

### PART C – Decision under Appeal

The decision under appeal is the ministry's reconsideration decision dated March 6, 2012 which denied the appellant's request for a supplement to cover the cost of a Invacare Pegasus Scooter.

The ministry found that the appellant's request did not meet requirements of Section 3(3)(b) and Section 3.4(4) of Schedule C of the Employment and Assistance for Persons With Disabilities Regulation (EAPWDR) as the information provided does not establish that five years have passed since the ministry last provided the appellant with a scooter.

The ministry also found that the appellant's request did not meet the requirements of Section 69 of the EAPWDR as a life threatening health need.

### PART D – Relevant Legislation

Employment and Persons with Disabilities Regulation (EAPWDR), Section 69 and Schedule C, Sections 3 and 3.4

## PART E – Summary of Facts

The evidence before the ministry at the time of the reconsideration decision consisted of:

- 1) Letter dated October 1, 2008 from the ministry to the appellant approving her request for an Auriga scooter at a total cost not to exceed \$3,416.93;
- 2) Medical Equipment Request and Justification dated July 8, 2011 which states in part that the appellant needs a "...new scooter, assessment with OT please, fibromyalgia, mobility affected";
- 3) Quote from a health product company dated October 25, 2011 for a Invacare Pegaus 4 wheeled scooter and a cane holder in the amount of \$3,498.30;
- 4) Letter from an occupational therapist to the ministry dated October 31, 2011, which states in part that the appellant has been followed by mental health since February 2010 and moved to the area in November 2009 following an assault that left her with an anoxic brain injury. As a result of this injury, the appellant has had some difficulties with memory and organization. While in the previous community, the appellant was provided with an Invacare Auriga scooter funded through the ministry. The appellant was using the scooter until September 2011 when it was stolen. According to the appellant, the scooter broke down at the bus loop and she went to a pay phone to call for help and the scooter was gone when she returned and there is a police report. The appellant has a number of medical conditions which affect her ability to function. She is a breast cancer survivor and treated with steroids which resulted in avascular necrosis in her hips and she has bilateral hip replacements. She has osteoporosis, arthritis and fibromyalgia and she reports she is only able to walk approximately 1 block, her gait is unsteady but she walks without a cane. The appellant relies heavily on pain medication and night sedation, the effects of which sometimes carry over to the next day. The appellant utilizes a scooter almost daily, as pain permits. She uses a scooter to grocery shop and wants to use it when accessing public transportation. The scooter permits her to attend a support group, to get out to medical appointments, and to run errands in order to maintain her independence. The occupational therapist summarizes that the appellant is dependent on a scooter to be able to access community resources and it is doubtful that her physical condition will improve and more probable that it will deteriorate further. A scooter will assist the appellant to maintain her independence and benefit her mental health. However, the appellant sometimes appears over-sedated and this could impact her ability to use good judgment while operating a scooter.
- 5) Copy of Medical Equipment Request- Tracking Sheet with entries for January 7, 2011(sic) stating in part that the ministry funded a scooter in October 2008, client's scooter was stolen September 2011, scooter broke down at the bus loop and she left to call for help, police report done, she can walk without a cane however only 1 block, scooter denied based on 5 year replacement policy;
- 6) Letter dated January 7, 2012 from the ministry to the appellant denying her request for a Invacare Pegasus Scooter and enclosing a copy of the decision summary;
- 7) Note dated January 20, 2012 from the appellant's physician stating in part that the appellant is suffering from fibromyalgia/myopathy and suffering from muscle weakness/ difficulty walking; recommend using electronic scooter, and marked "void"; and,
- 8) Request for Reconsideration- Reasons prepared by an advocate on behalf of the appellant.

At the hearing, the appellant stated that her advocate had a family emergency and was not able to attend the hearing, but the appellant stated that she wanted to proceed with the hearing and that she would represent herself, with her mother's support.

The appellant's mother stated that the appellant was born after a 26 week pregnancy and she has never been well, with fibromyalgia, muscle myopathy, a borderline lupus diagnosis, and cancer in 2000 when she had a breast removed and had chemotherapy and radiation treatments. The appellant's mother stated that the appellant's fight with cancer was a 5-year process and she supported the appellant but her care became very difficult and the appellant was hospitalized several times. The appellant's mother stated that they discovered the appellant's hips had disintegrated and had been improperly adjusted by a chiropractor before an X-Ray had been taken. The appellant had both hips replaced because she could not walk, and she has been advised to be very careful because if the hip is displaced it would be hard to repair. The appellant's mother stated that the appellant has underlying muscle myopathy and fibromyalgia and the doctor decided that she should use a

scooter. The appellant's mother stated that having a scooter really opened up the appellant's life and gave her more independence. The appellant's mother stated that about 3 years ago the appellant had a heart attack and was in intensive care for 3 to 4 weeks and her brain function was affected. The appellant's mother stated that the appellant has been living with her and the appellant has been working hard at socializing with others and got involved with a Society of others with medical issues and disabilities.

The appellant's mother stated that the appellant had been having some trouble with her scooter, she had taken it in for repairs to have a new console put on, and then it jammed up at the bus loop. The appellant's mother stated that the appellant did not have her cell phone so she walked a block and a half to a telephone to call a taxi van to come and pick her up with the scooter. The appellant's mother stated that the appellant returned about 20 minutes later and her scooter was gone. The appellant's mother stated that a police report was filed but they have not found the scooter. The appellant's mother stated that they even placed an ad in the local newspaper trying to find the scooter. The appellant's mother stated that this has pretty much grounded the appellant, unless she can drive the appellant or someone comes to pick her up, so she is back to depending on other people again. The appellant's mother stated that she cannot stay with the appellant for another year and a half to wait for a replacement scooter, so she will not be available to drive the appellant places. The appellant's mother stated that it has been disappointing since the appellant had been looking at her own housing and living more independently but now everything is up in the air. In response to a question, the appellant's mother stated that they did not place any insurance on the scooter because it was initially seen as a temporary assist for the appellant. The panel admitted the testimony of the appellant's mother as relating to the appellant's impairments and her need for a scooter, and being in support of the information before the ministry on reconsideration, pursuant to Section 22(4) of the Employment and Assistance Act.

The appellant stated that after her scooter was stolen, she found that her muscle myopathy got worse and the limp in her leg has become permanent and she is waiting to see a specialist about it. The appellant stated that it is very hard because the fibromyalgia is out of control and her doctor has been switching pain killers and it is making her sick. The appellant stated that she is at home more often without a scooter and it is like having 'cabin fever' because she used to go fishing, shopping, and to the support group Society where they play games, use the computers and go for lunch. The appellant stated that the scooter stopped working at the bus loop and she went to make a call and it was gone when she returned. The appellant stated that she has missed appointments and going to the support group Society, and she finds it hard to use a cane for shopping. In response to a question, the appellant stated that she met with her doctor on January 20, 2012 when the note was prepared recommending that she use an electronic scooter, and she does not know why the note is marked "void." The appellant also stated that she cannot use a wheelchair because her arms are weak and sore. In her Notice of Appeal, the appellant adds that her fibromyalgia and muscle myopathy make it very hard to walk, with losing strength in both legs when she tries to walk. The appellant states that the scooter is the only way she can get around.

The ministry's evidence included that on November 23, 2011, the ministry received a request from the appellant for a replacement scooter. The request included a completed Medical Equipment Request and Justification form, a quotation from a health product company for an Invacare Pegasus 4-wheeled scooter in the amount of \$3,498.30, and an assessment by an occupational therapist dated October 31, 2011. The report included the following information:

- the appellant has been followed by mental health since February 2010 and moved to the area in November 2009 following an assault that left her with an anoxic brain injury. As a result of this injury, the appellant has had some difficulties with memory and organization.
- while in the previous community, the appellant was provided with an Invacare Auriga scooter funded through the ministry. The appellant was using the scooter until September 2011 when it was stolen. According to the appellant, the scooter broke down at the bus loop and she went to a pay phone to call for help and the scooter was gone when she returned and there is a police report.
- the appellant has a number of medical conditions which affect her ability to function. She is a breast cancer survivor and treated with steroids which resulted in avascular necrosis in her hips and she has

bilateral hip replacements. She has osteoporosis, arthritis and fibromyalgia.

- the appellant reports she lost muscle mass and strength in her legs and are scheduled to see a rheumatologist, and reports she is only able to walk approximately 1 block, her gait is somewhat unsteady but she walks without a cane. The appellant relies heavily on pain medication and night sedation, the effects of which sometimes carry over to the next day.
- the appellant currently lives in the bottom floor of a house which she shares with her mother and another roommate. The suite is not accessible with the scooter, and the appellant parks the scooter in front of the house, running an extension cord around the side of the house to the front to charge it.
- the appellant utilizes a scooter almost daily, as pain permits. She uses a scooter to grocery shop and wants to use it when accessing public transportation. The scooter permits her to attend a support group, to get out to medical appointments, and to run errands in order to maintain her independence.
- the appellant is dependent on a scooter to be able to access community resources and it is doubtful that her physical condition will improve and more probable that it will deteriorate further. A scooter will assist the appellant to maintain her independence and benefit her mental health. However, the appellant sometimes appears over-sedated and this could impact her ability to use good judgment while operating a scooter.

The ministry records indicate that the appellant was approved for an Auriga scooter on October 1, 2008. The scooter was shipped on October 10, 2008. The ministry paid for the scooter on October 29, 2009(sic). The ministry stated that there are no other specific provisions in the legislation or in policy for the replacement of a scooter previously provided by the ministry that has subsequently been stolen.

## PART F – Reasons for Panel Decision

The issue on the appeal is whether the ministry's decision, which denied the appellant's request for a supplement to cover the cost of a Invacare Pegasus Scooter because it did not meet requirements of Section 3(3)(b) and Section 3.4(4) of Schedule C of the Employment and Assistance for Persons With Disabilities Regulation (EAPWDR) as five years have not passed since the ministry last provided the appellant with a scooter and it did not meet the requirements of Section 69 of the EAPWDR as a life threatening health need, is reasonably supported by the evidence or a reasonable application of the applicable enactment in the circumstances of the appellant.

Pursuant to Section 62 of the Employment and Assistance for Persons with Disabilities Regulation (EAPWDR), the applicant must be a recipient of disability assistance, or be a dependent of a person in receipt of disability assistance in a variety of scenarios. If that condition is met, Schedule C of the EAPWDR specifies additional criteria that must be met in order to qualify for a health supplement for various items. In this case, the ministry has not disputed that the requirement of Section 62 has been met in that the appellant has been approved as a recipient of disability assistance.

Section 3 of Schedule C of the EAPWDR provides:

### **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.
- (3) Subject to subsection (6), the minister may provide as a health supplement a replacement of medical equipment or a medical device, previously provided by the minister under this section, that is damaged, worn out or not functioning if
- (a) it is more economical to replace than to repair the medical equipment or device previously provided by the minister, and
  - (b) the period of time, if any, set out in sections 3.1 to 3.11 of this Schedule, as applicable, for the purposes of this paragraph, has passed.
- (4) Subject to subsection (6), the minister may provide as a health supplement repairs of medical equipment or a medical device that was previously provided by the minister if it is more economical to repair the medical equipment or device than to replace it. ...

Section 3.4 of Schedule C of the EAPWDR provides:

**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.

Section 69 of the EAPWDR provides as follows:

**Health supplement for persons facing direct and imminent life threatening health need**

69 The minister may provide to a family unit any health supplement set out in sections 2 (1) (a) and (f) [*general health supplements*] and 3 [*medical equipment and devices*] of Schedule C, if the health supplement is provided to or for a person in the family unit who is otherwise not eligible for the health supplement under this 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 ministry's position is that the appellant is eligible to receive health supplements under Section 62 of the EAPWDR, but the appellant's request for a supplement to cover the cost of a Invacare Pegasus Scooter does not meet the criteria of Schedule C, Sections 3(3)(b) and 3.4(4) of the EAPWDR. The ministry argues that the appellant was approved for an Auriga Scooter on October 1, 2008 and it was shipped on October 10, 2008 so that the appellant's request is for the replacement of a scooter previously provided by the ministry. The ministry argues that Section 3(3)(b) of Schedule C requires that the time period of 5 years must have passed since the ministry provided the scooter being replaced, which would be October 2013, as set out in Section 3.4(4) of Schedule C. In response to the advocate's argument that the appellant's request should be considered as a new request as there is no evidence that the scooter previously provided is "damaged, worn out, or not functioning", the ministry argues that this is to ignore the fact that what is being requested is the replacement of a scooter provided October 2008. The ministry points out that it could also be said that

because there is no evidence that the scooter being replaced is damaged, worn out, or not functioning, the ministry does not have the authority to replace it, or that because it does not exist it is not functioning. The ministry argues that the information does not establish that five years have passed since the ministry last provided the appellant with a scooter and there is no provision in policy for an exception.

The appellant's position is that Section 3(3) of Schedule C provides for the replacement of equipment previously provided by the ministry where the equipment is "...damaged, worn out, or not functioning" but that does not apply since the scooter cannot be repaired and it simply does not exist. The advocate argues in the Request for Reconsideration that the time limit for the replacement of equipment, as set out in Section 3.4(4) of Schedule C, does not apply in this case. The advocate points to the note from a physician dated January 20, 2012 as evidence that the appellant needs an electronic scooter, and argues that the appellant's basic mobility needs, as a basic human right, are not being met due to the theft of her scooter. The advocate argues that the provisions for replacement under Section 3(3) of Schedule C do not apply and that, therefore, the appellant's request should be considered as a new request under Section 3.4(3) of Schedule C.

The panel finds that it is not disputed that the ministry previously provided the appellant with a scooter in October 2008, that this scooter was stolen in September 2011, and that the appellant submitted a request to the ministry for an Invacare Pegasus Scooter on November 23, 2011. The panel finds that the appellant's request is for a "replacement" scooter, since the ministry previously provided a scooter to the appellant, and this fact cannot be ignored. However, the panel finds that the appellant's request is not for replacement of a scooter that is "damaged, worn out, or not functioning", as specified in Section 3(3) of Schedule C of the EAPWDR, but for a scooter that was stolen. The ministry confirmed that there are no other specific provisions in the legislation or in policy to allow the ministry to provide a replacement for a scooter that has been stolen, and the panel finds that there is no authority for the ministry to replace a stolen scooter previously provided. In this case, the appellant's mother stated that they had not taken out insurance on the scooter because it was considered to be only a temporary assist for the appellant at the time. The panel finds that the ministry's determination that Sections 3(3) and 3.4(4) of Schedule C of the EAPWDR applies to the appellant's request for the replacement of a scooter that was stolen was not reasonable.

With respect to Section 69 of the EAPWDR, the ministry's position in the reconsideration decision is that this section is intended to provide a remedy for those persons who are facing a direct and imminent life-threatening need for these supplements and who are not otherwise eligible to receive them. The ministry argues that the appellant does not require a remedy under Section 69 as she is eligible to receive health supplements set out under Schedule C, Sections 2 and 3. The advocate argues in the Request for Reconsideration that the appellant meets the eligibility requirements as set out under Section 69 of the EAPWDR. The advocate argues that without a scooter the appellant is unable to leave her house for medical appointments or to attend to her nutritional needs and a scooter is medically essential to achieve basic mobility and perform day-to-day activities.

The panel finds that it was not disputed that the appellant is eligible, as a recipient of disability assistance, for health supplements under Section 62 of the EAPWDR, whereas Section 69 applies to provide a health supplement to a person in the family unit who is otherwise not eligible for the health supplement under the EAPWDR. Therefore, the panel finds that the ministry's decision, which concluded that Section 69 of the EAPWDR does not apply to the appellant's circumstances, was reasonable.

In conclusion, the panel finds that the ministry's decision to deny the appellant's request for a supplement to cover the cost of a Invacare Pegasus Scooter because it did not meet requirements of Section 3(3)(b) and Section 3.4(4) of Schedule C of the EAPWDR was not a reasonable application of the applicable enactment in the circumstances of the appellant as the panel finds these sections do not apply to a request for the replacement of a stolen scooter. The panel rescinds the ministry's decision on this issue and it is overturned in favour of the appellant.

APPEAL #

The panel further finds that the ministry's decision to deny the appellant's request as it did not meet the requirements of Section 69 of the EAPWDR as a life threatening health need, is a reasonable application of the applicable enactment in the circumstances of the appellant and confirms the ministry's decision on this issue.