*
 - A.** "Lumbar-sacral disc herniations; spinal fusions. Low back pain - affects left leg; muscle cramps - left thigh, left leg and foot; numbness - left leg and left foot."
- **Q.** *Are his health-related conditions severe enough to preclude him from searching for, accepting or continuing full-time employment in the foreseeable future?*
 - A.** "Yes."

The panel finds that the additional documents from 2011 - 2012 are in support of the information and records that were before the minister at reconsideration as they provide additional detail about the appellant's spinal conditions and fusion surgery which were reported in the PPMB Medical Report of October 26, 2016 (copy in the reconsideration record).

Regarding the PPMB Medical Report of April 26, 2017 and the questionnaire signed by the GP on the same date, the appellant stated that the April 2017 report is an "updated report." The panel notes that although the report and questionnaire are dated before the reconsideration decision of May 12, 2017 and the appellant stated that he deposited them in the ministry's drop box on April 28, 2017, there is no indication they were before the ministry at reconsideration. The ministry did not refer to or list them in the reconsideration decision, and the appellant further stated that the reconsideration officer "did not receive his additional medical documents" that were deposited in the drop box.

The panel accepts that this report and the questionnaire provide an update to the October 26, 2016 PPMB Medical Report that was completed by the same GP and describes the same medical conditions. The only new information is additional detail about the appellant's restrictions due to his medical condition (in particular, "also prevents him from seeking employment"). The panel therefore admits all of the additional documents under section 22(4)(b) of the EAA 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's reconsideration decision of May 12, 2017 in which the ministry denied the appellant 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 PPMB application could not be assessed under subsection 2(3) of the Regulation based on the appellant's score on the Employability Screen. While the ministry was satisfied that the appellant met the requirements under subsections 2(2) and 2(4)(a) of the EAR for length of time on income assistance and duration of his medical condition, in the ministry's opinion, the medical condition does not preclude him from searching for, accepting, or continuing in employment, as required by subsection 2(4)(b) of the EAR.

The following sections of the legislation are relevant to the issue on appeal:

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,

(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)

To be eligible for the PPMB qualification, the criteria in EAR subsection 2(2) for length of time on assistance must be satisfied. The ministry accepted that the criteria in subsection 2(2) were met, noting that the appellant has been on income assistance for at least 12 of the immediately preceding 15 calendar months.

Subsection 2(3)

In addition to meeting subsection 2(2), the applicant must meet the requirements set out in subsection 2(3) or 2(4) depending on the Employability Screen score. The ministry determined that the appellant's Screen score is 11, and therefore found that the applicable section for assessment of the PPMB application is subsection 2(4) [rather than 2(3) which requires the Screen score to be at least 15]. The appellant did not dispute the calculation of the Screen score and the panel finds the ministry reasonably determined that the applicable section for assessment of his PPMB application is EAR subsection 2(4).

Subsection 2(4)(b)

In his RFR, the appellant argued that he meets all "requirements/ eligibility for PPMB." He elaborated in his appeal submission, stating that he hoped the additional documents provided on appeal "are accepted as sufficient verification of how my restrictions affect my ability to accept and maintain full-time employment." The appellant added that he is, however, "always looking for supported situations with an understanding employer that can fit with my ailments." In describing his restrictions, the appellant stated that his conditions "restrict exercise, walking, stairs, sitting more than 1 hour, and impede sleep."

The ministry argued that the criteria in EAR subsection 2(4)(b) were not met as the appellant's medical condition is not a barrier that precludes him from "searching for, accepting, and maintaining all kinds of employment." In the reconsideration decision, the ministry interpreted subsection 2(4)(b) as follows: *A medical condition is considered to preclude the 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 for any length of time, except in a supported or sheltered-type work environment.* The ministry noted that the GP indicated the appellant is "unable to do physical work."

In its Decision Summary, referenced in the reconsideration record, the ministry argued that although the GP reported the appellant's inability to do physical work, there was "no indication of why the applicant is unable to work in an environment that doesn't involve physical work...and not sufficient verification of what precludes the client from searching for, accepting, or continuing in any or all types of employment activities." The ministry argued that "while the client's condition may create some limitations in certain circumstances, we have no confirmation it prevents client from participating in any or all types of employment activities."

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 applicant from searching for, accepting or continuing in employment. The panel finds that the ministry's position that the applicant must be precluded from "all kinds of employment" is a reasonable interpretation of the legislation as subsection 2(4)(b) does not differentiate between different types of employment such as physical work versus other types of work, or full-time versus part-time work.

As the determination that the applicant is precluded from employment is in the opinion of the minister, the panel is tasked with not only determining whether the ministry's interpretation of the Regulation was reasonable, but also whether the ministry reasonably applied the legislation to the evidence presented. As noted by the ministry in the reconsideration decision, the PPMB Medical Report of October 26, 2016 indicated the appellant is "unable to do physical work" due to the restrictions specific to his medical condition. The panel finds that the ministry reasonably determined the GP did not provide sufficient information to confirm that the appellant is unable to participate "in any or all types of employment activities."

Turning to the appellant's additional submissions, the panel notes that most of the documentation submitted on appeal is from 2011 - 2012 and describes spinal conditions, surgical intervention, and continuing pain symptoms for that period, without any assessment of whether the appellant is precluded from searching for, accepting, or continuing in employment at that time, or prospectively. The only information on employment in these documents is the orthopedic specialist's comment in the PPMB Medical Report of October 2, 2012 indicating that the appellant "is anxious to try working, at least part-time." In any event, there is no provision in the Regulation for renewal of the PPMB qualification based on previous applications and current information regarding the appellant's restrictions and ability to work would therefore be required in assess whether he meets the eligibility requirements for PPMB in his most recent application.

In considering the most recent evidence on restrictions to employment, the panel notes the PPMB Medical Report signed by the GP on April 26, 2017 and the GP's responses to a questionnaire of the same date. In this updated medical report, the GP echoed his earlier comments [October 26, 2016 report], re-stating that the appellant is "unable to do any physical work" due to chronic pain. In addition, the GP stated that chronic pain "also prevents him from seeking employment." And in the questionnaire, the GP indicated that the appellant's symptoms of pain, muscle cramps, and numbness are the health limitations "that restrict his ability to work and search for full-time employment" and that "yes", his conditions are severe enough to preclude him from "full-time employment in the foreseeable future."

The panel finds that the additional evidence, and the evidence as a whole, does not sufficiently address whether the appellant is unable to search for, accept, or continue in employment where employment is reasonably interpreted to mean "all kinds of employment". In the medical reports of October 26, 2016 and April 26, 2017, the GP confirmed that the appellant is unable to do physical work but did not assess whether his medical condition also poses a barrier to preclude non-physical work. While the appellant argued in his appeal submission that his conditions "restrict exercise, walking, stairs, sitting more than 1 hour, and impede sleep", that level of detail on restrictions was not provided by the GP or stated in the other medical documentation. Furthermore, while the physician indicated in the April 26, 2017 report that the appellant's pain "also prevents him from seeking employment", there is no explanation on whether he is restricted from searching for all types of employment, or only "full-time employment" as indicated in the questionnaire of the same date. As there was insufficient information describing how the appellant's conditions preclude him from searching for, accepting or continuing in employment, including non-physical and part-time work, the panel finds that the ministry reasonably determined that the criteria in EAR subsection 2(4)(b) were not met.

Conclusion

The panel finds that the ministry's determination that the appellant is not eligible for the PPMB qualification under section 2 of the EAR was a reasonable application of the legislation in the circumstances of the appellant. The panel therefore confirms the ministry's reconsideration decision under section 24 of the EAA and the appellant is not successful in his appeal.