

PART C – Decision under Appeal

The decision under appeal is the ministry's reconsideration decision dated February 7, 2012 wherein the ministry denied the appellant's request for funding for the purchase of a marijuana vaporizer, on the grounds that the legislation does not authorize the ministry to provide one. The appellant receives disability benefits, and the ministry determined that a marijuana vaporizer is not any kind of a health supplement, medical service, or medical equipment or device as provided in Schedule C of the Employment and Assistance for Persons with Disabilities Regulation.

PART D – Relevant Legislation

Employment and Assistance for Persons with Disabilities Regulation, (EAPWDR) Part 5:Division 4 [*health supplements*]; and Schedule C

PART E – Summary of Facts

The evidence before the ministry at the time of the reconsideration decision included the following:

- A sales quote for an Arizer Solo vaporizer in the amount of \$391.97 including tax.
- An on-line printout of a newspaper article dated December 18, 2007 regarding an Employment and Assistance Appeal Tribunal (Tribunal) decision rescinding a ministry decision which had denied funding for a marijuana vaporizer.
- A prescription from the appellant's physician, dated 12 January 2012, stating that "This lady has asthma. She uses pot to help with chronic pain. She would benefit from a vaporizer to smoke her marijuana." At the bottom of the prescription is the addendum "Patient brought this back to say I am required to write 'to eliminate carcinogenic effects.'"
- In the appellant's Request for Reconsideration, she wrote that she is a licensed medical marijuana user for pain relief, anxiety and stress reduction. The purpose of the vaporizer is to deliver medicine to her body in a healthy way as opposed to smoking, which is carcinogenic and leads to lung cancer. The appellant stated that medical marijuana has reduced her dependency on morphine and all other medications, saving the ministry a substantial amount of money on an ongoing basis. The appellant had cut her cigarette smoking to 1 a day and hoped to quit entirely very soon. She stated that a marijuana cigarette contains up to four times the tar of a tobacco cigarette, and it is affecting her asthma. The ministry has covered the cost of an inhaler for the appellant's asthma medication for the past 8 years. The appellant wrote that Health Canada advises against smoking medical marijuana as it is carcinogenic, and that she doesn't want to get lung cancer simply because she can't afford a marijuana vaporizer. She advised that she also ingests (eats) the medical marijuana, but says that she can't do that exclusively as ingestion carries its own set of problems.

In the Notice of Appeal for the current proceedings, the appellant included a 2 page written submission and attached a copy of a Tribunal decision 2009-00637, in which the Tribunal had rescinded a ministry decision refusing to pay for a marijuana vaporizer.

In the Notice of Appeal the appellant wrote that she uses medical marijuana to relieve constant pain, and that she would like to avoid emphysema, cancer and COPD that may be caused by smoking the marijuana. In the submission attached to the Notice of Appeal the appellant maintained that the medical marijuana reduces her need for other medication by 4 or more pills a day. She advised that she has no funds to pay for a marijuana vaporizer, and that providing her with the device will save the ministry substantial amounts of money while preventing further harm to her lungs and body.

At the hearing before this panel the appellant substantially reiterated the evidence from her previous submissions. She advised that she has had significant improvements in weight control, pain control, mood and general health since she started using medical marijuana. Her medications formerly cost \$1,400 per month, and she can now get by on 4 or 5 fewer pills each day. The appellant stated that the marijuana smoke is carcinogenic and also tends to irritate her throat and asthma. The vaporizer would allow enhanced absorption of the active ingredient in marijuana thus allowing more effective use of her medical marijuana. The device is also portable so it will allow her to be less tied to home. The appellant advised that she is hopeful of finding work soon and the vaporizer would allow her to

consume marijuana unobtrusively since it does not emit smoke or the odor of burning marijuana. While she does have a physician's prescription for a marijuana vaporizer, as a cost-saving measure the appellant did not seek a supporting report from a respiratory therapist.

When asked by the ministry representative how she could be so sure the vaporizer would be beneficial to her, the appellant replied that she had had the opportunity to test a vaporizer on loan for three days and so had experienced the benefits.

The panel considers that the appellant's written submission and oral evidence at the hearing are written and oral testimony in support of the information and records that were before the minister at the time the decision being appealed was made, and admits them in accordance with section 22(4) of the *Employment and Assistance Act*.

The ministry representative reiterated the evidence and legislative provisions that had been considered, and the conclusions that had been reached by the ministry in the reconsideration decision.

PART F – Reasons for Panel Decision

The issue on appeal is whether the ministry's decision to deny funding for a marijuana vaporizer was a reasonable application of the applicable enactment in the circumstances of the appellant.

Part 5, Division 4 of the EAPWDR identifies a number of health supplements for which a person may be eligible if the relevant legislative criteria are satisfied. In the reconsideration decision the ministry determined that a medical marijuana vaporizer is not a health supplement that is provided for in the legislative scheme. In particular, the ministry considered whether a marijuana vaporizer is a positive airway pressure device as provided in section 3.9 of Schedule C, a medical supply as provided in section 2(1)(a) of Schedule C, any other health supplement in sections 3 through 3.11 of Schedule C, a medical service or therapy as provided in section 2(1)(c) of Schedule C, or any other health supplement in sections 2.1, 2.2, 4, 4.1, 5, 6, 7, 8 or 9 of Schedule C. The ministry also considered whether the appellant's request for a marijuana vaporizer would meet the "life threatening health need" criteria of section 69 of the EAPWDR. The ministry concluded that a marijuana vaporizer does not fall within any of these legislative provisions.

The relevant legislative provisions are described as follows:

General health supplements

2 (1) The following are the health supplements that may be paid for by the minister if provided to a family unit that is eligible under section 62 [*general health supplements*] of this regulation:

(a) medical or surgical supplies that are, at the minister's discretion, either disposable or reusable, if the minister is satisfied that all of the following requirements are met:

(i) the supplies are required for one of the following purposes:

- (A) wound care;
- (B) ongoing bowel care required due to loss of muscle function;
- (C) catheterization;
- (D) incontinence;
- (E) skin parasite care;
- (F) limb circulation care;

(ii) the supplies are

- (A) prescribed by a medical practitioner or nurse practitioner,
- (B) the least expensive supplies appropriate for the purpose, and
- (C) necessary to avoid an imminent and substantial danger to health;

(iii) there are no resources available to the family unit to pay the cost of or obtain the supplies. ...

Section 2(1.1) of Schedule C, provides that "medical or surgical supplies" do not include nutritional supplements, food, vitamins, minerals or prescription medications.

Section 2(1)(c) provides that the following items are health supplements if the other criteria of the section are met: a service for acupuncture, chiropractic, massage therapy, naturopathy, non-surgical podiatry, physiotherapy.

Section 2(1)(f) of Schedule C provides that the following items are health supplements if the other criteria of the section are met: the least expensive appropriate mode of transportation.

Section 2.1 of Schedule C provides that the following are the optical supplements that may be provided under Section 62.1 of the EAPWDR: basic eyewear and repairs, pre-authorized eyewear and repairs.

Section 2.2 of Schedule C provides that the minister may pay a health supplement under Section 67.2 of the EAPWDR for an eye examination if the other criteria of the section are met.

Medical equipment and devices

- 3** (1) Subject to subsections (2) to (5) of this section, the medical equipment and devices described in sections 3.1 to 3.11 of this Schedule are the health supplements that may be provided by the minister if
- (a) the supplements are provided to a family unit that is eligible under section 62 [*general health supplements*] of this regulation, and
 - (b) all of the following requirements are met:
 - (i) the family unit has received the pre-authorization of the minister for the medical equipment or device requested;
 - (ii) there are no resources available to the family unit to pay the cost of or obtain the medical equipment or device;
 - (iii) the medical equipment or device is the least expensive appropriate medical equipment or device.
- (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. ...

Section 3.1 provides that the following items are health supplements for the purposes of section 3 of the Schedule, if the other criteria of the section are met: a cane, a crutch, a walker, an accessory to a cane, a crutch or a walker.

Section 3.2 provides that the following items are health supplements for the purposes of section 3 if the other criteria of the section are met: a wheelchair, an upgraded component of a wheelchair, an accessory attached to a wheelchair.

Section 3.3 provides that the following items are health supplements for the purposes of section 3 of the Schedule, if the other criteria of the section are met: a wheelchair seating system, an accessory to a wheelchair seating system.

Section 3.4 provides that the following items are health supplements for the purposes of section 3 of the Schedule, if the other criteria of the section are met: a scooter, an upgraded component of a scooter, an accessory attached to a scooter.

Section 3.5 provides that the following items are health supplements for the purposes of section 3 of the Schedule, if the other criteria of the section are met: a grab bar in a bathroom, a bath or shower seat, a bath transfer bench with hand held shower, a tub slide, a bath lift, a bed pan or urinal, a raised toilet seat, a toilet safety frame, a floor-to-ceiling pole in a bathroom, a portable commode chair.

Section 3.6 provides that the following items are health supplements for the purposes of section 3 of the Schedule, if the other criteria of the section are met: a hospital bed, an upgraded component of a hospital bed, an accessory attached to a hospital bed.

Section 3.7 provides that the following item is a health supplement for the purposes of section 3 of the Schedule, if the other criteria of the section are met: a pressure relief mattress.

Section 3.8 provides that the following item is a health supplement for the purposes of section 3 of the Schedule, if the other criteria of the section are met: a floor or ceiling lift device.

Section 3.9 provides that the following items are health supplements for the purposes of section 3 of the Schedule, if the other criteria of the section are met: a positive airway pressure device, an accessory that is required to operate a positive airway pressure device, a supply that is required to operate a positive airway pressure device. Among the requirements in relation to a positive airway pressure device is that the medical need for it must be confirmed by an assessment performed by a respiratory therapist.

Section 3.10 provides that the following items are an orthosis which is a health supplement for the purposes of section 3 of the Schedule, if the other criteria of the section are met: a custom-made foot orthotic, custom-made footwear, a permanent modification to footwear, an ankle brace, an ankle-foot orthosis, a knee-ankle-foot orthosis, a knee brace, a hip brace, an upper extremity brace, a cranial helmet, a torso or spine brace.

Section 3.11 provides that the following item is a health supplement for the purposes of section 3 of the Schedule, if the other criteria of the section are met: a hearing aid.

Section 4 of the Schedule provides that the health supplement that may be paid under section 63 [*dental supplements*] are basic dental services, if the other criteria of the section are met.

Section 4.1 provides that the health supplement may be paid under section 63.1 for crown and bridgework, if the other criteria of the section are met.

Section 5 of Schedule C provides that the health supplement that may be paid for under Section 64 of the EAPWDR are emergency dental services.

Section 6 of the Schedule provides that the amount of a diet supplement that may be provided under section 66 [*diet supplements*] is set out for various conditions, if the other criteria of the section are met.

Section 7 of the Schedule provides as follows:

- 7 The amount of a nutritional supplement that may be provided under section 67 [*nutritional supplement*] of this regulation is the sum of the amounts for those of the following items specified as required in the request under section 67 (1) (c):
- (a) for additional nutritional items that are part of a caloric supplementation to a regular dietary intake, up to \$165 each month;
 - (b) Repealed. [B.C. Reg. 68/2010, s. 3 (b).]
 - (c) for vitamins and minerals, up to \$40 each month.

Section 8 of the Schedule provides that the amount of a natal supplement that may be provided under section 68 [*natal supplements*] is set out, if the other criteria of the section are met.

Section 9 of the Schedule provides that the minister may provide infant formula under section 67.1 of the EAPWDR if the other criteria of the section are met.

Under Section 69 of the EAPWDR, the minister may provide a general health supplement if it is provided to or for a person in the family unit who is otherwise not eligible for the health supplement under the Regulation and

if the minister is satisfied that:

- (a) the person faces a direct and imminent life threatening need and there are no resources available to the person's family unit with which to meet that need,
- (b) the health supplement is necessary to meet that need,
- (c) the person's family unit is receiving premium assistance under the *Medicare Protection Act*, and
- (d) the requirements specified in the following provisions of Schedule C, as applicable, are met:
 - (i) paragraph (a) or (f) of section (2) (1);
 - (ii) sections 3 to 3.11, other than paragraph (a) of section 3 (1).

The appellant points to the two previous Tribunal decisions as support for her request for funding. The panel acknowledges and accepts the ministry's argument that previous Tribunal decisions are not precedent-setting. The panel also notes that the provision under which at least the most recent of those decisions was made, regarding "breathing devices" in the then section 3(1)(e) of the EAPWDR, had been repealed well prior to the appellant's application for funding. There is no indication of the grounds on which the 2007 Tribunal decision was made. The appellant was not able to suggest any other specific legislative provision within which a marijuana vaporizer would fall.

The appellant argues that the ministry paid for her inhaler and aero chamber by which she inhales her asthma medication, and that a marijuana vaporizer is simply another form of inhaler that would allow her to more easily take her marijuana medication. In the reconsideration decision the ministry indicated that by policy it will interpret the term "positive airway pressure device" as including suction machines and related supplies as well as percussors. The reconsideration decision found that a marijuana inhaler does not fit within even the ministry's expanded definition of "positive airway pressure device". The ministry representative argued that even if a marijuana vaporizer did fit within the definition of a positive airway pressure device, the appellant has not satisfied the criterion in section 3.9(2) of Schedule C that the medical need for the device be confirmed by an assessment performed by a respiratory therapist.

The appellant advised that she would ask the minister for an exception to policy to provide her with a marijuana vaporizer.

The panel finds that on the plain meaning of the relevant provisions, the ministry was reasonable in determining that a marijuana vaporizer does not meet the definition of a positive airway pressure device or any type of supplement provided under the legislative scheme. The panel is bound to apply the legislation and cannot base its decision solely on policy considerations.

With respect to section 69, the ministry found it is not applicable because:

- the appellant is eligible to receive health supplements set out in sections 2 and 3 of Schedule C, so she is not "...a person...who is otherwise not eligible...";
- a marijuana vaporizer is not a health supplement set out in sections 2(1)(a) or (f), or in section 3; and
- the requirements specified in sections 2(1)(a) or (f), or sections 3 to 3.11 of Schedule C were not met.

Based on the evidence and a plain reading of the legislation, the panel finds that the ministry's decision with respect to section 69 was reasonable.

In conclusion, while the panel understands that the use of a vaporizer is likely to be beneficial to the appellant, the panel finds that the ministry's decision to deny funding for a marijuana vaporizer is a reasonable application of the applicable enactment in the circumstances of the appellant.

Accordingly, the ministry's decision is confirmed.