

## PART C – Decision under Appeal

The decision being appealed is the Ministry's December 29, 2011 reconsideration decision denying the Appellant's request for a Fortress 1700 DT scooter because the Ministry determined that the Appellant did not meet all of the criteria for medical equipment and devices and for scooters set out in EAPWDR Schedule C, and specifically that:

1. An assessment by an occupational therapist or a physical therapist did not confirm the medical need for the scooter as required by section 3(2)(b);
2. An assessment by an occupational therapist did not confirm that it is unlikely that the Appellant will have a medical need for a wheelchair during the 5 years following the assessment as required by section 3.4(3)(a); and,
3. The Ministry was not satisfied that the scooter is medically essential to achieve or maintain basic mobility as required by section 3.4(3)(c).

The Ministry determined that the Appellant met the other requirements for medical equipment or devices including that a medical practitioner prescribed the scooter as required by section 3(2)(a) and that the total cost of the scooter does not exceed \$3,500 as required by section 3.4(3)(b).

## PART D – Relevant Legislation

Employment and Assistance for Persons with Disabilities Regulation (EAPWDR) section 62 and Schedule C sections 3 and 3.4.

## PART E – Summary of Facts

For its reconsideration decision the Ministry had the following evidence:

1. Ministry's Medical Equipment Request and Justification Form (Ministry Form) completed as follows:

- By the Ministry and Appellant on July 25, 2011 indicating that the Appellant is eligible to access medical equipment under the EAPWDR.
- Medical practitioner recommendation section completed by the Appellant's doctor on September 9, 2011. The doctor described the Appellant's medical condition as severe osteoarthritis of the neck, chronic back pain, and osteoarthritis of her knees; walking is very difficult as she is in so much pain and falls frequently. The doctor recommended a 2 horsepower scooter.
- Section 3 Assessment and section for specifications of medical equipment required to meet the applicant's needs completed by an occupational therapist on October 11, 2011 specifying that a Fortress 1700 scooter, toilet safety frame and grab bar are required.

The form also states the Ministry's program objective and cites its Online Resource Policy Manual at its web site.

2. Occupational Therapy Assessment dated September 29, 2011 by the same occupational therapist indicating that: the Appellant has severe osteoarthritis of the neck and knees, chronic back pain and COPD asthma. For relevant medical history the occupation therapist wrote that the Appellant has severe osteoarthritis of neck and knees, chronic back pain and also COPD asthma. For physical function the therapist wrote that the Appellant presently walks independently and has a 4 wheel walker which she uses occasionally. The Appellant reported numerous falls including one when she was on the floor for hours and another outside a grocery store requiring an ambulance to be called. She reported that her knees suddenly give way. The therapist described the Appellant's home environment/self care as a condo with a level entry. The Appellant presently has a bath seat that she uses, she holds onto the towel rack to step into the tub and she requires a grab bar to be installed. The Appellant has difficulty standing from the toilet and requires a toilet safety frame. In that assessment the therapist also described the Appellant's trial with a Fortress 1700 DT scooter. In the "Recommendations" part the therapist wrote that the Appellant "was assessed as requiring a Fortress 1700 DT scooter, a toilet safety frame and a 24" grab bar".

3. Letter dated July 26, 2011 from the same doctor to the Ministry advising that the Appellant suffers from osteoarthritis of her knees, severe neck and back pain, and recommending a scooter to help with her mobility. The physician listed the Appellant's other medical problems and her medications.

4. Price quote dated October 4, 2011 for the scooter, the grab bar and toilet seat frame for a total of \$3,591.04 with the scooter costing \$3,415.50 (without tax).

5. Ministry approval for the grab bar and toilet frame and denial of the scooter, dated November 17, 2011.

5. Appellant's November 24, 2011 request for reconsideration together with her written statement and a written statement from her representative. The Appellant wrote that if she had a scooter she would be able to drive straight into the condo she lives in with her husband and store it there. The condo is about 3 miles from shops and her doctor's office. The Appellant described her medical conditions as severe osteoarthritis in her knees, neck and back, and also COPD asthma and badly deformed ankles. The Appellant wrote that she is unstable walking, she walks as if drunk and if she walks 500 feet, even without a fall, her back pain becomes excruciating despite her medications and the pain radiates down both legs. She then spends the rest of the day lying down. She wrote that she has

been using a 4 wheeled walker, but it is big, heavy and difficult to get on a bus with so she uses it infrequently. The walker also does not stop her from falling when her knee unexpectedly gives way. She wrote that she falls often, 4 or 5 times in the past month. If there is nothing for her to pull up on she can't get up unassisted from a fall, so it is not safe for her to go out alone. She also wrote that a scooter would make going to her doctor or shopping much safer and she would be able to get out of her home more often because the Fortress scooter is allowed on local buses which can kneel down for it.

For the reconsideration request the Appellant's representative submitted that the Appellant is increasingly confined to her home for two reasons:

- Arthritis in her knees has led to significant weakness, especially in the right knee which gives away unexpectedly leading to her falling and being unable to get up without assistance unless she can pull herself up on something.
- Inability to walk far without greatly increasing the level of pain in her back and legs to the point that if she walks 500 feet she cannot do anything else for the rest of the day.

The representative wrote that the doctor confirmed these effects from her medical conditions and prescribed a scooter. Also the Appellant explained in her statement why a 4 wheeled walker is no longer useful enough to allow her to use the bus to go to town for shopping or to the doctor. The representative argued that the scooter is for basic mobility which includes access to the community, not just moving around the home, and also for grocery, other shopping and doctor visits. These activities may be considered grounds to consider a scooter as "medically essential to achieve or maintain basic mobility" according to the Ministry's policy. The representative further argued that the Appellant would also like to enjoy the outdoors by "going for walks" and her mobility impairment has increasingly prohibited this. A scooter will give her a measure of independence because she will not have to wait for someone to accompany her or alternatively be confined at home because of safety concerns and the risk of injury if she falls when alone away from home. The representative submitted that the scooter requested by the Appellant falls squarely within the meaning of "basic mobility" as set out in a previous tribunal decision which she cited, and also this is a request not for transportation but for basic mobility necessitated by the Appellant's medical conditions.

The representative also submitted that the Appellant's current lack of basic mobility and her need for a scooter are sufficiently attested to in the doctor's prescription and the occupational therapist's assessment. The minister has the discretion to determine whether the scooter is medically essential to achieve or maintain basic mobility, but the representative submitted that discretion must be exercised reasonably. The representative argued that the Ministry's denial was unreasonable because it had no foundation of fact in the doctor's prescription or the therapist's assessment. The representative acknowledged that the occupational therapist did not address the issue of whether the Appellant will require a wheelchair during the 5 years following this assessment which is a requirement in EAPWDR Schedule C section 3.4(3)(a). However, the representative argued that the Ministry Form had no instructions for occupational therapists regarding this specific criteria and so it can be expected that the therapist would not report on this requirement. The representative also argued that for the Ministry to use this omission as a reason for denial is contrary to the common law rules of natural justice and procedural fairness, and it is also contrary to the *Hudson* decision ruling that the EAPWDA and EAPWDR must be interpreted with a benevolent purpose in mind. The representative suggested that it would be easy for the Ministry to include instructions to occupational therapists to consider the 5 year issue. If the Ministry had done that, then the therapist's failure to

address that issue in this case might be legitimate grounds for denial. However, in the present circumstances the representative argued that the denial on that ground was unreasonable and she cited the same previous tribunal decision for this argument as well.

In her notice of appeal dated January 12, 2012 the Appellant submitted that the requested scooter is for basic mobility, to allow her safe access to the community and greater independence since she can't safely leave home without accompaniment or without the scooter. The Appellant also submitted that the scooter will reduce the number of falls she has, allow her to go to her doctor and to do her shopping alone. Without it she is confined to her home most of the time, thereby suffering isolation.

At the hearing the Appellant described the problems she has with her ankles, legs, knee, neck and hip for which she may require surgery. She said her back discs are deteriorating. The Appellant also indicated that some days it's an effort for her to get around her suite and she is always afraid of falling. When she falls she does not have the strength to get up again. The Appellant described one fall after which she was on the floor for 10 hours until someone could help her. She said she has tons of bruises from her falls. Her various conditions are very painful and she is on various medications. She also has COPD with 22% lung capacity, making it hard to climb stairs and hills. She described her route from her home to the bus as downhill for about 2 blocks, but then uphill for that distance on the return trip. She hasn't been using a walker because she fell even with that and she cannot get up when using it because of the wheels. The Appellant said that she needs a scooter to get out more safely and be more independent. Now, her husband does all the shopping, cooking and housework and when she goes shopping she holds on to the buggy. The Appellant also indicated that she would do more shopping and get out more often if she had a scooter. She sees her doctor once a week. The Appellant's husband also described the Appellant's falls, her difficulty getting up again and her fear of falling if alone especially when she is away from home. He also said he does all the shopping, the cooking, everything around the house because his wife can't.

The Panel finds that the Appellant's statement in her notice of appeal, her testimony at the hearing and her husband's testimony at the hearing all relate to the information about her medical conditions and her need for the scooter which was before the Ministry at the time it made its reconsideration decision. Therefore the Panel admits that evidence as being in support of the evidence that was before the Ministry when it made its reconsideration decision pursuant to section 22(4) of the Employment and Assistance Act.

At the hearing the Appellant's representative submitted arguments supporting the Appellant's appeal. The representative reviewed the reconsideration decision, first referring to the Ministry's determination that the occupational therapist did not confirm that it was unlikely that the Appellant would have a medical need for a wheelchair during the 5 years following the assessment. The representative pointed out that the Ministry's Form does not have a section for an occupational therapist to address that requirement, nor are there any other instructions on the form or with the form to address that requirement. The representative also pointed out that, in contrast, the Ministry's Form does have instructions for a respiratory therapist assessment, instructions about product parameters, equipments trials and other information requested by the Ministry. In support of this argument the representative cited a previous tribunal decision.

The representative next addressed the Ministry's determination that the occupational therapist did

not confirm the medical need for the scooter and that it was not satisfied that the scooter is medically essential for the Appellant to achieve or maintain basic mobility. The representative submitted that the Ministry did not consider all of the evidence together and relied only on certain aspects of the occupational therapist's September 29, 2011 assessment report. She argued that the Ministry considered only the therapist's description of what the Appellant said about wanting to use the scooter for trips to the store, for doctor's appointments and for safe walks, and that the Ministry determined that other information was missing from the therapist's assessment. The representative further submitted that the Ministry did not consider the doctor's description of the Appellant's medical condition, the Appellant's difficulty with walking and falling frequently, the doctor's equipment prescription, the occupational therapist's specifications for the required equipment to meet the Appellant's needs, the therapist's signature certifying that she had assessed the medical needs of the Appellant and that the recommended medical equipment will satisfy her medical needs, all of which are found in the Ministry Form.

The representative also argued that outside mobility, going to stores, appointments, for walks, on the bus, is part of basic mobility and even the Ministry's policy reflects that. The representative also argued that when all of this evidence is taken together, when there is no indication that the occupational therapist disagreed with the doctor's assessment, and if the principles in the *Hudson* decision are considered, then it was not reasonable for the Ministry to determine that the evidence did not confirm the Appellant's medical need for the requested scooter to achieve or maintain basic mobility or that the occupational therapist's assessment did not confirm the medical need for the scooter.

To support her arguments, the representative submitted a copy of the previous tribunal decision she referred to and a copy of the Ministry's policy for medical equipment and devices found in its online resources, both of which were also cited in her written submission to the Ministry supporting the Appellant's reconsideration request.

The Panel's review authority is limited by section 24(1) of the Employment and Assistance Act which states that the Panel must determine whether the decision being appealed is, as applicable, reasonably supported by the evidence or a reasonable application of the applicable enactment in the circumstances of the person appealing the decision. The Panel finds that this means it can only consider the evidence that is applicable in the circumstances of this Appellant and only the applicable enactments in the circumstances of this Appellant, not the evidence or enactments as applied in the circumstances of other Appellants in other appeals. Therefore, the Panel finds that it cannot consider a previous tribunal decision as a precedent for this decision.

The copy of the Ministry policy submitted by the Appellant's representative is titled "Medical Equipment and Devices Policy – Guidelines for Determining Medically Essential to Achieve or Maintain Basic Mobility: April, 2010". That policy includes the following definitions and provisions:

- "Medically essential to achieve or maintain basic mobility" refers to a client's need for equipment due to a mobility impairment which is necessary to perform their day-to-day activities in their home and/or community.
- Each equipment request is reviewed on an individual basis and the client's needs are taken into consideration. If the factors suggest that the equipment is medically essential to achieve or maintain basic mobility, and all other eligibility requirements have been met, the client is

eligible for the requested equipment.

- Examples where a request may be considered medically essential to achieve or maintain basic mobility:

A client with cerebral palsy who experiences impaired motor control is requesting a scooter... The client's goal is to use the scooter for grocery shopping as she does not have sufficient mobility to walk to the store.

The Ministry agreed this was part of its policy and did not object to admitting it at the hearing.

The Appellant's representative submitted that the evidence about the Appellant's impaired mobility and the reasons why she needs the scooter establish that she meets the criteria in the regulations and in the Ministry policy for how those regulations are to be applied. The Appellant experiences impaired ability to walk safely, especially outside the home, and her goal is to use the scooter to go grocery shopping, and also to doctor's appointments and around the community.

The Panel notes that the Ministry Form refers to its Online Resource Policy Manual for full details on eligibility criteria and that the heading for the Ministry's policy is similar to the language in EAPWDR Schedule C section 3.4(3)(c). Also the Panel finds that the example cited in the policy for mobility impairment and the reason for requesting a scooter are similar to the Appellant's circumstances. Therefore, the Panel finds that this policy is directly applicable to the Appellant's circumstances and because the Appellant's representative referred to this policy in the request for reconsideration, the Panel admits this policy as evidence because it is in support of the reconsideration decision the Ministry pursuant to section 22(4) of the Employment and Assistance Act.

The Panel finds that the Appellant's representative's made the same submissions and addressed the same issues at the hearing as she did in her written submissions for the Appellant's reconsideration request. Therefore the Panel finds that all the Appellant's arguments made at the hearing are related to arguments which were before the Ministry at the time it made its reconsideration decision and therefore Panel accepts them as arguments in support of the Appellant's appeal.

At the hearing the Ministry reviewed the reasons in the reconsideration decision and noted that the decision hinged on the occupational therapist's September 2011 assessment document. Specifically in that document the therapist described the Appellant as presently walking independently and the therapist did not give a separate opinion about the Appellant's medical need for the scooter.

## PART F – Reasons for Panel Decision

The issue in this appeal is whether the Ministry reasonably denied the Appellant's request for a Fortress 1700 DT scooter because it determined that the Appellant did not meet all of the criteria for medical equipment and devices and for scooters set out in EAPWDR Schedule C, and specifically that:

1. An assessment by an occupational therapist or a physical therapist did not confirm the medical need for the scooter as required by section 3(2)(b);
2. An assessment by an occupational therapist did not confirm that it is unlikely that the Appellant will have a medical need for a wheelchair during the 5 years following the assessment as required by section 3.4(3)(a); and,
3. The Ministry was not satisfied that the scooter is medically essential to achieve or maintain basic mobility as required by section 3.4(3)(c).

The following sections of the EAPWDR apply to this appeal:

### **General Health Supplements**

**62(1)** Subject to subsection (1.1), the minister may provide any health supplement set out in section 2 [*general health supplements*] or 3 [*medical equipment and devices*] of Schedule C to or for a family unit if the health supplement is provided to or for a person in the family unit who is

- (a) a recipient of disability assistance.

### **Schedule C Health Supplements**

#### **Medical equipment and devices**

**3 (2)** For medical equipment or devices referred to in sections 3.1 to 3.8, in addition to the requirements in those sections and subsection (1) of this section, the family unit must provide to the minister one or both of the following, as requested by the minister:

- (a) a prescription of a medical practitioner or nurse practitioner for the medical equipment or device;
- (b) an assessment by an occupational therapist or physical therapist confirming the medical need for the medical equipment or device.

#### **Medical equipment and devices – scooters**

**3 . 4 (1)** In this section, "scooter" does not include a scooter with 2 wheels.

(2) Subject to subsection (5) of this section, the following items are health supplements for the purposes of section 3 of this Schedule if all of the requirements set out in subsection (3) of this section are met: (a) a scooter; (b) an upgraded component of a scooter; (c) an accessory attached to a scooter.

(3) The following are the requirements in relation to an item referred to in subsection (2) of this section: (a) an assessment by an occupational therapist has confirmed that it is unlikely that the person for whom the scooter has been prescribed will have a medical need for a wheelchair during the 5 years following the assessment; (b) the total cost of the scooter and any accessories attached to the scooter does not exceed \$3 500; (c) the minister is satisfied that the item is medically essential to achieve or maintain basic mobility.

(4) The period of time referred to in section 3 (3) (b) of this Schedule with respect to replacement of an item described in subsection (2) of this section is 5 years after the minister provided the item being replaced.

(5) A scooter intended primarily for recreational or sports use is not a health supplement for the

purposes of section 3 of this Schedule.

The Ministry's position is that the Appellant did not meet the criteria in EAPWDR Schedule C section 3(2)(b) and section 3.4(3)(a) and (c) because the information provided with the original request and with the reconsideration request did not establish the criteria in these sections.

In its reconsideration decision the Ministry considered the requirements in section 3(2)(b) and section 3.4(3)(c) together. The Ministry noted the medical diagnosis in the occupational therapist's assessment and in the doctor's July 26, 2011 letter. The Ministry also referred to the therapist's September 29, 2011 assessment report referring to the Appellant's ability to walk independently, use a 4 wheeled walker occasionally, bathing and toileting independently with the use of assistive devices, and to the Appellant's report of numerous falls and knees suddenly giving away making it unsafe to go out alone. The Ministry noted that the therapist reported that the Appellant would like a scooter to go to the store, to doctor's appointments and for walks safely, but the Ministry determined that the information in that therapist's report did not establish whether, after using public transit, the Appellant has sufficient mobility to safely ambulate upon her arrival to perform activities such as going to appointments or shopping with the 4 wheeled walker. The Ministry also indicated it reviewed the submissions with the Appellant's request for reconsideration. Based on this information the Ministry was not satisfied that an assessment by an occupational therapist confirmed the medical need for the scooter or that the scooter was medically essential to achieve or maintain basic mobility.

The Appellant argued that the Ministry only considered the doctor's July 26, 2011 letter and the occupational therapist's September 29, 2011 assessment when it made its decision. The Appellant submitted that the Ministry must consider all of the evidence, including the following: the doctor describing in the Ministry's Form that walking is very difficult for the Appellant because she is in so much pain and falls frequently; the therapist, on October 10, 2011, specifying in the Ministry's Form that the scooter is medically required; and, the therapist not disagreeing with the doctor's assessment. The Appellant further submitted that Ministry should not rely on only the September 29, 2011 therapist's assessment document but on all of the therapist's evidence which establishes that the therapist confirmed the medical need for the scooter and which also establishes that the scooter is medically essential for the Appellant to achieve or maintain basic mobility. The Appellant argued that the Ministry must also apply its own policy to the Appellant's circumstances and the example in the policy is similar the Appellant's case. She needs the scooter to achieve or maintain basic mobility to perform day-to-day activities in the community. Her outside mobility is as essential as inside mobility. If all of this evidence is considered then the Appellant submitted it was not reasonable for the Ministry to determine that the Appellant did not meet the criteria in section 3(2)(b) and section 3.4(3)(c).

The Panel finds that section 3(2)(b) sets out a different requirement than section 3.4(3)(c) and therefore the Panel will therefore consider them separately. First section 3(2)(b) requires an assessment by an occupational therapist or physical therapist confirming the medical need for the medical equipment or device. In the Appellant's case an occupational therapist provided an Occupation Therapy Assessment dated September 29, 2011. Under "Recommendations" the therapist wrote that the Appellant was "assessed as requiring a Fortress 1700 DT scooter" (as well as toilet safety frame and 24"grab bar). In the Ministry Form in the box for "specifications of medical equipment required to meet the Applicant's needs", the same occupational therapist wrote "Fortress



1700 scooter, toilet safety frame, grab bar.” Also in the Ministry Form the same therapist signed her name on October 11, 2011 certifying that she had assessed the medical needs of the Appellant and the recommended medical equipment will satisfy the Appellant’s medical needs. The Panel finds that when all of this evidence from the occupational therapist is considered together, and especially the therapist’s confirming that the Appellant was assessed as requiring the scooter, then the Ministry’s determination that an occupational therapist did not confirm the medical need for the scooter was not reasonably supported by the evidence.

The Panel notes that section 3.4(3)(c) requires the minister to be satisfied that the item requested is medically essential to achieve or maintain basic mobility. In the Appellant’s case her doctor describes her walking as very difficult as she is in so much pain and falls frequently. The doctor also wrote that the Appellant suffers from osteoarthritis of her knees, severe neck and back pain and recommended that she get a scooter to help with her mobility. The Appellant also reported frequent falls, fear of falling and injury confining her to home, and her need for a scooter to safely go to stores, doctor’s appointments and around the community. She does not use the walker she has because it is not safe or easy for her to use. In the September 2011 assessment report the occupational therapist noted the Appellant’s medical conditions as severe osteoarthritis of the neck and knees, chronic back pain and COPD asthma. The therapist described the Appellant as presently walking independently and as using a 4 wheeled walker occasionally, but the therapist also noted that the Appellant reported having numerous falls, including once when she was on the floor for hours and another outside a grocery store when an ambulance was called. The Appellant also reported to the therapist that her knees suddenly give way and she would like a scooter to be able to go to the store, to doctor’s appointments and for walks safely. The occupational therapist did not indicate anything in her assessment disputing or questioning this information from the Appellant. In fact at the end of that report the occupational therapist wrote that the Appellant “was assessed as requiring a Fortress 1700 DT scooter”. The same therapist, in the Ministry Form, wrote in this type of scooter for the specification of the medical equipment “required” to meet the Appellant’s needs and certified that she had assessed the Appellant needs and the recommended equipment will “satisfy the Appellant’s medical needs”.

The Panel finds that the evidence from the doctor about the Appellant’s walking impairment, the Appellant’s self-reports about falling and her fear of falling when outside the home and wanting a scooter to get out, together with the occupational therapist’s assessment all indicate that the Appellant’s mobility is impaired, especially when outside. Also the Panel finds that the doctor recommended the scooter based on his assessment of the Appellant and the therapist indicated that the scooter was required for the Appellant’s medical needs. In addition the Panel notes that the Appellant’s circumstances are similar to the example in the Ministry’s policy for determining if a scooter is essential to achieve or maintain basic mobility. Therefore the Panel finds, based on all of the evidence, that it was not reasonable for the Ministry to determine that the evidence did not establish that the requested scooter was medically essential for the Appellant to achieve or maintain basic mobility.

The Ministry also determined that the information provided did not establish that it is unlikely that the Appellant will have a medical need for a wheelchair during the 5 years following the assessment as required by section 3.4(3)(a). The Appellant agrees that this is a regulatory requirement; however, she argues that if that requirement is not specifically included in the Ministry Form and if there are no

instructions for the requirement, then it is not reasonable for the Ministry to expect an occupational therapist to address that requirement. The Appellant also pointed out that the Ministry does provide other instructions for other therapists and other requirements in that form.

The Panel reviewed the Ministry Form which is in the record and notes that although there is a reference to the Ministry's online policy manual there are no specific instructions or requests for information about this 5 year wheelchair requirement anywhere in the Ministry Form, and specifically there is nothing in the section to be completed by an occupational therapist, physical or respiratory therapist. However, the Panel also notes that in the Ministry's first denial of the request for the scooter the Ministry indicated that one reason for the denial was that an occupational therapist did not confirm that the Appellant will not require a wheelchair within the next 5 years. With her request for reconsideration the Appellant submitted additional information and arguments, but did not provide confirmation from the occupational therapist to address this requirement. The Panel also notes that in the reconsideration decision the Ministry wrote that this 5 year wheelchair requirement had not been met and the Ministry included a copy of all of the applicable regulations. At the appeal hearing, the Appellant submitted evidence and arguments to support her appeal, but again she did not provide the required confirmation from the occupational therapist to satisfy the requirement in section 3.4(3)(a). Therefore Panel finds that it was reasonable for the Ministry to determine that the Appellant did not meet this criteria and did not meet all the requirements for a scooter in EAPWDR Schedule C section 3.4.

The Panel finds that, based on the whole of the evidence, the Ministry's reconsideration decision was reasonably supported by the evidence and was a reasonable application of the applicable enactments in the Appellant's circumstances. The Panel therefore confirms that decision.