

PART C – DECISION UNDER APPEAL

The decision under appeal is the Ministry of Social Development and Poverty Reduction (the Ministry) Reconsideration Decision dated September 26, 2018, which held that the Appellant did not qualify for renewal of the designation of a person with persistent multiple barriers to employment (PPMB) under Section 2 of the Employment and Assistance Regulation.

The Ministry determined that the Appellant met the requirement of Section 2(2) as she has been in receipt of income assistance for 12 of the immediately preceding 15 calendar months and that her application would be assessed under Section 2(4) rather than Subsection 2(3) based on her employability screen score of 14. The Ministry was satisfied that the requirement of Section(4)(a)(i) was met as a medical practitioner (the Doctor) has confirmed 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 2 more years. However, the Ministry determined that the requirement of Section (4)(b) was not met as it was not satisfied that the Appellant's medical conditions preclude her from searching for, accepting or continuing in employment.

PART D – RELEVANT LEGISLATION

Employment and Assistance Regulation (EAR), Section 2 and Schedule E

PART E – SUMMARY OF FACTS

The Appellant has been in receipt of income assistance as a PPMB and was notified by the Ministry in April 2018 that her PPMB status was under review pursuant to Ministry policy, which requires that clients who qualify for PPMB status must have their status reviewed every 2 years. The Appellant's employability screen score is assessed by the Ministry as 14.

In support of her renewal application, the Appellant provided a "Medical Report - Persons with Persistent Multiple Barriers" (the Medical Report) dated April 20, 2018, completed by her Doctor. The primary medical condition is identified as Fibromyalgia with an unknown date of onset and the Appellant's secondary medical condition is identified as an acquired brain injury with a date of onset of 2015. Treatments are identified as "*medication*" with the outcome of "*no real improvement*" and "*RMT (massage therapy provided by a registered massage therapist) / Physio etc.*" which the Doctor states the Appellant is "*unable to afford*". The expected duration of the Appellant's medical condition is described as two years or more. The medical conditions are reported to be episodic in nature with no pattern and "*aggravation/resolution triggered by stress/sleep cycles etc.*". Where asked to describe the nature of any restrictions specific to the diagnosed medical condition, the Doctor has written "*Nil (at) present. (Patient) finds that pain limits walking*".

The information before the Ministry at the time of reconsideration also included the following: ☐

- PPMB Medical Report dated August 12, 2014, completed by the Doctor, in which the Appellant's primary medical condition was listed as "*Traumatic brain injury*" with a secondary medical condition of "*Chronic post traumatic pain & headaches*". Several prescription drug treatments were identified, with the comment "*minimal / no improvement Rx discontinued*" in the "Outcomes" section of the Medical Report. The expected duration of the Appellant's medical condition is described as two years or more, and the medical conditions are reported to be not episodic in nature;
- Undated Employability Screening Report showing a total score of 14 and how that score was calculated; and,
- Physical Medicine and Rehabilitation Specialist Medical Exam Report dated October 28, 2013 in which the Appellant's medical condition is identified as "*chronic widespread pain, including chronic post traumatic headaches*". The specialist provides a medical history of the Appellant and the results of a general physical examination, concluding that "*her main issue at the moment ... is chronic pain*". The specialist recommends "*pharmacological treatment ... supplemented with a regular exercise program and a physical rehabilitation program*" but notes that the Appellant is "*strongly against any prescription medications, and ... cannot afford physiotherapy or massage therapy*".

In the "Reason for Request" section of her Request for Reconsideration, dated September 19, 2018, the Appellant:

- States that she meets the requirements for the PPMB designation;
- Indicates that she has recently been diagnosed with Autism Spectrum Disorder (ASD);
- Summarizes her "*primary and permanent (medical) conditions*"; and
- Outlines the steps she has taken to overcome barriers that impede her ability to search for, accept and continue in employment.

Additional Information Submitted after Reconsideration

In her Notice of Appeal (NOA), dated October 4, 2018, the Appellant indicates that the reason for her appeal was “*due to multiple daily mobility/pain and anxiety barriers (she) is unable to maintain employment*” and that she has recently received an ASD diagnosis.

On October 22, 2018, the Appellant provided a written submission which includes a letter signed by a Psychiatrist and dated October 12, 2018 stating that on August 30, 2018 the Psychiatrist examined the Appellant and administered an Autism Diagnostic Interview and subsequently an Autism Diagnostic Observation Schedule, Module 4 and that “*the standardized instruments confirmed that (the Appellant) does have ASD*”.

The Ministry did not object to the admissibility of the additional information contained in the Appellant’s October 22, 2018 submission, but did argue that the Psychiatrist’s diagnosis of ASD did not include a discussion on the impact of that diagnosis on employability, and that the Ministry would need to know how the diagnosis restricts employment before it could determine whether the ASD diagnosis was a barrier that precludes the person from searching for, accepting or continuing in employment pursuant to EAR Section 2(4)(b). The Ministry also argued that the Psychiatrist’s diagnosis did not indicate whether the condition has continued for at least one year and is likely to continue for at least 2 more years, as required under EAR Section 3(b)(i)(a).

At the hearing, the Appellant stated that she suffers from chronic pain due to Fibromyalgia and traumatic brain damage from a car accident 13 years ago, and that test results in January 2016 relating to her daughter’s ASD diagnosis found evidence of a genetic autism marker implying that the Appellant also might have ASD, which was confirmed by a medical examination conducted by the Psychiatrist in August 2018. As a result of these impairments, she has difficulty staying on topic and on task, and, for example, cannot complete forms and requires assistance whenever she is asked to do so. In response to questions from the Ministry, the Appellant stated that she had applied and been denied a Persons with Disabilities (PWD) designation at some point in the past but could not remember when, and that the last employment program she attended was a Work BC program over 20 years ago. She explained that she can no longer search for, accept or continue working not only because of her restrictions relating to Fibromyalgia, brain injury trauma and ASD, but also because she has to look after her severely autistic daughter.

At the hearing, the Ministry relied on its Reconsideration Decision and led the participants through the applicable legislation. The Ministry explained that it was standard Ministry policy to require a review of an individual’s PPMB designation every two years, and that, while it was not necessary for someone with the designation to re-apply for that designation on review, the legislation requires that recipients seek treatment and/or take steps to become employable as the designation is intended to be a temporary one. The Ministry also confirmed that its interpretation of EAR Section 2 was that a medical practitioner is required to provide an opinion as to whether a medical condition has continued for at least one year and is likely to continue for at least 2 more years, whereas it is the Ministry that must determine whether a medical condition is a barrier that seriously impedes a person’s ability to search for, accept or continue in employment and whether a person has taken all reasonable steps to overcome employment barriers under EAR Section 2(3), or whether a medical condition is a barrier that precludes a person from searching for, accepting or continuing in employment if Section 2(4) applies.

The Ministry also explained that the PWD designation was intended for persons with severe mental or physical impairments that were ongoing. In addition, the Ministry provided a detailed explanation of Ministry policy with respect to how it determines whether the nature of an individual’s employment is minimal or significant enough to “preclude” a recipient from employment pursuant to EAR Section 2(4)(b).

Admissibility of Additional Information

Section 22(4) of the Employment and Assistance Act (EAA) provides that panels may admit as evidence the information and records that were before the Ministry when the decision being appealed was made and “*oral and written testimony in support of the information and records*” before the Ministry when the decision being appealed was made, i.e. information that substantiates or corroborates the information that was before the Ministry at reconsideration. These limitations reflect the jurisdiction of a panel established under section 24 of the EAA: to determine whether the Ministry’s reconsideration decision is reasonably supported by the evidence or a reasonable application of the enactment in the circumstances of an appellant.

Regarding the Appellant’s testimony that the Ministry was aware that test results in January 2016 relating to her daughter’s ASD diagnosis, which found evidence of a genetic autism marker and therefore also showed that the Appellant had ASD, the Panel finds that there is insufficient evidence to establish that the Ministry was aware that the Appellant had been diagnosed with ASD at that time.

Regarding the Psychiatrist’s October 12 letter confirming the Appellant’s ASD diagnosis, the Appellant stated in her RFR dated September 19, 2018 that she has recently been diagnosed with ASD, and the Ministry had that information at the time that the Reconsideration Decision was made. Therefore the Panel considered the information in the October 12, 2018 letter signed by a Psychiatrist and included in the Appellant’s submission dated October 22, 2018 to be written testimony that is in support of the information and records which were before the Ministry when the decision being appealed was made. Accordingly, the Panel admitted this evidence, pursuant to Section 22(4) of the EAA.

PART F – REASONS FOR PANEL DECISION

The issue under appeal is whether the Ministry's Reconsideration Decision, which held that the Appellant did not qualify for PPMB because she had not met the requirement of Section 2(4)(b) of the EAR (which holds that her medical condition must, in the Ministry's opinion, preclude her from searching for, accepting, or continuing in employment), is reasonably supported by the evidence or a reasonable application of the legislation in the Appellant's circumstances.

Relevant Legislation - EAR 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; ...
- (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, ... 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.

Schedule E

Employability Screen

Number	Criteria	Category of Response	Score
1	What is the person's age?	(a) under 19	0
		(b) 19 to 24 inclusive	1
		(c) 25 to 49 inclusive	0
		(d) 50 to 65 inclusive	0
2	Apart from the current application, how many times has the person been on Income or Social Assistance anywhere in Canada in the last 3 years?	(a) never	0
		(b) 1 to 3 times	1
		(c) more than 3 times	3
3	What is the total amount of time the person has spent on Income or Social Assistance in the last 3 years?	(a) less than 2 months	0
		(b) 2 to 12 months	3
		(c) more than 12 months	7
4	What is the highest level of education the person has completed?	(a) post-secondary program — degree or diploma	1
		(b) some post-secondary	0
		(c) high school/GED	0
		(d) grade 10 to grade 12	1
		(e) less than grade 10	3
		(f) trade certificate	0
5	What is the total amount of time the person has spent in paid employment over the last 3 years?	(a) more than 12 months	0
		(b) from 3 to 12 months	1
		(c) under 3 months	2
		(d) none or very limited work experience	4
		(e) volunteer work only	3
6	What is the person's English speaking ability or literacy level?	(a) good working knowledge of English	0
		(b) English as a second language (ESL) or in need of English skills training	3
TOTAL			

* * *

The Appellant's position is that she meets the requirements for the PPMB designation, and that, in addition to the impediments to employment relating to her Fibromyalgia and her traumatic brain injury, she has recently been diagnosed with ASD, which further impedes her ability to seek, accept or continue with employment. The Ministry's position is that the Appellant's employability score was under 15 (and that therefore the criteria set out in EAR Section 2(3) do not apply), that the Psychiatrist has not indicated whether her ASD has continued for at least one year and is likely to continue for at least 2 more years pursuant to EAR Section 2(3)(b)(i)(A), and that the information provided does not demonstrate that the Appellant's medical conditions present a barrier that precludes her from searching for, accepting or continuing in employment pursuant to Section 2(4)(b) of the EAR.

Panel Decision

EAR Section 2 sets out the conditions which must exist for someone to qualify as a PPMB. Section 2(2) states that the person must have been a recipient of income assistance or hardship assistance for at least 12 of the immediately preceding 15 calendar months. The Ministry determined that the Appellant met this qualification and the Panel finds that the Ministry was reasonable in making this determination.

EAR Section 2(1) states that, in addition to the requirements set out in Section 2(2), either the requirements of Section 2(3) *or* the requirements of Section 2(4) must also apply.

Section 2(3) provides five conditions which must apply for a person to qualify as a PPMB as follows:

1. The Ministry must have determined that the person scores at least 15 on the employability screen set out in EAR Schedule E;
2. Based on the result of that employability screen, the Ministry must consider that the person has barriers that seriously impede the person's ability to search for, accept or continue in employment;
3. The person must have 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 one year and is likely to continue for at least 2 more years;
4. The medical condition referred to above must, in the opinion of the Ministry, be a barrier that seriously impedes the person's ability to search for, accept or continue in employment; and
5. The person must have taken all steps that the Ministry considers reasonable for the person to overcome the barriers referred to above.

As acknowledged by the Ministry at the hearing, the Panel notes that both Sections 2(3) and 2(4) of the EAR require that the assessment of the duration of a medical condition be made by a medical practitioner, and that the assessment of whether a medical condition is either both a barrier that seriously impedes the person's ability to search for, accept or continue in employment and whether the person has taken all the necessary steps to overcome the barriers if Section 2(3) applies, or whether the medical condition represents a barrier that precludes the person from searching for, accepting or continuing in employment if the assessment is made under Section 2(4), must be made by the Ministry. The Panel further notes that there is no requirement that the Ministry rely on any assessment that a medical practitioner might offer on the impact of a medical condition on a person's ability to search for, accept or continue in employment, even though it might be reasonable for the Ministry to weigh any such opinion in reaching a decision on this point should one be provided by a medical practitioner.

The Appellant's Medical Condition

In its Reconsideration Decision, the Ministry found that, while the Appellant had a medical condition that is 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, the Ministry determined that the Appellant, with a score of 14, had not scored at least 15 on the employability screen. Therefore the Ministry found that EAR Section 2(3) did not apply.

Employability Screen Score

The Ministry has created an Employability Screen Form (the Form) which it uses to score a prospective recipient to determine whether he or she scores at least 15 on the employability screen set out in EAR Schedule E. The Form reflects the criteria and point scale as set out in Schedule E with one significant exception. The Panel notes that the third question in the Form reads “Apart from **your** current application ...” while Number 2 in the Employability Screen scoresheet forming Schedule E of the EAR reads “Apart from **the** current application ...”. In context “application” has one of two possible meanings: it can mean a formal request for something (e.g. the process under which a prospective income assistance recipient applies for assistance) or it can mean the situation which is the subject of the matter at hand, (in this instance, the act of reviewing a recipient's continuing eligibility for a particular designation). If the word is being used based on the meaning of the latter definition, “Apart from **the** current application” and “Apart from **your** current application” cannot be used interchangeably. For these reasons, the Panel suggests that the Ministry should be using the same language that appears in EAR Schedule E in the Form. The Panel notes that the use of the word “application” in the context of a review of the Appellant’s continued PPMB eligibility cannot mean proceeding through a formal application for coverage, filling out an application form, having it vetted by the ministry, etc., because that is not what is occurring here. “Application” in this context must therefore mean “situation”, and it is the “current situation” that is referred to, not a situation that has occurred in the past.

In the past, specifically in 2014 in this case, the Appellant applied for (and upon review by the Ministry was approved for) social assistance as a PPMB. That designation was apparently re-confirmed upon the first biennial review in 2016. Therefore prior to the current situation (which is the second biennial review of her eligibility), she was on social assistance at least once, and because points are allocated based on how many times a client has been on and off social assistance in the past, it would make sense that a prospective client who walks into an office for the first time and applies for a PPMB designation but has never received social assistance in the past would get fewer points than someone who has qualified before, and that a client might be assigned even more points if he or she has been on and off social assistance more than 3 times in the past, as that would tend to indicate continuing barriers to employment.

Even if the meaning of “application” in this context was intended to be a formal request for the PPMB designation (and the Ministry was considering the current review to be such a formal request), because the language in EAR Schedule E for this criterion specifically excludes any such current application (“**Apart from** the current application ...”), and because the Ministry has acknowledged that the Appellant was “on Income or Social Assistance” for 12 of the past 15 months, she has been on it at least once “anywhere in Canada in the last 3 years” and therefore should have been scored a “1” or possibly even a “3” here (if she has been on it more than 3 times), bringing the total score up to at least 15 and EAR Section 2(3) into play. The Panel further notes that the Appellant provided evidence at the hearing that she is unable to complete forms without assistance and that Ministry forms, including the Form showing a total score of 14, were completed on her behalf by a Ministry representative.

The Panel therefore finds that the Ministry did not reasonably determine that the Appellant’s employability screen score was not 15 or more, and as a result failed to consider whether the Appellant’s medical condition constituted “a barrier that seriously impedes the person's ability to search for, accept or continue in employment” or whether she has taken all steps that the Ministry considers reasonable to overcome the barrier, pursuant to EAR Sections 2(3)(b)(ii) and 2(3)(c) respectively.

Implications of the ASD Diagnosis

As indicated above in Part E of this Decision, the Panel considered the information in the October 12, 2018 letter signed by a Psychiatrist and included in the Appellant’s submission dated October 22, 2018 to be written testimony in support of the information and records which were before the Ministry when the decision being appealed was made, and admitted this evidence. The Panel notes the Ministry’s argument, presented at the hearing, that the Psychiatrist did not provide any information in his October 12 letter as to whether the Appellant’s ASD has continued for at least one year and is likely to continue

for at least 2 more years, as required under EAR Section 2(3)(b)(i)(A). The Panel further acknowledges that it is not qualified to determine whether it is reasonable for the Ministry to require that a medical practitioner confirm that a person diagnosed with ASD has experienced the disorder for at least one year and that it will be likely to continue for at least 2 more years. However, the Panel finds that the Ministry was not reasonable in not considering the implications of the Appellant's ASD in the circumstances, and in not applying the tests set out in 2(3) and 2(4) with respect to the ASD diagnosis, and weighing the implications in its Reconsideration Decision.

Conclusion

The Panel finds that the Ministry's Reconsideration Decision was not reasonably supported by the evidence and was not a reasonable interpretation of the legislation in the circumstances of the Appellant and rescinds the decision pursuant to Sections 24(1)(a) and 24(2)(a) of the EAA. The Appellant's appeal, therefore, 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

Simon Clews

SIGNATURE OF CHAIR

DATE (YEAR/MONTH/DAY)

2018/10/25

PRINT NAME

Jennifer Armstrong

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2018/10/26

PRINT NAME

Susan Ferguson

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2018/10/29