

PART C – Decision under Appeal

The decision under appeal is the July 24, 2012 reconsideration decision of the Ministry of Social Development (“the ministry”) which denied the appellant’s request for a custom-made dental splint (“the dental splint”) on the basis that it did not meet the requirements set out in the Employment and Assistance for Persons with Disabilities Regulation (EAPWDR) for the provision of a health supplement. Specifically, the ministry determined that:

- (1) While the appellant is eligible for basic dental services under s. 63 and s. 4 of Schedule C of the EAPWDR, the dental splint was not a service set out in the Schedule of Fee Allowances – Dentist and the cost of the dental splint exceeded both the \$1000 limit on basic dental services and the remaining balance of that \$1000 limit available to the appellant;
- (2) The dental splint was not a service set out in any of the ministry’s other Schedule of Fee Allowances (Denturist, Emergency Dental, Emergency Denturist, and Crown and Bridgework);
- (3) The dental splint was not an eligible item set out anywhere in the EAPWDR as a health supplement including s. 3.10 of Schedule C which provides for an “orthosis”; and
- (4) the eligibility criteria for a health supplement for persons facing a life-threatening health need under s. 69 of the EAPWDR were not met as the dental splint is not a health supplement set out in Schedule C, s. 2(1)(a) or s. 3 and the information provided did not establish a life-threatening health need.

PART D – Relevant Legislation

Employment and Assistance for Persons with Disabilities Act (EAPWDA)

- Section 5

Employment and Assistance for Persons with Disabilities Regulation (EAPWDR),

- Sections 62 – 69 and Schedule C

Schedule of Fee Allowances – Dentist, Denturist, Emergency Dental, Emergency Denturist, and Crown and Bridgework

PART E – Summary of Facts

The evidence before the ministry at reconsideration included:

- 1) Information submitted to and received from Pacific Blue Cross respecting the dental splint which is identified by Fee/Procedure number 14711 at a cost of \$1500.
- 2) An Orthoses Request and Justification (ORJ) form. Section 2 of the ORJ was completed by a medical practitioner and dated July 26, 2011. The medical practitioner describes the appellant's medical condition as bilateral degenerative joint disease leading to a painful limitation of movement and requiring a "custom made dental splint." Section 3 of the ORJ was completed by a dentist and dated August 19, 2011. The dentist specifies that a maxillary anterior guidance orthosis is required and will guide the path of closure of the lower jaw while providing harmony between proper joint position and supported bite. The dentist indicates that the dental splint is required for the prevention of surgery and to improve physical functioning impaired by degenerative joint disease, adding that the appellant can only eat very soft foods impacting nutrition.
- 3) An April 25, 2011 letter from an oral radiologist who notes degenerative joint disease (DJD) affecting the bilateral temporomandibular joints which was more advanced on the left side.
- 4) Pacific Blue Cross remittance statements respecting June - July 2010 – the appellant has \$395.01 remaining of \$1000 basic dental service limit.
- 5) A copy of a dental x-ray, prescription receipts, a list of filled prescriptions (includes antibiotics), and a physician's prescription for a CPAP trial.
- 6) The appellant's Request for Reconsideration which included an April 19, 2012 letter in which she describes her need for the dental splint as a result of bilateral degenerative joint disease and requests reimbursement.

On appeal, prior to the hearing, the appellant submitted:

- 1) A copy of an invoice for the dental splint showing the total cost as \$1500, a payment of \$500 and a remaining balance owing of \$1000; and
- 2) A copy of a May 22, 2012 letter to the then Minister of Social Development from the appellant's constituency MLA who describes the impact of the appellant's DJD on her health and the need for the appellant to go ahead with the installation of the dental splint in December 2011 while awaiting processing of the ORJ.

Observers on behalf of the ministry and the appellant were in attendance at the hearing with the consent of both parties.

At the hearing, the appellant's advocate provided a written submission which included both evidence respecting the appellant's medical condition and argument. The advocate's arguments are set out in Part F of the panel's decision. The advocate writes that osteoarthritis (DJD) and osteoporosis have resulted in the painful degeneration of the appellant's jaw that has contributed to the development of chronic gum abscesses which compromise her immune system. Abscesses have required the removal of teeth which has worsened the appellant's bite and resulted in further deterioration and pain. These painful side effects are alleviated by the dental splint which allows the appellant's teeth to be guided into their proper position. The advocate also describes the impact the appellant's DJD has on her ability to speak and eat and writes that it has resulted in both sleep apnea and depression.

The advocate also introduced evidence to distinguish the appellant's symptoms from dysfunction of the temporomandibular joint (TMJ). The advocate also writes that the appellant has Type 2 diabetes and that the inability to eat increases the risk of dangerous complications.

The ministry did not introduce any additional evidence at the hearing and had no objection to the admission of the appellant's evidence.

The panel finds that the additional evidence provided by the appellant on appeal provided further information respecting the requested dental splint and the reasons for the request and is therefore in support of the information and records before the ministry at reconsideration and admissible under s. 22(4) of the *Employment and Assistance Act*.

PART F – Reasons for Panel Decision

The issue under appeal is whether the ministry's decision to deny the requested dental splint was reasonably supported by the evidence or a reasonable application of the applicable enactment in the appellant's circumstances.

Section 5 of the *EAPWDA* is set out below.

5. Subject to the regulations, the minister may provide disability assistance or a supplement to or for a family unit that is eligible for it.

The relevant sections of the *EAPWDR* are set out below.

- 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,

- 62.1 – 68 set out similar provisions respecting the health supplements provided under sections 2.1 through 9 of Schedule C.

- 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 – 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.

(b) Repealed.

(c) subject to subsection (2), a service provided by a person described opposite that service in the following table, delivered in not more than 12 visits per calendar year [The table sets out the following services: acupuncture, chiropractic, massage therapy, naturopathy, non-surgical podiatry, physiotherapy].....

(f) the least expensive appropriate mode of transportation to or from.....

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

2.1 and 2.2 set out the requirements for the provision of optical and eye examination supplements.

3 (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.

3.1 – 3.9 and 3.11 set out the requirements for the provision of the following medical equipment and devices: canes, crutches and walkers, wheelchairs, wheelchair seating systems, scooters, bathing and toileting aids, hospital beds, pressure relief mattresses, floor or ceiling lift devices, positive airway pressure devices, and hearing aids.

3.10 In this section:

"off-the-shelf", in relation to an orthosis, means a prefabricated, mass-produced orthosis that is not unique to a particular person;

"orthosis" means

- (a) a custom-made or off-the-shelf foot orthotic;
- (b) custom-made footwear;
- (c) a permanent modification to footwear;
- (d) off-the-shelf footwear required for the purpose set out in subsection (4.1) (a);
- (e) off-the-shelf orthopaedic footwear;
- (f) an ankle brace;
- (g) an ankle-foot orthosis;
- (h) a knee-ankle-foot orthosis;
- (i) a knee brace;
- (j) a hip brace;
- (k) an upper extremity brace;
- (l) a cranial helmet used for the purposes set out in subsection (7);
- (m) a torso or spine brace.

(2) Subject to subsections (3) to (11) of this section, an orthosis is a health supplement for the purposes of section 3 of this Schedule if

- (a) the orthosis is prescribed by a medical practitioner or a nurse practitioner,
- (b) the minister is satisfied that the orthosis is medically essential to achieve or maintain basic functionality,
- (c) the minister is satisfied that the orthosis is required for one or more of the following purposes:
 - (i) to prevent surgery;
 - (ii) for post-surgical care;
 - (iii) to assist in physical healing from surgery, injury or disease;
 - (iv) to improve physical functioning that has been impaired by a neuro-musculo-skeletal condition, and
- (d) the orthosis is off-the-shelf unless
 - (i) a medical practitioner or nurse practitioner confirms that a custom-made orthosis is medically required, and
 - (ii) the custom-made orthosis is fitted by an orthotist, pedorthist, occupational therapist, physical therapist or podiatrist.

4 (1) In this section, "**period**" means

- (a) in respect of a dependent child, a 2 year period beginning on January 1, 2009, and on each subsequent January 1 in an odd numbered year, and
- (b) in respect of a person not referred to in paragraph (a), a 2 year period beginning on January 1, 2003 and on each subsequent January 1 in an odd numbered year.

(1.1) The health supplements that may be paid under section 63 [*dental supplements*] of this regulation are basic dental services to a maximum of

- (a) \$1400 each period, if provided to a dependent child, and
- (b) \$1 000 each period, if provided to a person not referred to in paragraph (a).
- (c) Repealed. [B.C. Reg. 163/2005, s. (b).]

(2) Dentures may be provided as a basic dental service only to a person

- (a) who has never worn dentures, or

(b) whose dentures are more than 5 years old.

(3) The limits under subsection (1.1) may be exceeded by an amount necessary to provide dentures, taking into account the amount remaining to the person under those limits at the time the dentures are to be provided, if

(a) a person requires a full upper denture, a full lower denture or both because of extractions made in the previous 6 months to relieve pain,

(b) a person requires a partial denture to replace at least 3 contiguous missing teeth on the same arch, at least one of which was extracted in the previous 6 months to relieve pain, or

(c) a person who has been a recipient of disability assistance or income assistance for at least 2 years or a dependant of that person requires replacement dentures.

(4) Subsection (2) (b) does not apply with respect to a person described in subsection (3) (a) who has previously had a partial denture.

(5) The dental supplements that may be provided to a person described in subsection (3) (b), or to a person described in subsection (3) (c) who requires a partial denture, are limited to services under

(a) fee numbers 52101 to 52402 in the Schedule of Fee Allowances — Dentist referred to in paragraph (a) of the definition "basic dental service" in section 1 of this Schedule, or

(b) fee numbers 41610, 41612, 41620 and 41622 in the Schedule of Fee Allowances — Denturist referred to in paragraph (b) of the definition "basic dental service" in section 1 of this Schedule.

(6) The dental supplements that may be provided to a person described in subsection (3) (c) who requires the replacement of a full upper, a full lower denture or both are limited to services under

(a) fee numbers 51101 and 51102 in the Schedule of Fee Allowances — Dentist referred to in paragraph (a) of the definition "basic dental service" in section 1 of this Schedule, or

(b) fee numbers 31310, 31320 or 31330 in the Schedule of Fee Allowances — Denturist referred to in paragraph (b) of the definition "basic dental service" in section 1 of this Schedule.

(7) A reline or a rebase of dentures may be provided as a basic dental service only to a person

who has not had a reline or rebase of dentures for at least 2 years.

4.1 (1) In this section, "**crown and bridgework**" means a dental service

- (a) that is provided by a dentist,
- (b) that is set out in the Schedule of Fee Allowances – Crown and Bridgework, that is effective April 1, 2010 and is on file with the office of the deputy minister,
- (c) that is provided at the rate set out for the service in that Schedule, and
- (d) for which a person has received the pre-authorization of the minister....

5 The health supplements that may be paid for under section 64 [*emergency dental and denture supplements*] of this regulation are emergency dental services.

6 – 9 set out the requirements for the provision of the following supplements: diet, monthly nutritional, natal, and infant formula.

Eligibility for a Dental Supplement (s. 4 of Schedule C and s. 63 of the EAPWDR)

The ministry's position is that the appellant is not eligible for the dental splint as a basic dental service under s. 63 and s. 4 of Schedule C of the EAPWDR because the dental splint was not a service set out in the Schedule of Fee Allowances – Dentist and the cost of the dental splint exceeded both the \$1000 limit on basic dental services and the remaining balance of that \$1000 limit available to the appellant. The appellant's position is that if she is not found eligible for the dental splint as a medical device, then the dental splint should be covered as a dental device under the fee number 14611 at a cost of \$244.35 which is within both the \$1000 basic dental services limit and the \$395.01 balance remaining.

With respect to dental supplements provided under s. 63 and s. 4 of Schedule C of the EAPWDR as basic dental services, the panel notes that pursuant to the definition of "basic dental service" in s. 1 of Schedule C of the EAPWDR, the dental service must be one set out in the ministry's Schedule of Fee Allowances – Dentist. In this case, the requested dental splint, which has fee number 14711, is not listed in the Schedule of Fee Allowances - Dentist. Consequently, the panel finds that the ministry has reasonably determined that the appellant is not eligible for the dental splint as a basic dental service under s. 4 of Schedule C irrespective of what amount the appellant has remaining of her 2-year \$1000 limit for basic dental services. While the panel acknowledges the appellant's argument that coverage for the dental splint can be found under fee number 14611, that is not the dental service that was either requested of or denied by the ministry and as such, eligibility for service 14611 is not before the panel.

Eligibility for a Crown and Bridgework or Emergency Dental/Denturist Supplement (s.4.1 and 5 of Schedule C and sections 64 and 65 of the EAPWDR)

The ministry's position is that the appellant is not eligible for the dental splint as a service under any of the ministry's other Schedule of Fee Allowances (Denturist, Emergency Dental, Emergency Denturist, and Crown and Bridgework) because it is not listed in any of those Schedules. The appellant has not advanced an argument as to her eligibility under these Schedules of Fee Allowances.

In order for a person to be eligible for a supplement for crown and bridgework or emergency dental/denture supplements, both s. 4.1 (crown and bridgework) and s. 1 (definition of emergency dental/denture service) of Schedule C require that the service be one that is set out in the relevant Schedule of Fee Allowances. In this case, the requested dental splint is not listed in the Schedule of Fee Allowances – Crown and Bridgework or in the Schedule of Fee Allowances for either Emergency Dental or Emergency Denturist. Therefore, the panel finds that the ministry reasonably determined that the appellant is not eligible for the dental splint under s. 4.1 or s. 5 of Schedule C of the EAPWDR.

Eligibility for an Orthosis Supplement (s. 3 and 3.10 of Schedule C)

The ministry's position is that the appellant is not eligible for the dental splint as an orthosis as the dental splint is not any of the orthoses set out in s. 3.10 of Schedule C. At the hearing, the ministry also argued that s. 3.10 requires that if the requested orthosis is custom-made, it must be fitted by other than a dentist though the panel notes that the reconsideration decision does not address this additional criterion. While acknowledging that the appellant originally applied for the dental splint as an orthosis under s. 3.10 of Schedule C, on appeal, the advocate does not advance the argument that the dental splint is an orthosis within the meaning of s. 3.10 but notes that the legislative definition is narrow and "underinclusive."

The panel notes that s. 3.10 of Schedule C sets out an exhaustive list of what types of items fall within the meaning of "orthosis" for the purposes of that section and that the requested dental splint is not included. Therefore, the panel finds that the ministry reasonably determined that the appellant is not eligible for coverage for the dental splint as an orthosis under s. 3.10 of Schedule C of the EAPWDR.

Eligibility for a General Health Supplement (s. 2(1)(a) of Schedule C)

The ministry's position as set out in the reconsideration is simply that the dental splint is not any of the items set out in Schedule C although s. 2(1)(a) is not specifically addressed. At the hearing, in response to the arguments advanced by the appellant respecting s. 2(1)(a) of Schedule C, the ministry took the position that it is a stretch to view the dental splint as providing wound care, that there was no evidence from a physician respecting abscesses, and insufficient medical documentation respecting the threat to the appellant's health that would result if the dental splint was not provided. The appellant's position is that the requested custom-made dental splint is needed to address medical rather than dental needs, namely, osteoarthritis (DJD) and osteoporosis which result

in significant jaw problems. The advocate argues that coverage should be provided under s. 2(1)(a) of Schedule C on the basis that the dental splint: (i) is a reusable "medical supply" required to provide "wound care" for chronic mouth abscesses the appellant suffers as a result of the physical trauma of her teeth biting down incorrectly; (ii) was prescribed by a medical practitioner; (iii) is the least expensive as without it the appellant would have required surgery which is more costly; (iv) was needed to avoid infections that were compromising the appellant's immune system and to allow the appellant to properly eat thereby satisfying the legislative criteria that the medical supply/device be required to avoid an imminent and substantial danger to her health. Finally, the advocate argues that, as a person on disability with limited finances, the appellant has no resources to meet the expense as she cannot pay the outstanding \$1000 or repay the \$500 loan from a friend. The advocate further argues that the dental splint should not be denied on the basis that TMJ is not covered by the ministry because the dental splint was prescribed to alleviate a bilateral degenerative joint disease, a medical condition not related to muscular TMJ dysfunction.

The first eligibility criterion to be met for the provision of a health supplement under s. 2(1)(a) of Schedule C for medical or surgical supplies is that the minister be satisfied that the supplies are required for one of the purposes listed (A) through (F). No argument has been made that the dental splint is required for purposes (B) through (F). The advocate argues that the dental splint is a medical supply required for purpose (A) – wound care. The panel has first considered the plain meaning of supplies (*n.*) as it appears in s. 2(1)(a) of Schedule C – "medical or surgical supplies" - and finds that the term medical supplies refers to medical items required on a continual basis for some period of time which need to be replenished and which may be readily replenished as they are mass produced commodities, not a custom-made dental splint which is a relatively permanent device to be used only by the person for whom it was made. With respect to the advocate's argument that the dental splint is required for the purpose of wound care, the panel finds that the legislation requires that a medical supply be required directly for the care and treatment of a wound and does not encompass any indirect or incidental benefit respecting wounds. The appellant and her advocates, including her MLA, have given evidence that the appellant's DJD gives rise to chronic abscesses necessitating antibiotics; however, the information provided by the medical practitioner and dentist (ORJ) identifies the need for the dental splint as relating to the appellant's ability to move her jaw not for wound care. Therefore, while the panel accepts that the appellant has a medical need for the dental splint, the panel finds that the language of s. 2(1)(a)(i)(A) allows for the provision of "medical or surgical supplies" that are required for "wound care" and that the plain meaning of that language does not reasonably extend to a custom-made dental splint used to guide or direct the appellant's bite. Consequently, the panel finds that the ministry has reasonably determined that the appellant is not eligible for coverage for the dental splint as a medical or surgical supply under s. 2(1)(a) of Schedule C of the EAPWDR.

Eligibility for other Health Supplements under Schedule C (s. 2(1)(c) and (f), 2.1, 2.2, 3.1- 3.9, 3.11, and 6 – 9 of Schedule C)

The ministry's position is that the dental splint is not any of the health supplements provided under s. 2(1)(c) and (f), 2.1, 2.2, 3.1- 3.9, 3.11, and 6 – 9 of Schedule C and the appellant has not argued that the dental splint is any of these supplements.

The panel finds that the ministry has reasonably determined that based on a plain reading of the

EAPWDR the requested dental splint is not any of the therapies or items set out in sections 2(1)(c), (f), 2.1, 2.2, 3.1 - 3.9, s. 3.11, or 6 - 9 of Schedule C and that the ministry has reasonably determined that the appellant is not eligible for the dental splint under these sections of Schedule C of the EAPWDR.

Eligibility under s. 69 EAPWDR to meet a life-threatening health need

The ministry's position is that the appellant is not eligible under s. 69 of the EAPWDR because the dental splint is not a health supplement set out in Schedule C, s. 2(1)(a) or s. 3 and the information provided did not establish a life-threatening health need. At the hearing, the ministry pointed to the absence of information from a physician respecting a high risk of infection. The advocate's position is that if the appellant is otherwise found ineligible for the dental splint, she is eligible under s. 69 of the EAPWDR because the dental splint is a medical supply required for the purpose of wound care and the appellant has a direct and life threatening need for the dental splint because without it she is prevented from being able to eat, has chronic abscesses and infections, and is at risk of complications relating to her Type 2 Diabetes (increased risk of heart attack, nerve and kidney damage).

The panel finds, for the reasons previously provided, that the requested items are not any of the health supplements set out in Schedule C. Additionally, while the panel acknowledges the medical information identifying the appellant's need for the dental splint, the panel finds that that information falls short of establishing that there is an imminent life-threatening need as is required by s. 69 of the EAPWDR. The appellant's physician and dentist have both confirmed that the appellant experiences significant pain due to her DJD and the dentist has indicated an impact on nutrition. However, the legislative test set out in s. 69 of the EAPWDR requires that the threat be to a person's life and that that threat be "imminent", which requires some immediacy to the threat; neither is established by the medical information provided. For these reasons, the panel finds that the ministry has reasonably determined that the appellant is not eligible for the dental splint under s. 69 of the EAPWDR as the dental splint is not any of the health supplements that may be provided under s. 69, those set out in s. 2(1)(a) or (f) or s. 3 of Schedule C, and as an imminent life-threatening need for the dental splint has not been established.

Conclusion

The panel finds that the ministry's reconsideration decision is a reasonable application of the applicable enactment in the appellant's circumstances and confirms the decision.