

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development (ministry) reconsideration decision dated May 17, 2012 wherein the ministry denied the appellant's request for funding for the purchase of a nebulizer, mask and tubing 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 nebulizer, mask and tubing 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 quotation for a nebulizer, mask and tubing (hereinafter referred to collectively as a "nebulizer") in the amount of \$126.00 including tax, dated December 13, 2011.
- A prescription from the appellant's physician, dated 25 January 2012, stating that "This man has liver failure and copd. I have prescribed ventolin, but he is unable to afford to buyor (*sic*) rent the machine. IO (*sic*) strongly recommend the nebulizer over the MDIs considering his medical condition. It would be necessary for him to have financial assistance for this."
- In his May 15, 2012 Request for Reconsideration, the appellant wrote that he has been granted approval for a liquid solution medication. A nebulizer is required in order for the appellant to inhale the liquid. The medication allows the appellant to breathe much better by opening up his airways. Failure to fund the nebulizer would be far more costly to the government than funding it, because of the costs that would result for ambulance, paramedics, physicians and hospital admission.

In the Notice of Appeal for the current proceedings, the appellant noted that nebulizers can be rented, but that it is cheaper to purchase one.

At the appeal before this panel the appellant substantially reiterated the evidence from his previous submissions. He added that his medication is available in pill form, but with his medical condition it hurts his liver too much for him to be able to take the pills. The provincial Medical Services Plan covers the cost of the liquid medication, but the appellant cannot afford the \$126 to buy the nebulizer. The appellant stated that he has recently lost a significant amount of weight. He confirmed that he is a recipient of disability assistance. By the time he pays \$390 for rent and purchases his own food, he does not have enough money left to be able to buy the nebulizer. He wears clothing gifted to him by his father, does not own a vehicle, and relies on public transportation.

In response to a question from the panel as to whether he is currently taking his medication in pill form or doing without, the appellant reiterated that he cannot take the pill form of medication. Instead, his pharmacy has loaned him a nebulizer until he can pay for it.

The panel considers that the appellant's written submission in the Notice of Appeal 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 as evidence in accordance with section 22(4) of the *Employment and Assistance Act*.

The ministry relied on its reconsideration decision.

PART F – Reasons for Panel Decision

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

The relevant legislative provisions are described as follows:

EAPWDR Schedule C

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's position is that the liquid medication and the nebulizer to allow him to inhale it are medically essential to him. He says that it is simply good fiscal management for the ministry to purchase him a nebulizer, since without a nebulizer he won't be able to take the appropriate medication which will result in hospital admissions that will cost the ministry more than the nebulizer. Alternatively he suggested that the ministry could rent the nebulizer for him, which would make it a "reusable medical supply". Finally, the appellant enquired as to whether the ministry could loan him the funds to purchase the nebulizer with repayment being deducted from his ongoing disability benefits.

The ministry's position, as set out in the reconsideration decision and confirmed at this appeal hearing, is that a nebulizer is not *medical equipment* as set out in sections 3.1 to 3.11 of Schedule C of the EAPWDR.

The ministry also maintains that a nebulizer is not a *disposable or reusable medical or surgical supply* as contemplated by Schedule C s. 2(1). It is also not required for one of the purposes identified in Schedule C s. 2(1)(a)(i), and the ministry says that on the evidence a nebulizer is not necessary to avoid an imminent and substantial danger to health.

The ministry says that a nebulizer is not a *therapy* as contemplated by Schedule C, ss. 2(1)(c), 2(2), and 2(2.1), and that the evidence does not show that the other legislated criteria for these therapies have been met.

The ministry maintained that a nebulizer does not meet the criteria as one of the remaining *health supplements* identified in Schedule C, ss. 2(1)(f), 2.1, 4, 4.1, 5, 6, 7, 8 or 9.

The ministry stated that it does not have the discretion to provide loans for repayment.

In conclusion, the ministry argued that its reconsideration decision was reasonable.

The panel finds that on the plain meaning of the relevant provisions, the ministry was reasonable in determining that a nebulizer does not meet the definition of any type of supplement provided under the legislative scheme. The appellant's suggestion with respect to renting a nebulizer still would not make it a disposable or reusable medical or surgical supply as set out in s. 2(1)(a) of Schedule C, nor would it change its nature to make it any other kind of health supplement provided for by the legislation. The legislation does not grant the ministry the discretion to make loans. Finally, the panel considered the application of s. 69 of the EAPWDR [*health supplement for persons facing direct and imminent life threatening need*], but concluded it is not applicable because: 1) the appellant is eligible to receive health supplements set out in sections 2 and 3 of Schedule C, so he is not "... a person...who is otherwise not eligible..."; and 2) a nebulizer is not a health supplement set out in sections 2(1)(a) or (f), or in section 3 of Schedule C.

In conclusion, while the panel sympathizes with the appellant and understands that the use of a nebulizer is necessary for him to be able to inhale his medication, the panel finds that the ministry's decision to deny funding for a nebulizer is a reasonable application of the applicable enactment in the circumstances of the appellant. Accordingly, the ministry's decision is confirmed.