

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development (the "Ministry")'s Reconsideration Decision dated August 10, 2012 which found the appellant ineligible for the cost of Botox injection fees. In particular, the Ministry found that Botox injection fees do not meet the requirements set out for medical supplies under the *Employment and Assistance for Persons with Disabilities Regulation* (EAPWD Regulation) Schedule C, section 2(1)(a)(i). In addition, the Ministry found that the information provided does not demonstrate that the Botox injections are necessary to avoid an imminent and substantial danger to health as required by the EAPWD Regulation, Schedule C, section 2(1)(a)(ii)(C).

PART D – Relevant Legislation

Employment and Assistance for Persons with Disability Regulation (EAPWD Regulation), Section 62 and *Schedule C, section 2(1)(a)*

PART E – Summary of Facts

At reconsideration, the documents that were before the ministry included the following:

- 1) Request for Reconsideration dated July 16, 2012 in which the appellant states that he has dealt with neck pain for 16 years which is a side effect of the injections that he takes for his bipolar disorder. The appellant states that acupuncture helped somewhat, but not entirely. The appellant states that he has found up to 70% relief with Botox injections but he cannot afford the \$125 injection fee as his disability income is \$906 per month. The appellant states that the Medical Services Plan has agreed to pay for the cost of the Botox supplement on a one year trial basis and all he is requesting is that the cost of the injection of \$125 be paid, four times per year;
- 2) Letter from the appellant's physician dated June 9, 2012 recommending that the appellant undergo Botox injections for his medical diagnosis of cervical dystonia secondary to medications. The physician states that this is a medically indicated treatment for the appellant's chronic pain problem;
- 3) Invoice from a medical provider dated June 12, 2012 indicating the Botox injection fee is \$125; and
- 4) Letter from the Ministry to the appellant dated June 26, 2012 advising that the appellant's request for Botox was denied as the information provided does not establish that all the regulator criteria have been met, in that the Botox is not listed under Schedule C (2)(1) of the EAPWD Regulation and therefore the Ministry does not have the legal authority to provide this item.

In his Notice of Appeal dated August 21, 2012, the appellant states that he disagrees with the Ministry's decision because it is unfair and unconstitutional. The appellant states that if the government hospital caused the problem to begin with, it is only fair that they should fix it. The appellant states that "*...it would be a better decision on the government's behalf, rather than force a class action law suit*".

With his Notice of Appeal the appellant submitted new evidence which was a letter from a mental health coordinator dated August 22, 2012. The coordinator states that the appellant has been a member at the mental health facility for over 15 years and that the coordinator has known him for just over four years and has observed him struggle with cervical dystonia. The coordinator states that the Botox injections will help the appellant to live a better and more pain free life and because he is on disability he cannot afford the injection costs.

The coordinator states that the psychological effects of living with chronic pain can be as debilitating as the pain itself and produce other side effects including depression, irritability and difficulty concentrating, which she is certain that the appellant experiences. The coordinator states that she observed improvement in the appellant's demeanour and posture after his last Botox injection.

The Ministry had received the coordinator's letter with the appellant's Notice of Appeal and did not object to the coordinator's letter. The panel finds that the new evidence is admissible under section

22(4) of the Employment and Assistance Act as it is in support of the information and records that were before the Ministry when the Reconsideration Decision was made.

The appellant also advised that he had a new letter from his physician dated September 17, 2012 asking that the Ministry reconsider its decision. The appellant did not have any immediate access to a fax machine or computer to allow him to provide the letter to the Ministry or the panel at the hearing. The panel asked whether the appellant wanted to seek an adjournment to provide him with time to submit the new physician's letter for consideration but the appellant advised that he wanted to proceed with the hearing.

At the appeal, the appellant's evidence was that he has had chronic pain for 16 years, which disturbs the quality of his life. He stated that as MSP is paying for the cost of the Botox, all he is seeking is the cost of the \$125 injection fee, which is \$125, every 2 ½ to 3 months, or 4 times a year, which would be a cost of \$500 per year. The appellant's evidence is that as he is on disability income he cannot afford the cost of the Botox injection fees and he has borrowed money from the mental health facility to pay for the two Botox injection fees to date.

The appellant's sister, who assisted as his advocate, stated that the appellant has involuntary neck flailing and it is difficult for him to be in public but that the Botox injections enhance the quality of his life and enable him to participate in and contribute to society.

The Ministry relied on its Reconsideration Decision. The Ministry's evidence is that while the Botox injections have been prescribed by a medical practitioner, the legislation does not authorize payment of Botox injection fees. The Ministry's evidence is that the Botox injection fees were considered as a medical or surgical supply but the legislation requires that the items be required for either wound care, ongoing bowel care required due to loss of muscle function, catheterization, incontinence, skin parasite care or limb circulation care and that Botox injection fees do not fall into any of the prescribed categories.

The Ministry's evidence was that while they appreciate that Botox injections may enhance the quality of the appellant's life and his standard of living, in order to meet the legislative requirements, it must be necessary to avoid an imminent and substantial danger to health. The Ministry's evidence is that the letter from the appellant's physician confirms that the appellant has chronic pain which might be impacting the appellant's health, but the information does not indicate that the Botox injections are necessary to avoid an imminent and substantial danger to his health.

Based on the evidence, the panel's finding of facts are as follows:

- The appellant has been diagnosed with cervical dystonia secondary to medications resulting in chronic pain;
- The appellant has experienced neck pain and stiffness for approximately 16 years; and
- The appellant has tried Botox injections and found them to be helpful.

PART F – Reasons for Panel Decision

The issue under appeal is whether the Ministry's decision finding the appellant ineligible for the cost of Botox injection fees as it does not meet the requirements for medical supplies and is not necessary to avoid an imminent and substantial danger to health as required by EAPWD Regulation Schedule C, sections 2(1)(a)(i) and 2(1)(a)(ii)(C) was reasonably supported by the evidence or was a reasonable application of the legislation in the circumstances of the appellant.

The relevant sections of the EAPWD Regulation are as follows:

General health supplements

62 (1) Subject to subsections (1.1) and (1.2), 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,
- (b) a person with disabilities who has not reached 65 years of age and who has ceased to be eligible for a disability assistance because of
 - (i) employment income earned by the person or the person's spouse, if either the person or the person's spouse
 - (A) is under age 65 and the family unit is receiving premium assistance under the *Medicare Protection Act*, or
 - (B) is aged 65 or more and a person in the family unit is receiving the federal spouse's allowance or the federal guaranteed income supplement,
 - (ii) a pension or other payment under the *Canada Pension Plan* (Canada), or
 - (iii) money received by the person or the person's spouse under the settlement agreement approved by the Supreme Court in Action No. S50808, Kelowna Registry,
- (c) a person who was a recipient of disability assistance on the day he or she became 65 years of age and a dependant of that person, if the dependant was a dependant of the person on that day and remains a dependant of that person,
- (d) a dependant of a person referred to in paragraph (a) or (b) (iii),
- (d.1) a dependant of a person referred to in paragraph (b) (i), if any person in the family unit
 - (i) is under age 65 and the family unit is receiving premium assistance under the *Medicare Protection Act*, or
 - (ii) is aged 65 or more and any person in the family unit is receiving the federal spouse's allowance or the federal guaranteed income supplement,

- (d.2) a dependant of a person referred to in paragraph (b) (ii),
- (d.3) a dependant of a person referred to in paragraph (b) (i), if any person in the family unit
 - (i) is under age 65 and the family unit is receiving premium assistance under the *Medicare Protection Act*, or
 - (ii) is aged 65 or more and any person in the family unit is receiving the federal spouse's allowance or the federal guaranteed income supplement,
- (e) a dependent child of a recipient of hardship assistance,
- (f) a person with disabilities who has ceased to be eligible for disability assistance because of an award of compensation under the *Criminal Injury Compensation Act* or an award of benefits under the *Crime Victim Assistance Act* made to the person or the person's spouse, if
 - (i) the person is under age 65 and the family unit is receiving premium assistance under the *Medicare Protection Act*, or
 - (ii) the person is aged 65 or more and any person in the family unit is receiving the federal spouse's allowance or the federal guaranteed income supplement, or
- (g) a person whose family unit ceases to be eligible for disability assistance because of financial assistance provided through an agreement under section 12.3 of the *Child, Family and Community Service Act*, during the term of the agreement.

(1.1) A person eligible to receive a health supplement under subsection (1) (b) (ii) or (d.2) may receive the supplement

- (a) while any person in the family unit is
 - (i) under age 65 and receiving a pension or other payment under the Canada Pension Plan, or
 - (ii) aged 65 or more and receiving the federal spouse's allowance or the federal guaranteed income supplement, and
- (b) for a maximum of one year from the date on which the family unit ceased to be eligible for medical services only.

(1.2) A person eligible to receive a health supplement under subsection (1) (c) may receive the supplement

- (a) while any person in the family unit is receiving the federal spouse's allowance or the federal guaranteed income supplement, and
- (b) for a maximum of one year from the date on which the family unit ceased to be eligible

for medical services only.

(1.3) A person who was eligible to receive a health supplement under subsection (1) (b) (i), (d.1), (d.3) or (f) but ceases to be eligible for medical services only may continue to receive the supplement for a maximum of one year from the date on which the family unit ceased to be eligible for medical services only.

(2) A person referred to in subsection (1) (b) or (f) and his or her dependants and a person referred to in subsection (1) (c) cease to be eligible for any supplement under this Division if the person's family unit takes up residence outside British Columbia.

[am. B.C. Regs. 92/2005; 170/2008. App. 2, s. 1; 67/2010, Sch. 2, s. 1;
114/2010, Sch. 2, s. 2.]

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.

(1.1) For the purposes of subsection (1) (a), medical and surgical supplies do not include nutritional supplements, food, vitamins, minerals or prescription medications.

EAPWD Regulation Schedule C, section 2(1)(a) – medical or surgical supply

The appellant argues that the Botox injections greatly enhance his life and his request for the cost of the injection fees of \$125 per treatment is not a lot and should be covered by the Ministry. He also argued that the legislation is not fair and that as the government gave him the medication that caused these side effects, they should fix the problem.

The advocate argued that the legislation has a pretty narrow application, that the list of covered items is incomplete, and that not many people would qualify for supplements. The advocate argued that the legislation ought to be reconsidered and that the Ministry ought to "*think outside the box*".

The Ministry argues that to meet the criteria for a medical or surgical supply as required by Schedule C, section 2(1)(a)(i) the item must be required for wound care, ongoing bowel care required due to loss of muscle function, catheterization, incontinence, skin parasite care or limb circulation care. The Ministry argued that as they are bound by the legislation and cannot authorize payments for any items not prescribed in the legislation.

The Ministry also argues that as Schedule C, section 2(1.1) states that for the purposes of subsection 2(1)(a), medical and surgical supplies does not include nutritional supplements, food, vitamins, minerals or prescription medications are not considered to be medical and surgical supplies, the Botox injection fees are further excluded even if they were considered to be a prescription medication. The Ministry argues that the information provided does not establish that the appellant's request for the cost of Botox injection fees meets the requirements set out for medical supplies under EAPWD Regulation Schedule C, section 2(1)(a)(i).

As Botox injection fees are not one of the prescribed medical or surgical supplies listed in Schedule C, section 2(1)(a)(i) and as section 2(1.1) states that prescription medications are not included as medical and surgical supplies for the purposes of Schedule C, section 2(1)(a), the panel finds that the Ministry's decision that the Botox injection fees do not meet the required legislation was a reasonable application of the legislation in the appellant's circumstances.

EAPWD Regulation Schedule C, section 2(1)(a)(ii) – imminent and substantial danger to health

The appellant argued that the Botox injections greatly enhance the quality of his life. He also argued that if he is driving and he has a neck spasm that may cause an imminent and substantial danger to his health so the Botox injections would help to prevent that danger.

The advocate argued that by denying the appellant's request for the Botox injection fees, the government was not taking into consideration the impact of depression in the appellant's life which contains a component of danger that should not be overlooked. The advocate also argued that if the Ministry pays for the cost of the Botox injection fees now, it will likely cost the government less in the long run.

The Ministry argued that the physician's letter does not provide any evidence that the Botox injection fees are necessary to avoid an imminent and substantial danger to health but that even if it did, the Botox injection fees still do not meet the required criteria of Schedule C, Section 2(1)(a)(i) so cannot

be authorized.

Schedule C, section 2(1)(a)(ii) states that the medical supplies must be prescribed by a medical or nurse practitioner and necessary to avoid an imminent and substantial danger to health. While the Botox injections have been prescribed by a medical practitioner, the letter from the appellant's physician does not provide any evidence indicating that the Botox injections are necessary to avoid an imminent and substantial danger to the appellant's health.

While the coordinator's letter states that the appellant experiences psychological side effects of his condition which include depression, irritability, and difficulty concentrating, the coordinator's letter does not confirm that the Botox injections are necessary to avoid an imminent and substantial danger to health.

While the appellant argues that he could have neck spasms while driving which could result in an imminent and substantial danger to his health, the panel finds that the possibility of this occurring, is not sufficient evidence to meet the legislative requirement that the Botox injections are necessary to avoid an imminent and substantial danger to health.

The panel finds that the Ministry's decision that the Botox injections are not necessary to avoid an imminent and substantial danger to health was reasonably supported by the evidence and was a reasonable application of the legislation in the appellant's circumstances.

Other arguments

The appellant argues that the Ministry's decision to deny his request for the cost of Botox injection fees is unfair and unconstitutional but pursuant to section 19.1 of the EAA and sections 44 and 46.3 of the Administrative Tribunals Act, the panel does not have the jurisdiction to consider whether the legislation in issue is unconstitutional. The panel's decision is limited to whether the Ministry's Reconsideration Decision was reasonably supported by the evidence or was a reasonable application of the legislation in the appellant's circumstances.

In conclusion, while the panel sympathizes with the appellant's circumstances, the Ministry's decision was a reasonable application of the legislation in the circumstances of the appellant and was reasonably supported by the evidence. Therefore, the panel confirms the Ministry's decision.