APPEAL #

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development (ministry) reconsideration decision dated October 18, 2012 wherein the ministry denied the appellant's request for funding for a trial of a Constant Positive Airway Pressure (CPAP) machine on the grounds that the appellant's medical condition is only mild sleep apnea, rather than being moderate to severe as required by s. 3.9(2)(c) of Schedule C of the Employment and Assistance for Persons with Disabilities Regulation (EAPWDR). The ministry also found that the CPAP machine was not necessary in order for the appellant to meet a direct and imminent life-threatening need as required by s. 69 of the EAPWDR.

PART D – Relevant Legislation

EAPWDR ss. 62 and 69, and Schedule 3 ss. 3 and 3.9

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PART E – Summary of Facts

The information before the ministry at the time of reconsideration included the following:

- A Medical Equipment Request and Justification form (the MERJ form) signed by the appellant's physician on March 29, 2012. On the form the physician diagnosed the appellant with metabolic disorder and obstructive sleep apnea, and recommended a CPAP machine for the appellant. The MERJ form was also signed by a registered respiratory therapist (RRT) on April 4, 2012, certifying that she had assessed the appellant and that a standard CPAP machine including mask, filters and hose would satisfy the appellant's medical need.

- A quote submitted by the RTT on behalf of the appellant in the amount of $100 per month for a 2 month trial of a CPAP machine, dated January 4, 2012.

- A post-operative report dated March 29, 2011 from a specialist in head, neck and nasal sinus surgery, indicating that the appellant was having difficulty breathing out of his left nostril after surgery resulting from "multiple nasal fracture."

- The report of a study performed of the appellant's sleep function on November 18, 2011, prepared by a specialist physician at a sleep clinic. The appellant scored 12/24 on the Epworth Sleepiness Scale, consistent with moderate daytime sleepiness. He also scored 8 on the Apnea Hypopnea Index (AHI), consistent with mild obstructive sleep apnea. There were severe oxygen desaturations to 75%. The specialist physician recommended that the appellant should have a CPAP trial or a referral for a sleep disorders consultation and nocturnal polysomnogram.

- A letter from the appellant's physician dated June 22, 2012 confirming that the appellant suffers from diabetes, high blood pressure, morbid obesity, and obstructive sleep apnea. The physician reported that since the appellant started CPAP therapy, there has been improvement regarding control of the appellant's blood pressure and diabetes, and that the appellant had lost 22 pounds. The physician strongly recommended that the appellant continue with CPAP therapy.

- Invoices for the period November 2011 to August 2012 for the appellant's rental of a CPAP machine, in the amounts of $100.00 per month.

- A letter from the ministry to the appellant dated August 21, 2012 and a decision summary dated September 10, 2012 advising the appellant that he had been found ineligible for the CPAP machine. In its decision summary dated September 10, 2012 the ministry wrote that the AHI scale represents "...the current consensus of the American Academy of Sleep Medicine."

- A Request for Reconsideration prepared September 17, 2012.

- A two page written submission prepared by the appellant's advocate, dated October 18, 2012. This document included Reiter's Syndrome as one of the appellant's medical conditions.

- An excerpt from the ministry's online resources, providing guidelines as to how to determine whether sleep apnea is mild, moderate or severe. The guidelines are based on information

provided by the Ministry of Health which correlates mild apnea with an AHI of 5 to 14, moderate apnea with an AHI of 15 to 29, and severe apnea with an AHI of 30 or more. In its decision summary dated September 10, 2012 the ministry wrote that the AHI scale represents "...the current consensus of the American Academy of Sleep Medicine."

At the appeal hearing the appellant's advocate submitted two additional documents:

- A three page written argument. The panel has reviewed this document and has accepted it as argument as it does not introduce any new evidence.

- A one-page letter from the appellant's physician dated November 15, 2012 (the November 15 letter). It confirms the same diagnoses as his letter of June 12, 2012 with the addition of Reiter's Syndrome. The physician offers his opinion that "Although sleep clinic results show the patient has an AHI of 8 which can be interpreted as consistent with mild sleep apnea, the patient's symptoms and conditions should not be viewed in isolation from each other. Given the cumulative effect of the patient's conditions and symptoms, and the systemic improvements in his health following commencement of CPAP therapy, the patient's obstructive sleep apnea is properly characterized as moderate to severe."

The ministry acknowledged that the new evidence from the physician ought to be admitted. The panel considers that the November 15 letter provides information from the physician as to how the previously-provided medical information should be interpreted. The panel accepts the November 15 letter into evidence as written testimony in support of the information and records that were before the ministry at the time of reconsideration, in accordance with s. 22(4) of the *Employment and Assistance Act*.

The appellant is a recipient of disability assistance. He has been using a rented CPAP machine since November, 2011, but is now at risk of losing the machine as he cannot afford to pay the rental rate of $100 per month. At the appeal hearing, the appellant provided evidence as to the health benefits he has experienced since starting CPAP therapy. Those benefits include significantly reduced flare-ups of his Reiter's Syndrome, blood pressure reduced to normal, significantly improved control of his diabetes, weight loss of 95 pounds, reduction in asthma puffers from 3 per day to 1 per day, higher energy levels which will enable him to resume his volunteer work with a local non-profit agency, and significantly reduced medication costs (the medication costs are paid by the government). The appellant also said that he has had 11 nose surgeries and that he only has 4% use of his nasal airways.

The panel considers the appellant's testimony as providing more detail about the impacts of CPAP therapy on his medical health conditions, and accepts it as oral testimony in support of the information and records that were before the ministry at the time of reconsideration, in accordance with s. 22(4) of the *Employment and Assistance Act*.

The ministry relied on its reconsideration decision and did not submit any new evidence.

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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 CPAP trial on the bases that he did not have moderate to severe sleep apnea as required by s. 3.9(2)(c) of Schedule C of the EAPWDR, and that the CPAP machine was not necessary in order for the appellant to meet a direct and imminent life-threatening need as required by s. 69 of the EAPWDR.

The relevant legislation is as follows:

EAPWDR

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 ...

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).

Schedule C

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...

3.9 (1) Subject to subsection (4) 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 (2) of this section are met:

(a) a positive airway pressure device;

(b) an accessory that is required to operate a positive airway pressure device;

(c) a supply that is required to operate a positive airway pressure device.

(2) The following are the requirements in relation to an item referred to in subsection (1) of this section:

(a) the item is prescribed by a medical practitioner or nurse practitioner;

(b) a respiratory therapist has performed an assessment that confirms the medical need for the item;

(c) the minister is satisfied that the item is medically essential for the treatment of moderate to severe sleep apnea.

(3) The period of time referred to in section 3 (3) (b) of this Schedule with respect to replacement of an item described in subsection (1) of this section is

(a) 5 years from the date on which the minister provided the item being replaced, for an item described in subsection (1) (a), and

(b) 1 year from the date on which the minister provided the item being replaced, for an item described in subsection (1) (b) or (c).

(4) A ventilator is not a health supplement for the purposes of section 3 of this Schedule.

* * *

The Degree of Severity of the Appellant's Sleep Apnea

The ministry's position is that all the statutory eligibility requirements for the CPAP machine set out in s. 62 of the EAPWDR, and in ss. 3 and 3.9 of Schedule C have been met other than s. 3.9(2)(c) of Schedule C of the EAPWDR. In its reconsideration decision the ministry wrote that "...The ministry is not satisfied that your CPAP machine is medically essential for the treatment of moderate to severe sleep apnea. [The sleep clinic] indicates that you have an AHI of 8 which is consistent with mild sleep apnea." At the appeal hearing, the ministry argued that it does not have the discretion under s. 3.9(2)(c) to consider anything other than the ministry guidelines which refer to the AHI scale of sleep apnea severity. The ministry also stated that the legislation provides that the CPAP machine can only be supplied for the treatment of moderate to severe sleep apnea, and that any beneficial effects the CPAP therapy may be having on the appellant's other health conditions such as his diabetes, blood pressure and obesity are irrelevant to the issue of the appellant's eligibility for the CPAP machine. In any event, the ministry said, there is no medical evidence linking the appellant's improved health conditions to the CPAP trial.

The appellant's position is that s. 3.9(2)(c) does provide the ministry with the discretion to consider factors other than the AHI scale in determining the severity of the appellant's sleep apnea, and that if the AHI was to be the sole determining factor the legislation would so specify. The appellant said that the ministry wrongly fettered its discretion by relying solely on ministry policy and the AHI scale in interpreting the term "moderate to severe sleep apnea". By doing so the appellant said that the ministry failed to consider other relevant factors, such as the improvement of several medical conditions experienced by the appellant, and so rendered a decision contrary to the purpose and intent of the EAPWDR. The appellant also argued that supplying the CPAP machine is the only sensible thing to do considering the costs versus benefits, particularly in light of the much-reduced level of medication that the appellant now requires.

Panel Decision

The lack of an express definition of the legislative language "moderate to severe sleep apnea" gives the ministry a degree of discretion with respect to interpreting the term. The ministry must exercise that discretion reasonably. The ministry is entitled to develop policy as a means of guiding its own decision-makers and to inform applicants of the kinds of considerations the ministry takes into account in deciding individual cases. However, without legislative authority to make binding policy, the ministry should rely on and refer to policy only so long as it continues to be open to considering case-specific circumstances.

From the brief analysis in the reconsideration decision, and from the position taken by the ministry at the appeal hearing, it is clear to the panel that the ministry did rely solely on the appellant's AHI score in determining that the appellant's sleep apnea is "mild" rather than "moderate to severe." This would be reasonable if the legislation expressly or by implication designated the AHI as being the only measure of sleep apnea severity. In the panel's view the legislation does not do that. It would also be reasonable if the ministry had evidence that the AHI is widely considered within the medical profession to be the only reasonable determinant of the severity of sleep apnea. If the ministry does have such evidence it has not referred to it in its reconsideration decision, and it was not able to provide such evidence to the panel. The panel notes that the AHI scale has been referred to by the ministry as representing the "current consensus of the American Academy of Sleep Medicine", but the panel has been provided with no context in which to conclude that the medical profession generally views the AHI scale is the only reasonable or acceptable consideration in determining the degree of severity of sleep apnea, or that the legislation should be interpreted in that manner.

The appellant had argued at reconsideration for a broader interpretation of the term "moderate to severe sleep apnea". The panel notes that the ministry at the time of reconsideration did not have the benefit of the physician's November 15 letter which provides the physician's opinion that the AHI scale results shouldn't be the sole determinant, and that the cumulative effect of the appellant's conditions and symptoms show that his sleep apnea should be properly characterized as moderate to severe. The opinion of the appellant's physician is not determinative of the issue, but it is a factor to be considered along with the recommendation of the RTT that the appellant should be given a CPAP trial, the evidence of the significant improvements in many aspects of the appellant's health conditions subsequent to his starting CPAP therapy, and the linkage drawn implicitly by the appellant's physician between those improved outcomes and the CPAP therapy. By giving weight to the evidence of the improved health outcomes in regards to the appellant's obesity, diabetes, blood pressure and Reiter's Syndrome, the panel does not consider that the CPAP machine directly treated those health conditions, but that those improvements are ancillary to the appellant's improved sleep and higher energy levels. The panel does not find the appellant's argument regarding cost/benefit analysis to be relevant to the interpretation of the term "moderate to severe sleep apnea." Based on the foregoing analysis, the panel finds that the ministry was not reasonable in concluding that the appellant's sleep apnea was "mild" rather than "moderate to severe".

Life Threatening Health Need

The ministry's position is that the evidence does not establish that the appellant is facing a direct and

imminent life-threatening health need, or that a CPAP trial is necessary to meet a direct and imminent life-threatening health need. The ministry referred specifically to the November 18, 2011 report of the specialist physician which used the AHI scale to characterize the appellant's sleep apnea as "mild".

The appellant's position, as set out in his written submission dated October 18, 2012 is that if he discontinues CPAP therapy his health will immediately deteriorate to an extent which "may well be life threatening."

Panel Decision

On the plain meaning of the legislative language, s. 69 of the EAPWDR applies where a person faces a direct and imminent life threatening need and a health supplement – in this case the CPAP trial – is necessary to meet that need. There is no medical evidence from the appellant's physician, the specialist physician, or the RTT that the appellant's sleep apnea is directly life-threatening, or that a life-threatening need is imminent. The appellant acknowledged that discontinuation of the CPAP therapy "may" be life-threatening. The term "imminent" requires a degree of immediacy that is not present in the appellant's circumstances. Based on this evidence, the panel finds that the ministry reasonably concluded that the appellant did not satisfy the legislative criteria of s. 69.

Conclusion

Based on the foregoing reasons, the panel finds that the ministry's decision to deny the appellant's request for a CPAP trial was not a reasonable application of the legislation in the circumstances of the appellant, and accordingly rescinds the decision.