

PART C – DECISION UNDER APPEAL

The decision under appeal is the Ministry of Social Development and Poverty Reduction (ministry) reconsideration decision dated May 17, 2018, which determined that the appellant does not meet the criteria to qualify for the Persons with Persistent Multiple Barriers (PPMB) category under section 2(4)(b) of the Employment and Assistance Regulation (EAR).

The ministry was not satisfied that the appellant's medical condition precludes her from searching for, accepting or continuing in all types of employment.

PART D – RELEVANT LEGISLATION

Employment and Assistance Regulation (EAR), section 2

PART E – SUMMARY OF FACTS

Relevant Evidence Before the Minister at Reconsideration

Ministry Records

- **November 20, 2017 - Note from appellant's doctor**
 - "Physically and Medically unable to work."

- **March 22, 2018 - Medical Report – PPMB - completed by appellant's doctor.**

Medical Conditions

 - The primary medical condition is bowel surgery and diverticulitis with a date of onset - 2000.
 - The secondary medical condition is severe right shoulder arthritis with a date of onset -2000.
 - The treatment is surgery on the right shoulder, abdominal surgery and colon resection – "Also COPD Recurrent Pancreatitis".
 - The condition has existed over 17 years.

Prognosis

 - The expected duration of the medical condition is two years or more.
 - The medical condition is not episodic in nature.

Restriction

 - Limited use of right arm at shoulder, chronic recurrent abdominal pain.

- **March 23, 2018 - Employability Screen form** with a total score of 3.
 - The total score was subsequently corrected to 10.

- **March 23, 2018 - Client Employability Profile.**

- **March 27, 2018 – Letter from the ministry to the appellant** - advising her she does not meet the criteria for the PPMB category.

The reasons for the denial are:

 - The appellant's score on the employability screen is less than 15; therefore the minister does not consider that the appellant has barriers that seriously impede her ability to search for, accept or continue in employment as required under the EAR, section 2(3).
 - The ministry does not have sufficient verification of how the appellant's restrictions seriously impede her from searching for, accepting or continuing in employment. Therefore, in the opinion of the minister, the appellant's medical condition is not a barrier that seriously impedes her ability to search for, accept, or continue in employment as is required under the EAR section 2(3)(b)(ii).

- **May 10, 2018 - Reason for Request for Reconsideration Information**

The appellant states that as a result of two surgeries on her shoulder, it does not fit into the socket right, aches and goes numb. As well, she does not have a lot of movement or strength in her shoulder. There are days she cannot brush her hair as she cannot hold onto the brush or lift her hair up to brush it. Her hands lock up and she can't move them, or it hurts and she can't feel anything.

The appellant has had two bowel surgeries. During the last one she went septic and spent time in ICU. All her organs were affected and damaged. She has pancreatitis and diverticulitis, which are extremely painful to the point of not being able to have anything touching her stomach. Because of the surgeries food passes through fast and she gets a lot of diarrhea.

During the last bowel surgery, the bowel twisted and gangrene set in. She has had two stomach surgeries, two shoulder surgeries, COPD, diverticulitis, pancreatitis, a cyst in her throat and now skin cancer patches.

The appellant's doctor sent in a note when she was applying for disability saying that physically and medically she cannot work. When an attack happens she can only lie down, not move and take all pressure off her stomach. It takes all day to prepare food - peeling a potato or carrot is not an easy chore as her hand goes numb and she has to stop and do it again. When pumping gas her hand freezes up or goes numb and she can't do it. There are days she lies on the couch or bed in agony because of pain. Her life and daily living has so significantly changed due to medical issues.

Additional Information

June 12, 2018 - Appellant Submission

The appellant provided the following statement to provide more details regarding her disability and how it impacts her ability to work.

I have diverticulitis, severe arthritis in my right shoulder, pancreatitis, COPD and cysts in my throat. I have had two bowel surgeries and two shoulder surgeries. I have done physio and rehab on my right shoulder.

As a result of my conditions, I experience the following symptoms:

- Chronic abdominal pain, with daily attacks of debilitating pain. The attacks can last anywhere from minutes to hours. During an attack, I have to stop what I am doing and lie down, not move, take all pressure off of my stomach and wait for it to pass. I never know when this will happen during the day and how long it will last. On a monthly basis, there are entire days I lay on the couch or bed in agony because of pain. I can't get dressed because I can't stand any pressure against my stomach.
- Really bad, urgent diarrhea every day. I do not know when it's going to happen or how many times during the day.
- Chronic pain in my right shoulder and into my neck (I am right handed).
- Limited range of motion in my right shoulder.
- Weakness in my right arm/shoulder.
- If I use my right hand for a few minutes, it goes numb or freezes up and my fingers swell up, and I can't use them.
- Pain in my left shoulder from overcompensating.
- Shortness of breath when I do any physical activity.

As a result of my conditions, I experience the following functional limitations:

- Difficulties planning and carrying out tasks/activities, as I do not know when I will experience a debilitating attack of abdominal pain or how long it will last.
- I cannot be far from a bathroom. When the diarrhea hits, I need to be able to stop whatever I am doing to get to a bathroom. Sometimes I do not make it and need to be able to clean myself up. I have to go somewhere, I will not eat the day before in hopes that it will reduce the severity and frequency of the diarrhea. It does not always work.
- Cannot lift anything with right arm.
- Cannot raise my right arm above chest level.
- Can only use my right hand for a few minutes before it starts to freeze/go numb. Then I have to stop what I am doing and wait for it to unfreeze. Because of this, I frequently drop things or just can't pick them up. Many tasks take longer; such as writing, typing, cooking, cleaning, brushing my teeth and hair, pumping gas.
- Some days I cannot even lift my right arm to brush my teeth or hair or grasp a coffee cup. At least twice a week I cannot brush my hair.
- Limited physical activity. I can walk about one block or go up a few stairs before I get out of breath and have to stop and catch my breath.

My understanding is that my condition is [sic] not going to get better, only worse. My bowel symptoms are so unpredictable – I wish I knew when it was going to happen and could work around it so I could work. I would love to have my life back to what I used to do.

I have tried to get jobs, but when you cannot fulfill the requirements or have to phone in because you are in so much pain you can't get out of bed, or have diarrhea and can't leave the house or it hits when you are in the middle of something and either have to move as fast as you can to get the washroom (IF you make it) and don't know how long you're going to be in there for, employers do not keep you.

So, even if I could find a job I could do that doesn't require me to use my right arm/hand, my bowel issues prevent me from maintaining employment. An employer won't keep an employee that has to constantly call in sick or leave due to pain/diarrhea.

I talked at length to an advocate about my life. She took notes as we talked. She wrote up this statement for me to look at. She offered to change anything that isn't an accurate description of my life. It is an accurate description of my life and I am now signing this statement as my own".

June 12, 2018 - Letter from appellant's doctor – To Whom It May Concern

"The following questions are posed to a physician to assist in determining eligibility for the PPMB designation."

1. What are the appellant's diagnoses?
"Diverticulitis, recurrent pancreatitis, severe right shoulder arthritis, COPD"
2. Have the appellant's conditions lasted for at least one year or occurred frequently in the past year?
"Yes"
3. Are the appellant's conditions likely to last for at least two more years?
"Yes"
4. What symptoms or health limitations that arise from the appellant's medical conditions restrict her ability to work?
"Chronic abdominal pain with frequent, unpredictable episodes of debilitating pain
Chronic urgent diarrhea
Limited range of motion and weakness in right arm/shoulder
Freezing/numbness/swelling in right hand/fingers upon use
Shortness of breath on physical exertion"
5. Are the appellant's health related restrictions severe enough to preclude her from searching for, accepting or continuing in employment in the foreseeable future?
"Yes. Cannot maintain employment due to frequent episodes of debilitating abdominal pain and diarrhea. Limited functionality in right shoulder/arm/hand in right handed patient creates additional barrier to employment."

At the hearing, the appellant stated that she cannot work. She has tried to obtain employment, but stated that when you phone in, sitting on the toilet, employers don't want you on the payroll. The appellant has made the following efforts to obtain employment. She worked at a campground (checked people in and out) for two months on and off. Other employers gave her a chance to try and work, including working at a gas station, kitchen, daycare, entry data and retail. These attempts lasted from a couple of days, to a day, to a couple of hours.

At the hearing the ministry reiterated the information in the reconsideration decision and stated that, as the appellant's doctor did not describe the degree of restrictions to the use of the appellant's right arm/shoulder and nature of activities restricted due to limited use of right arm/shoulder, abdominal pain, and the expected duration of time the appellant was unable to work, the ministry determined that the information did not demonstrate that the appellant was precluded from searching for, accepting, or continuing in all types of employment, such as light physical work or sedentary work.

Admissibility of New Evidence

At the hearing, the ministry was asked if it had any objections to the panel admitting the additional information from the appellant as evidence. The ministry had no objections.

The panel determined that the appellant's statement and letter from the appellant's doctor – both dated June 12, 2018, as well as the appellant's description of her attempts to find employment, were admissible, as evidence under section 22(4) of the *Employment and Assistance Act* as they were in support of the records before the minister at reconsideration.

The ministry's statement, at the hearing, regarding its determination that the medical information did not demonstrate that the appellant was precluded from searching for, accepting, or continuing in all types of employment, was considered as argument.

PART F – REASONS FOR PANEL DECISION

The issue under appeal is the reasonableness of the ministry decision, dated May 17, 2018, which held that the appellant does not meet the criteria to qualify for the Persons with Persistent Multiple Barriers (PPMB) category under section 2(4)(b) of the Employment and Assistance Regulation (EAR).

The ministry was not satisfied that the appellant's medical condition precludes her from searching for, accepting or continuing in all types of employment, as required by section 2(4)(b) of the EAR.

Section 2 of the EAR sets out the requirements for PPMB qualification.

As the ministry revised the appellant's employability score, the ministry considered the appellant's application under the EAR, subsections 2(2) and 2(4) as subsection (3) does not apply.

The ministry was satisfied that the requirements of subsection (2)(2) were met.

As well, the ministry was satisfied that the eligibility criteria under 2(4)(a)(i) was met.

Relevant Legislation

Employment and Assistance Regulation

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 one 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.

Ministry Argument

The ministry argues that as the appellant's doctor didn't describe the restrictions, to the use of the appellant's right arm/shoulder, and abdominal pain, it determined that the information did not demonstrate that the appellant was precluded from searching for, accepting, or continuing in all types of employment.

Appellant Argument

The appellant argues that she is unable to work due to her medical conditions.

Panel Decision

Under section 2(4) of the EAR, the appellant must have a medical condition, other than an addiction, that is confirmed by a medical practitioner and under 2(4)(b) that, in the opinion of the minister, is a barrier that precludes the appellant from searching for, accepting or continuing in employment.

In the reconsideration decision, the ministry determined that the medical report, dated March 22, 2018, provided with the appellant's application, does not demonstrate that her medical condition presents a barrier that precludes her from searching for, accepting or continuing in employment, as the information in the medical report, does not describe the degree of restrictions to the use of the appellant's right arm/shoulder, the nature of activities restricted due to the limited use of her right arm/shoulder, limitations to the use of her left arm/shoulder, or the nature of any restrictions caused by abdominal pain.

The ministry determined that the information, does not establish that the appellant's condition precludes her from participating in all types of employment, such as light physical work or sedentary work, or in a program that will work with her to overcome her barriers.

The appellant submitted a Notice of Appeal on June 5, 2018 and also provided additional information – a statement with more details about her disability and how it impacts her ability to work, and a letter from her doctor - both dated June 12, 2018.

In the appellant's statement she describes how her medical condition is a barrier that precludes her from searching for, accepting or continuing in employment.

...

My bowel symptoms are so unpredictable – I wish I knew when it was going to happen and could work around it so I could work. I would love to have my life back to what I used to do.

I have tried to get jobs, but when you cannot fulfill the requirements or have to phone in because you are in so much pain you can't get out of bed, or have diarrhea and can't leave the house or it hits when you are in the middle of something and either have to move as fast as you can to get the washroom (IF you make it) and don't know how long you're going to be in there for, employers do not keep you.

So, even if I could find a job I could do that doesn't require me to use my right arm/hand, my bowel issues prevent me from maintaining employment. An employer won't keep an employee that has to constantly call in sick or leave due to pain/diarrhea.

...

As well, at the hearing, the appellant reiterated that she cannot work and stated that she has made the following effort to obtain employment. She worked at a campground (checked people in and out) for two months on and off. Other employers gave her a chance to try and work, including working at a gas station, kitchen, daycare, entry data and retail. These attempts lasted from a couple of days, to a day, to a couple of hours.

The appellant's doctor confirmed that the symptoms or health limitations that arise from the appellant's medical conditions that restrict her ability to work are:

“Chronic abdominal pain with frequent, unpredictable episodes of debilitating pain
Chronic urgent diarrhea
Limited range of motion and weakness in right arm/shoulder
Freezing/numbness/swelling in right hand/fingers upon use
Shortness of breath on physical exertion”

The doctor also confirmed that the appellant's health related restrictions are severe enough to preclude her from searching for, accepting or continuing in employment in the foreseeable future and added that the appellant, “Cannot maintain employment due to frequent episodes of debilitating abdominal pain and diarrhea. Limited functionality in right shoulder/arm/hand in right handed patient creates additional barrier to employment.”

In the reconsideration decision, the ministry stated the criteria that were not met:

- the degree of restriction to the use of the appellant's right arm/shoulder;
- the nature of activities restricted due to the limited use of the appellant's right arm/shoulder;
- the nature of any restrictions caused by abdominal pain, and
- the limitations to the use of her left arm/shoulder.

At the hearing, the ministry confirmed that all the above issues were addressed in the appellant's submission, dated June 12, 2018, and that the appellant's submission addresses the issues directly, and provides more information as well. The ministry acknowledged that the said submission addresses all deficiencies highlighted in the reconsideration decision.

Considering this additional evidence, and having regard to the ministry's acknowledgement that the additional evidence addresses all the deficiencies highlighted in the reconsideration decision, the panel finds that the ministry unreasonably determined that the requirement of section 2(4)(b) of the EAR was not met, which requires that a “person has a medical condition...that is confirmed by a medical practitioner”... and that, in the opinion of the minister, “is a barrier that precludes the person from searching for, accepting or continuing in employment.”

Conclusion

For these reasons, the panel finds the ministry's decision was not reasonably supported by the evidence, and rescinds the decision. Therefore, the appellant's appeal is successful.

PART G – ORDER

THE PANEL DECISION IS: (Check one) UNANIMOUS BY MAJORITY

THE PANEL CONFIRMS THE MINISTRY DECISION RESCINDS THE MINISTRY DECISION

If the ministry decision is rescinded, is the panel decision referred back to the Minister for a decision as to amount? Yes No

LEGISLATIVE AUTHORITY FOR THE DECISION:

Employment and Assistance Act

Section 24(1)(a) or Section 24(1)(b)

and

Section 24(2)(a) or Section 24(2)(b)

PART H – SIGNATURES

PRINT NAME

Connie Simonsen

SIGNATURE OF CHAIR

DATE (YEAR/MONTH/DAY)

2018/June/25

PRINT NAME

Anil Aggarwal

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2018/June/25

PRINT NAME

Taj Mitha

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2018/June/25