

PART C – DECISION UNDER APPEAL

The decision under appeal is the Ministry of Social Development and Poverty Reduction's (the ministry) reconsideration decision dated March 8, 2018, which found that the appellant did not meet the statutory requirements of section 2 of the *Employment and Assistance Regulation* for qualification as a person with persistent multiple barriers (PPMB).

The ministry was satisfied that the appellant has been a recipient of income assistance for at least 12 of the immediately preceding 15 calendar months as per EAR section 2(2), and that the appellant has a medical condition other than addiction that has continued for at least one year and is likely to continue for at least two more years as required by sections 2(4)(a)(i).

However, the ministry was not satisfied that the appellant's medical condition is a barrier that precludes his ability to search for, accept or continue in employment as required by EAR section 2(4)(b).

PART D – RELEVANT LEGISLATION

Employment and Assistance Regulation (EAR) section 2

PART E – SUMMARY OF FACTS

The information before the ministry at the time of reconsideration included the following:

- 1) Medical Report – PPMB dated February 22, 2011 (2011 Medical Report) indicating that the appellant's primary medical condition is chronic chest pain and his secondary medical condition is mood disorder. The expected duration of medical condition is 2 years or more. The physician indicates that the appellant's restrictions are difficulties with carrying and lifting
- 2) Medical Report – PPMB dated January 14, 2013 (2013 Medical Report) indicating that the appellant's primary medical condition is left clavicle non-union and his secondary medical condition is post traumatic arthritis that is expected to last 2 years or more. The physician indicates that the appellant's restrictions are pain with major joints
- 3) Medical Report – PPMB dated March 20, 2015 (2015 Medical Report) indicating that the appellant's primary medical condition is left leg shortening and his secondary medical condition is left clavicle non-union that is expected to last 2 years or more. The physician indicates that the appellant's restrictions are limited walking and carrying/lifting with left arm
- 4) Medical Report – PPMB dated January 5, 2018 (2018 Medical Report) indicating that the appellant's primary medical condition is left leg shortening and his secondary medical condition is left clavicle non-union that is expected to last 2 years or more. The physician indicates that the appellant's restrictions are limited walking distance and carrying/walking with left arm
- 5) Employability Screen indicating the appellant's score of 14
- 6) The appellant's Request for Reconsideration dated February 20, 2018 (RFR) stating that question three on the Employability Screen is wrong as he has been on income assistance more than three times. The RFR indicates that the appellant's medical condition prevents him from working as he has persistent pain, becomes fatigued really fast (starts making mistakes and has to rest), has chronic pain, recurring carpal tunnel and flare-ups of pain, and daily living activities have to be well planned ahead. The RFR indicates that the appellant has crushed vertebrae/pinched nerves, poor circulation, his hands can go numb, and he is susceptible to infections in his leg.

In his Notice of Appeal dated March 16, 2018 (NOA) the appellant states that his restrictions include serious limitations in carrying, lifting, walking, and hard physical labour or sedentary work. The NOA indicates that the appellant's crushed vertebrae and plate, along with shortness of leg make it impossible to sit for long periods. The appellant indicates that he is on pain medications and has carpal tunnel in both hands. The appellant indicates that more information is coming from the physician after March 19, 2018.

Prior to the hearing the appellant provided a submission dated April 4, 2018 (the "Submission") indicating that he should qualify for PPMB under EAR 2(3) as well as under 2(2) and 2(4). The Submission indicates that he does not agree with the answer provided to question seven on the Employability Screen which was that he has a good working knowledge of English. The Submission states that English is not his first language and although he spoke English in the school system, his first language was spoken at home, which was not a written language. The appellant states that he has limited English language literacy in writing and reading and that his employment opportunities are limited due to literacy. The Submission also indicates that even if the appellant's application is not accepted under EAR section 2(3) the ministry should still find that he qualifies under EAR section 2(4) as the same restrictions are reported in the 2018 Medical Report as were reported in the 2015 Medical Report, that his condition has worsened, and his physician indicates that he is unable to work.

Prior to the hearing the appellant also submitted a letter from the physician dated March 19, 2018 (the "Physician Letter") indicating that the appellant has been under his care for many years and that he is unable to work due to left leg shortening and osteomyelitis (infection of the bone) which is painful and requires further treatment which may include surgery. The physician indicates that the appellant is unable to walk more than one block at this time. The physician also indicates that the appellant is unable to work due to left clavicle non union and that this fracture has not healed making carrying and lifting and pushing with the left arm very difficult and painful. The physician indicates that the appellant is not able to carry more than 10 pounds with this arm.

At the hearing the appellant stated that English is not his first language and he struggles with comprehension. He stated that he can read English but suffers from dyslexia as “*words go into one anothe*”. He stated that while he completed some Grade 9 to 11 courses, he never finished them and has only completed Grade 8. He also stated that his medications impair his memory, concentration, information processing and affect his coordination. The appellant stated that he has a continuous infection that despite antibiotics is not going away.

At the hearing the appellant’s advocate argued that English is not the appellant’s first language and that on the Employability Screen, question 7 should have been marked as being ESL or in need of English skills which would have changed his Employability Screen to 17 and required the ministry to assess him under section 2(3), not 2(4).

Admissibility of New Information

The ministry representative objected to the admissibility of the Submission and the Physician Letter as the ministry did not have that information at the time of reconsideration. In particular, the ministry representative stated that the ministry made a decision based on the information provided at the time of reconsideration which indicated that the appellant had a good working knowledge of the English language. The ministry also noted that the appellant’s previous Employability Screens also indicated that he had a good working knowledge of the English language.

The panel has admitted the information in the appellant’s NOA, oral testimony, Submission and Physician Letter regarding his restrictions as the information is in support of the information and records that were before the ministry at the time of reconsideration, in accordance with section 22(4) of the *Employment and Assistance Act*. In particular, the information in the Notice of Appeal corroborates the information regarding the appellant’s physical limitations.

The panel has not admitted the appellant’s oral information or the information in the Submission regarding his difficulties with the English language or dyslexia as that information was not before the ministry at the time of reconsideration.

PART F – REASONS FOR PANEL DECISION

Issue on Appeal

The issue on appeal is whether the ministry's decision to deny the appellant qualification as a PPMB was reasonably supported by the evidence or was a reasonable application of the applicable legislation in the circumstances of the appellant. In particular, was the ministry reasonable in determining that the appellant's medical condition is not a barrier that precludes his ability to search for, accept or continue in employment as required by EAR section 2(4)(b)?

Relevant Legislation

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
 - (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.

[en. B.C. Reg. 368/2002.]

Position of the Parties

Appellant's Position

The appellant's position is that question three on the Employability Screen that asks how many times, apart from the current application, has the appellant been on assistance anywhere in Canada in the last 3 years), is not correct. The appellant states that he has been on assistance more than three times so the question should have a score of 3 instead of 0. The appellant argues that his medical condition keeps him from working due to persistent pain, fatigue, loss of equilibrium, chronic pain and re-occurring carpal tunnel and flare ups. The appellant argues that his Employability Screen score should be 17 rather than 14 and his application should be assessed under EAR section 2(3) not 2(4).

The appellant also argues that that even if his application is not accepted under EAR section 2(3) the ministry should still find that he qualifies under EAR section 2(4) as the same restrictions are reported in the 2018 Medical Report as were reported in the 2015 Medical Report, that his condition has worsened, and his physician indicates that he is unable to work.

The appellant argues that the pain medications he take cause him to become easily fatigued, lose concentration, impact his memory, affects his coordination, and causes him to make mistakes. He states that most employers will not allow someone to work under the influence of the pain medications he is required to take. The appellant argues that his physician did not include any information about the side effects of the pain medication because they are well known and that information is readily available on the internet. The appellant argues that his activities of daily living have to be well planned ahead and that everything has to be timed perfect as if not, he will fall and injure himself. The appellant also states that he has a recurring leg infection that has lasted 10 months now and is not responding to antibiotic treatment that causes further restrictions, fatigue, and frequent hospital visits.

Ministry's Position

The reconsideration decision indicates that the appellant has a medical condition that has continued for at least one year and is likely to continue for at least 2 more years so he meets the eligibility criteria of EAR section 2(4)(a)(i). However, the ministry determined that the information provided does not demonstrate that the appellant's medical conditions present a barrier that precludes him from searching for, accepting, or continuing in employment as required by EAR section 2(4)(b).

The ministry's position is that question three on the Employability Screen is intended to determine how many distinct periods of time the appellant has been in receipt of income assistance anywhere in Canada in the past 3 years besides his current period of assistance, not in relation to how many PPMB applications have been approved. The ministry's position is that the appellant has been in receipt of monthly uninterrupted income assistance for the past 3 years or more so the answer to question three, being 0, is correct.

The reconsideration decision indicates that the 2018 Medical Report reports the appellant's restrictions to be "limited walking distance; and carrying/lifting with left arm" but that the physician does not describe how far the appellant can walk or how much weight he can lift/carry with his left arm and that no limitations are noted with respect to the appellant's right arm. The reconsideration decision indicates that although the 2018 Medical Report establishes restrictions to walking and lifting/carrying with his left hand, it is difficult to establish that the appellant is precluded from searching for, accepting, or continuing in all types of employment, such as light physical labour, or sedentary work.

The reconsideration decision indicates that the ministry reviewed the 2011 Medical Report, the 2013 Medical Report, and the 2015 Medical Report which describe medical conditions of arthritis, chronic chest pain, and mood disorders, but that the 2018 Medical Report does not include these conditions. The reconsideration decision also indicates that although the 2013 Medical Report indicates restrictions related to joint pain, the 2018 Medical Report does not include this restriction.

The ministry representative at the hearing argued that the information in the 2018 Medical Report is not the same as the 2011, 2013 and 2015 Medical Reports, and there is no indication of ongoing mood disorder or joint pain causing restrictions. The ministry representative stated that more specific information regarding the nature of the appellant's restrictions is required as based on the restrictions noted; the appellant can look for a desk job or other sedentary position. The ministry's position is that while the appellant has some barriers, he can do some work that is sedentary or light in nature. The ministry representative also stated that while the appellant argues that medications impact his ability to work, the physician did not say anything about the medications or restrictions arising from the medications.

The ministry representative stated that the PPMB denial is based on the 2018 Medical Report and that reviews are conducted to ensure that the information is current. The ministry representative stated that based on the information in the 2018 Medical Report, the legislative criteria of EAR section 2(4)(b) is not met.

Panel Decision

As noted above, in the Submission and at the hearing the appellant argued that his application should be assessed under EAR section 2(3) on the basis that the Employability Screen for question 7 (what is your English speaking ability or literacy level) should be scored as 3 (English as a second language or in need of English skills training) rather than 0 (good working knowledge of English). The appellant argues that if question 7 was scored as 3 rather than 0 his total score would be 17, requiring the ministry to assess his application under EAR section 2(3) rather than 2(4). The panel notes that the RFR was completed by someone other than the appellant but it is not clear who completed it on his behalf and there is no information provided at the time of reconsideration regarding the appellant's English language skills or diagnosis of dyslexia. As the panel has not admitted the new information regarding the appellant's English language skills and dyslexia as it does not corroborate information before the ministry at the time of reconsideration, this new information will not be considered.

Based on the information that was before the ministry at the time of reconsideration, the panel finds that the ministry reasonably determined that as the appellant has been in receipt of monthly uninterrupted income assistance for the past three years or more, the answer to question three on the Employability Screen of zero was accurate. The panel also finds that as the ministry reasonably determined that the appellant's Employability Screen score was 14, that the ministry reasonably considered the appellant's PPMB application under EAR section 2(2) and 2(4) rather than 2(3).

The panel also finds that the ministry reasonably determined that while the 2018 Medical Report establishes restrictions to walking and lifting/carrying with his left hand, that it is difficult to establish that the appellant is precluded from searching for, accepting, or continuing in all types of employment, such as light physical labour or sedentary work. In particular, while the appellant may be precluded from heavier physical work, there are no restrictions noted to the use of his right arm and no restrictions indicated to demonstrate that he would not be able to perform light physical labour or sedentary work.

In the letter from the physician dated March 19, 2018, the physician states that the appellant is unable to work. However, EAR section 2(4)(b) clearly states that it is the opinion of the minister, not the physician, as to whether the appellant's medical condition is a barrier that precludes him from searching for, accepting or continuing in employment. Accordingly, it is up to the ministry to make the determination as to whether the minister is satisfied, based on the reported restrictions, whether the appellant is precluded from working. The reconsideration decision notes that the physician has not confirmed why the appellant is precluded from employment that is not physical in nature and while the physician states that the appellant is unable to work as he is unable to walk more than one block and unable to carry more than 10 pounds with his left arm, the physician does not provide any other information regarding restrictions from working a light duty or sedentary job.

While the appellant argues that his medications also prevent him from working, the physician did not indicate that the appellant has any restrictions relating to his medication use. Although the appellant argues that the side effects of his medications are readily available, and that the physician did not think it was necessary to include that information, the panel finds that the ministry reasonably concluded that the restrictions noted were not sufficient to meet the legislative criteria of EAR section 2(4)(b).

The panel notes that it may be confusing for the appellant to understand why his PPMB application was denied when he was previously approved on three different occasions. However, each PPMB application is new and is based on the information at the time. The panel notes that while the reconsideration decision indicates that the 2018 Medical Report does not include information regarding the appellant's mood disorder noted in the 2011 Medical Report or pain with major joints as noted in the 2013 Medical Report, the reconsideration decision did not set out why the ministry found the 2015 Medical Report to be sufficient and the 2018 Medical Report was not. It would have been helpful for the ministry to provide further explanation as to why the restrictions in the 2018 Medical Report were not sufficient when the medical conditions and restrictions noted in the 2018 Medical Report were almost identical to the 2015 Medical Report. However, as each PPMB application review is new, the panel finds that the ministry reasonably determined that the restrictions noted in the 2018 Medical Report were not sufficient to meet the legislative criteria of EAR section 2(4)(b).

Conclusion

The panel finds that the ministry's reconsideration decision, which determined that the appellant was not eligible for PPMB designation was reasonably supported by the evidence and is a reasonable application of the applicable enactment, and therefore confirms the decision. The appellant is not successful on appeal.