APPEAL #

PART C – Decision under Appeal

The decision under appeal is the ministry's reconsideration decision dated October 3, 2012, which held that the appellant is not eligible to receive a supplement for a 2 month continuous positive airway pressure (CPAP) trial with mask and humidifier, as set out in the Employment and Assistance for Persons with Disabilities (EAPWD) Regulation, section 62 and Schedule C, sections 3 and 3.9. The ministry determined that all necessary legislative requirements had been met by the appellant with the exceptions of the criteria set out in Schedule C, sections 3.9(2)(b) and 3.9(2)(c). Specifically the ministry determined that as the appellant's sleep apnea falls within the mild range with an apnea/hypopnoea index (AHI) of10.6, the ministry was not satisfied that the assessment provided by the Registered Respiratory Therapist confirms a medical need for the medical equipment requested, as set out in section 3.9(2)(b), or that the item is medically essential for the treatment of moderate to severe sleep apnea, as set out in section 3.9(2)(c).

PART D – Relevant Legislation

Employment and Assistance for Persons with Disabilities (EAPWD) regulation), section 62
EAPWD Regulation Schedule C sections 3 and 3.9.

APPEAL #

PART E – Summary of Facts

The appellant's mother attended the hearing to provide support to her daughter.

Information and records that were before the ministry at the time of reconsideration include:

- A faxed copy of a request to the ministry for a CPAP trial for the appellant from an independent respiratory service provider dated June 18, 2012. The cover sheet confirms that the appellant has been diagnosed with Obstructive Sleep Apnea (OSA), with a sleep disturbance index of 10.6. Attached was a prescription from a physician confirming the diagnosis and a copy of an overnight sleep study completed on room air.
- A copy of a prescription note from the appellant's physician dated May 25, 2012, prescribing CPAP therapy for treatment of OSA.
- An Oximetry Summary Report for the night of May 22/23 2012, which indicates the appellant has a Desaturation Event Index (DEI) of 10.6.
- A copy of a Medical Equipment Request – Tracking Sheet – CPAP Dated June 18, 2012. Under Decision it states that the appellant has an AHI of 10.6 which is consistent with mild OSA. The ministry only funds for moderate OSA, therefore denied.
- Medical Equipment Request and Justification Form completed June 18, 2012, providing a rental and purchase quote for requested medical equipment.
- A copy of Medical Equipment and Device Decision Summary dated August 17, 2012, stating that the following regulatory criteria have been met. The family unit is eligible for health supplements under section 62 of the EAPWD regulation thereby meeting the requirements set out in Schedule C section 3(1)(a) to apply for the benefit. The family unit has sought preauthorization of the minister and there are no resources available to the family unit to pay the cost or obtain the medical equipment as set out in Schedule C section 3(1)(b)(i)(ii). The medical equipment or device requested has been prescribed by a medical practitioner as set out in Schedule C section 3(2). The item requested is a positive airway pressure device as set out in Schedule C section 3(9)(2) and the item requested has been prescribed by a medical practitioner as set out in Schedule C section 3(9)(2)(a). The Decision summary then goes on to state that the following criteria have not been met. A respiratory therapist has not performed an assessment that confirms the medical need for the item and the minister is not satisfied that the item is medically essential for the treatment of moderate to severe sleep apnea as set out in Schedule C section 3(9)(2)(b) and (c). In the summary the ministry states that while it is sympathetic to the circumstances of the appellant; her AHI score of 10.6 is consistent with a mild sleep apnea. Ranges for this test value are 0-5 normal, 5 to 15 mild,15 to 30 moderate and 30+ severe, as per the current consensus of the American Academy of Sleep Medicine. CPAP therapy is medically indicated for, and funded by the ministry for, moderate to severe OSA.
- A copy of a denial letter from the ministry to the appellant dated August 17, 2012.
- A copy of the appellant's Request for Reconsideration dated September 21, 2012. In section 3 of the of the Request for Reconsideration form the appellant states that she has been diagnosed with mild sleep apnea; neuropathic pain and schizoaffective disorder; and during the night, she reports waking-up gasping for breath, or sometimes twitching. In the morning she never feels rested.
- A copy of a letter from the appellant's General Practitioner (GP) dated September 20, 2012, stating that it is important for the appellant to have good quality uninterrupted sleep because of concurrent significant medical conditions (diabetes, neuropathic pain and schizoaffective disorder) issues. The physician also states that the appellant has been diagnosed with mild sleep apnea, however, in her situation the mild apnea has a greater impact on her health than indicated by the degree of apnea on the sleep study.
- A copy of a letter dated September 21, 2012, completed by the appellant's mental health specialist, also a physician who reports that the appellant is under his care for the treatment of schizoaffective disorder, (often depressed). The physician states that sleep apnea, mild or otherwise, ruins sleep quality which worsens depressive symptoms, and since the appellant has a difficult experience with depression anything which may improve her sleep is essential.

In the reasons section of the appellant's Notice of Appeal, she writes that symptoms of sleep apnea impact her daily life. She never feels refreshed when she wakes-up, and falls asleep if she sits down to read or watch TV. Good quality sleep would be wonderful and would help to manage her other illnesses.

At the hearing the appellant summarized the material in the appeal record, and presented arguments as to why she believed the ministry decision was not reasonable. The appellant added that her sleeping problems have been exacerbated by medication she has been taking since June 2010, to help control her schizoaffective disorder. This medication caused her to gain weight which only serves to worsen her sleep apnea. She said she can't stop taking the medication to help her lose weight and that she has gained over 30 pounds since starting the medication.

The appellant's mother who was also in attendance, testified that the appellant's condition is steadily getting worse. She has become so concerned about it that she now sleeps in her daughter's room so she can awaken her when she stops breathing.

The ministry stood by the record reiterating that they are truly sympathetic to the appellant's position.

The panel found the oral evidence introduced by the appellant and her mother at the hearing to be in support of the information and records before the ministry at reconsideration, as it provided new information regarding the appellant's medication, and clarity regarding the side effects that her medication has had on her since she started taking it in 2010. It also provided new information helping to illustrate the degree of interventions employed by the appellant's mother to minimize the effects of her daughter's sleep apnea, (i.e. sleeping in her daughter's room so she can wake her when she stops breathing). This evidence was admitted under Section 22(4) of the Employment and Assistance Act. The ministry did not oppose.

In light of the forgoing information the panel made the following findings of fact:

- The appellant is a Person with Disabilities and the family unit is eligible to receive general health supplements under section 62 of EAPWD regulation.
- The family unit has requested pre-authorization of the minister.
- There are no resources available to the family unit to pay the cost or obtain the medical equipment.
- The medical equipment being requested has been prescribed by a medical practitioner.
- A respiratory therapist has performed an assessment that confirms that the appellant has been diagnosed with OSA, with a sleep disturbance index of 10.6.
- The appellant has been diagnosed by a physician with mild sleep apnea; diabetes, neuropathic pain, schizoaffective disorder; and depression.

APPEAL #

PART F – Reasons for Panel Decision

The issue in this appeal is whether the ministry reasonably determined that the appellant is not eligible to receive support for a 2 month CPAP trial with mask and humidifier. Specifically the ministry was not satisfied that the assessment provided by the Registered Respiratory Therapist confirms a medical need for the medical equipment requested, or that the item requested is medically essential for the treatment of moderate to severe sleep apnea. In arriving at its decision the ministry relied upon the following regulatory legislation.

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 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 (f), 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.

Schedule C Health Supplements

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.

(5) Subject to subsection (6), the minister may provide as a health supplement repairs of medical equipment or a medical device that was not previously provided by the minister if

(a) at the time of the repairs the requirements in this section and section 3.1 to 3.11 of this Schedule, as applicable, are met in respect of the medical equipment or device being repaired, and

(b) it is more economical to repair the medical equipment or device than to replace it.

(6) The minister may not provide a replacement of medical equipment or a medical device under subsection (3) or repairs of medical equipment or a medical device under subsection (4) or (5) if the minister considers that the medical equipment or device was damaged through misuse.

Medical equipment and devices – positive airway pressure devices

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 panel finds that there is no dispute by either party that the appellant's request for a 2 month CPAP trial meets the general requirements for the provision of medical equipment and devices set out in Schedule C, section 3(1)(a) and (b)(i) and (ii) of the EAPWD regulation. However, the issue in dispute is whether the ministry reasonably determined that the appellant did not meet the requirements set out in Schedule C, section 3.9(2)(b) and (c) of EAPWD regulation.

The appellant's position is that regardless of the fact that her sleep apnea falls within the mild range, her condition is getting worse as a result of side effects from her medication and as both her GP and mental health specialist believe there are sound medical reasons for her to undergo a two month CPAP trial, her request for the benefit is reasonable. The ministry's position is that the assessment provided by the Registered Respiratory Therapist does not confirm a medical need for the medical equipment requested as set out in the EAPWD regulation Schedule C section 3.9(2)(b) or that the item is medically essential for the treatment of moderate to severe sleep apnea, as set out in section 3.9(2)(c). As the appellant's sleep apnea falls within the mild range with an AHI of10.6 the ministry finds her to be ineligible to receive the requested benefit.

The appellant argued that both her GP and her mental health specialist support the need for her to have a two month CPAP trial. In a letter dated September 20, 2012, the appellant's GP stated that it is important for her to have good quality uninterrupted sleep because of concurrent and significant medical conditions (diabetes, neuropathic pain and schizoaffective disorder) issues. The physician also states that the appellant has been diagnosed with mild sleep apnea, however, in her situation the mild apnea has a greater impact on her health than indicated by the degree of apnea indicated on the sleep study.

In a letter dated September 21, 2012, the appellant's mental health specialist reports that the appellant is under his care for the treatment of schizoaffective disorder, (often depressed). The physician states that sleep apnea, mild or otherwise, ruins sleep quality which worsens depressive symptoms and since the appellant has a difficult experience with depression anything which may improve her sleep is essential.

At the hearing the appellant also argued that her sleeping problems have been exacerbated by medication she has been taking since June 2010, to help control her schizoaffective disorder. This medication has caused her to gain weight which she believes only serves to worsen her sleep apnea. She can't stop taking the medication in order to help her lose weight, and has gained over 30 pounds since starting the medication with no end in sight. The appellant's mother, who was also in attendance at the hearing, also argued that the appellant's condition is steadily deteriorating and that she has become so concerned about it that she now sleeps in her daughter's room so she can awaken her when she stops breathing. The appellant summarized her argument by stating that as both her GP and mental health specialist support her application for a two month CPAP trial, and as both she and her mother believe that her condition is deteriorating, the ministry's decision to deny her application for a two month CPAP trial is unreasonable.

The ministry argued that while it is sympathetic to the circumstances of the appellant, the symptoms that she described in her Notice of Appeal, stating that she never feels refreshed when she waked up, and falls asleep if she sits down to read or watch TV, are all consistent with the criteria used by the ministry of health to define mild sleep apnea. The ministry further argued that the appellant's AHI score is 10.6 is consistent with the definition for mild sleep apnea. Ranges for this test value are 0-5 normal, 5 to 15 mild, 15 to 30 moderate and 30+ severe, as per the current consensus of the American Academy of Sleep Medicine. CPAP therapy is medically indicated for, and funded by the ministry for, moderate to severe OSA. Regardless of the appellant's diagnosis the Registered Respiratory Therapist had an opportunity to provide a medically based argument as to why he believes the appellant has a medical need for the medical equipment requested, and elected not to do so. Finally as the appellant's Registered Respiratory Therapist, GP, and mental health specialist, are all in agreement that the appellant has been diagnosed with mild sleep apnea, the ministry is not satisfied that the item requested is medically essential for the treatment of moderate to severe sleep apnea. For these reasons the ministry argued that the appellant has not met the requirements set out in Schedule C section 3.9(2)(b) or (c) of the EAPWD regulation.

The panel finds that the appellant's Registered Respiratory Therapist, GP, and her mental heath specialist all agree that she has mild OSA. The panel also finds that there is consensus between both physicians, that regardless of the fact that the appellant's sleep apnea is mild, she has other concurrent medical conditions, (diabetes, neuropathic pain, schizoaffective disorder; and depression), that should be taken into account when reviewing her request for a two month CPAP trial. The panel also finds there is consensus between the

appellant and her mother regarding the side effects that medication for schizoaffective disorder have had on her, with increased weight and increased incidents of breathing interruptions while sleeping at night.

While the panel acknowledges the collective expertise and arguments presented by the professionals noted above, and the observations and arguments presented by both the appellant and her mother regarding the side effects of medication on her sleep apnea, the issue that the panel must address is the reasonableness of the ministry's decision based on the evidence presented, and the application of Schedule C section 3.9(2)(b) and (c) of the EAPWD regulation. The current legislation requires that in order for an applicant to be found eligible to receive a 2 month CPAP trial, a Registered Respiratory Therapist must perform an assessment that confirms the medical need for the item and the minister must be satisfied that the item is medically essential for the treatment of moderate to severe sleep apnea. Based on the evidence presented, the panel finds that the ministry reasonably determined that these requirements have not been met. The oximetry findings submitted with the appellant's request for reconsideration indicated an AHI of 10.6, well below an AHI of 15, which is the minimum level indicating moderate sleep apnea required before an applicant can receive the requested benefit.

For this reason the panel finds the ministry's decision was a reasonable application of the applicable regulatory enactment as set out in section 3.9(2)(b) and (c) of Schedule C of the EAPWD regulation and confirms the ministry's decision.