

**PART C – Decision under Appeal**

The decision under appeal is the February 13, 2012 reconsideration decision of the Ministry of Social Development (the ministry) refusing the appellant's request for a supplement in the form of a power wheel chair. The ministry held that the appellant had not satisfied two legislative criteria. Firstly, the ministry found that an assessment by an occupational therapist (OT) had not confirmed the medical need for the power wheel chair, as required by Schedule C section 3(2)(b) of the Employment and Assistance for Persons with Disabilities Regulation (EAPWDR). Secondly, the ministry found that it could not determine that the power wheel chair is medically essential to achieve or maintain basic mobility, as required by Schedule C section 3.2(2) of the EAPWDR.

**PART D – Relevant Legislation**

EAPWDR Schedule C sections 3(2), 3.2(1) and (2), and 3.4(2) and (3)

## PART E – Summary of Facts

The information before the minister at the time of the reconsideration decision included the following:

- An assessment of the appellant performed by an OT, dated November 22, 2011, with an attached quote for a Shoprider UL8W Axis Power wheelchair in the amount of \$2,290.75.
- A Medical Equipment Request and Justification form signed by the appellant on July 7, 2011. This form includes a “prescription” for a medical scooter which was signed by the appellant’s physician on July 9, 2011. The form also includes a space titled “Specifications of Medical Equipment Required to Meet the Applicant’s Needs.” In that space the words “Shoprider UL8W Axis Power” are written. This section of the form was signed by the OT on December 1, 2011.
- The original decision, dated January 24, 2012, denying the appellant’s request for a power wheelchair.
- The Request for Reconsideration signed by the appellant on February 2, 2012.

The appellant is a recipient of disability assistance.

In the Diagnosis/Prognosis section of the OT’s assessment, the OT gave the appellant’s age as 70, which matches the appellant’s date of birth as provided by the OT in the assessment. The OT wrote that the appellant requested a scooter to access the local malls and level streets near his home. The appellant’s able bodied wife does all the driving for the couple.

In describing the medical condition of the appellant, the physician’s prescription says “Medical scooter for myopathy and ataxia in Rt leg. Osteoporosis. High risk fractures.” The type of medical equipment recommended is “Medical scooter”. Next to the words “Medical scooter” the physician has underlined the term “ASAP”.

In the medical history section of the assessment, the OT notes that the appellant has a long standing seizure disorder, referred to by a neurologist as multi-domain impairment syndrome. The appellant has a seizure dog and is a heavy smoker. He has COPD, is osteoporotic and fractured his tibia, radius, ribs and humerus in the last few years from falls. He was investigated for weakness and sudden giving way in his legs in 2010 and no definitive diagnosis could be made.

In terms of mobility the OT’s assessment describes the appellant’s walking tolerance is one block when he has to stop due to shortness of breath and knee pain. The OT wrote that the appellant has a cane but refuses to use it, and that he has a 4 wheeled walker but does not want to use it in case he falls forward into the walker. The OT says the appellant has a Berg Balance score of 43/56 which indicates he requires an aide.

With respect to cognition the OT noted that the appellant has no short term memory, cannot subtract, and has poor language and visuo-spatial skills and no abstraction. Scanning during the Trail Making test was poor and was halted by the OT after 2 minutes of Part B where the appellant had gotten 2/3 of the way through with numerous mistakes. According to the OT, the physician stated that the appellant’s level of cognition varies quite a bit from visit to visit. The OT reports that the appellant states he cannot copy or understand the written word, and that the appellant’s wife manages his medications.

The OT assessed the appellant for driving skill on a small breakdown wheelchair at a local mall. The OT wrote that the size was chosen so the appellant's wife could take it apart and place it in the car for use at the mall. It will also fit through all doors and in all rooms should he need one in the future for home access. The OT reported that the mall was not particularly busy and that the appellant managed the wheelchair quite well, but that his use of the cross walk control and cut out had to be corrected, and that the appellant's appreciation of traffic regarding speed and right of way were poor.

In the Recommendation section of the assessment, the OT wrote the following:

*"This client could make use of a power w/c for outings in the Mall but would need supervision if he was outside of the building. His compliance with having supervision is questionable. His use of anti seizure and pain meds and the Dr's reported observance of variations in his cognitive ability during office visits raises concerns about using a power mobility device. He will continue to refuse to use a mobility aide in the home or around the yard where he had his last fall while working in the yard.*

*If funding is provided for this w/c please see the attached quote from [a vendor] for a small power w/c that could be loaded into the family car to take to the Mall."*

In his Request for Reconsideration the appellant wrote that he needs a power wheelchair to go to the mall, outside around the house, to the beach, and to go out of town. His legs collapse when walking, and he has fallen as a result even when using his walker. He doesn't feel he needs supervision when using a power wheelchair.

At the hearing before this panel the appellee represented himself, saying that he'd tried without luck to find an advocate. The appellant said that the ministry was trying to give the impression that he needs supervision 24/7, but that in fact he can go into town on his own for coffee. The appellant stated that he is 78 years old, and that his physician has assessed him as being qualified to obtain a driver's license, but that at his age the appellant doesn't want a driver's license. The appellant reported that his physician has stated that he should have had a wheelchair long ago, and that since the appellant submitted his application for the wheelchair he has fallen twice, breaking his shoulder and both wrists the first time and a wrist again the second time. The appellant explained that his legs collapse without warning. He reiterated that he wanted the wheelchair not just for the mall, but for going to the beach, picnics, and other outdoor activities. On questioning from the panel, the appellant said that he doesn't refuse to use a cane or walker, and that in fact he uses his walker "all the time". With a cane, his balance is a problem since he tends to the right more than the left. The appellant said that with a walker he can go 2 or 3 blocks. He gets no warning as to how far he'll be able to walk because his legs can give out.

The appellant said that his current physician is the second doctor that has recommended he get a power wheelchair, and that he wants to use his legs as often as he can as he does not want to be restricted to a wheelchair. He said that he has had no seizures for the past 5 years since he has been on new medication. The appellant stated that the wheelchair can be folded up to be put in the car – a scooter is more difficult to put in.

In response to a question from the panel, the appellant said that he doesn't have documentary evidence of his physician's assessment as to his suitability for a driver's license. He said that he was surprised by the negative tone of the OT assessment since the OT was quite positive during their

time together, though the OT did express concern about the appellant's tendency to stagger to his right hand side.

In response to a question from the ministry representative as to whether he already has a wheelchair, the appellant replied "no", that he has a walker and he does have an old second hand scooter for which he paid "next to nothing" and which doesn't work well.

The panel admits the new evidence from the appellant as being oral testimony in support of the information and records that were before the minister at the time of the reconsideration decision, in accordance with section 22(4) of the *Employment and Assistance Act*.

The ministry representative relied on the reconsideration decision.

## PART F – Reasons for Panel Decision

The issue on appeal is the reasonableness of the ministry's decision to deny the appellant's request for a supplement in the form of a power wheelchair on the bases that the OT has not confirmed the medical need for a power wheelchair as required by EAPWDR Schedule C, section 3(2)(b), and that the wheelchair is not medically essential to achieve or maintain basic mobility as required by EAPWDR Schedule C, section 3.2(2).

The relevant legislation is as follows:

### 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.

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### Medical equipment and devices – wheelchairs

3.2 (1) In this section, "**wheelchair**" does not include a stroller.

(2) Subject to subsection (4) of this section, the following items are health supplements for the purposes of section 3 of this Schedule if the minister is satisfied that the item is medically essential to achieve or maintain basic mobility:

- (a) a wheelchair;
- (b) an upgraded component of a wheelchair;
- (c) an accessory attached to a wheelchair.

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### Medical equipment and devices – scooters

3.4 (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.

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The appellant's position is that his physician has prescribed that he obtain a powered mobility device. The OT has requested a power wheel chair. Without a power wheelchair the appellant is substantially restricted in his mobility because of the demonstrated risk of falling and fracturing bones. The appellant says he does not need supervision to operate a power wheelchair, and that the physician assessed his cognitive abilities as being sufficient to qualify for a driver's license.

The ministry argues that the physician's prescription should be given relatively little weight. The OT is a specialist in the assessment of the appellant's medical needs and abilities - the OT went to the extent of assessing the appellant's cognitive abilities in terms of ability to write while the physician would not have done such a comprehensive assessment. The ministry stresses that an important and relevant factor is whether the appellant can safely use a power machine, and says that the OT has expressed doubt about the appellant's ability to safely use the power wheelchair. The ministry speculates that the appellant's abilities may become even more restricted with age.

In deciding whether or not to provide a supplement in the form of medical equipment and devices, section 3(2) of Schedule C of the EAPWDR gives the minister the discretion to require one or both of a prescription from a physician and an assessment by an occupational therapist. The ministry's Medical Equipment Request and Justification form has separate sections for a prescription and for an assessment. In this case both sections have been filled in and a comprehensive OT assessment attached. The reconsideration decision that is the subject of this appeal does not specify whether the ministry turned its mind to the issue as to whether both a prescription and an assessment had to be submitted. The reconsideration decision does not refer to the doctor's prescription at all, focusing entirely on the OT's assessment. Accordingly, the panel concludes that the only provision of section 3(2) at issue is paragraph 3(2)(b) – the OT's assessment of the medical need for the power wheelchair – and that the physician's prescription is supporting evidence.

The physician's prescription strongly recommends a medical scooter, based on the high risk of fractures. The OT's assessment says that the appellant requested a scooter, but the OT has recommended a folding power wheelchair, citing its ability to be placed in the family car. The OT provided no other explanation as to why a power wheelchair is preferable to a scooter. The legislation is clear that wheelchairs and scooters are different medical devices, each having its own set of legislative criteria that must be satisfied, so the panel interprets the physician's prescription as supporting the appellant's need for a powered mobility device in general rather than specifically a power wheelchair.

It's clear that in making his recommendation the physician has considered the demonstrated risk of the appellant continuing to fall and fracture bones. Unlike the OT, the physician has not expressly considered the risk posed by the appellant's cognitive shortcomings as identified by the OT. The OT considered both sets of risks and on balance did make the recommendation that the appellant "could make use of" a power wheelchair for outings to the mall, though she recommended that he should

only do so under supervision anywhere outside a mall building, then went on to express doubt about the appellant's willingness to comply with supervision, and conveyed her concern with respect to the appellant's cognitive ability to use a power mobility device. It is difficult to imagine a more tepid and ambivalent recommendation. In fact, the panel is left with the distinct impression that it is a "non-recommendation", and that the OT has simply left it to the ministry to decide whether there is a medical need for this medical device.

The OT assessment confirms that the appellant does not currently require a power wheelchair for mobility within his home. With respect to mobility outside the home, given that the word "need" conveys some necessity, while the phrase "could make use of" implies that use is optional, the panel concludes that the ministry reasonably determined that the OT assessment does not confirm the medical need for a power wheelchair and accordingly the ministry's decision with respect to section 3(2)(b) was reasonable.

Section 3.2(2) of EAPWDR Schedule C requires the ministry to be "satisfied" that the wheelchair is "medically essential" to achieve or maintain basic mobility. The plain meaning of the word "essential" is that a thing is "of the essence" or absolutely necessary, and can't be done without. Given that the power wheelchair is not needed for basic mobility within the home, and the ambivalence and doubts expressed by the OT regarding the appellant's ability to make use of a power mobility device, it was reasonable for the ministry to conclude that the power wheelchair is not medically essential to achieve or maintain basic mobility.

Accordingly, the panel finds that the ministry's decision was a reasonable application of the applicable enactment in the circumstances of the appellant and therefore confirms the ministry's decision.