

PART C – Decision under Appeal

The decision under appeal is the Reconsideration Decision dated October 30, 2012 in which the Ministry of Social Development (the "ministry") denied the appellant's request for an adjustable beverage holder for his walker (the "holder") and a 30 inch reacher (the "reacher"). The ministry held that neither the holder nor the reacher were included in the description of a medical supplement set out in any section of the *Employment and Assistance for Persons with Disabilities Regulation* or, alternatively, they were not, pursuant to section 3.2(1) of Schedule C of the said regulation, "medically essential to achieve or maintain basic mobility."

PART D – Relevant Legislation

Employment and Assistance for Persons with Disabilities Regulation (EAPWDR), clause 62(1)(a) and Schedule C, subsections 3(1) and (2) and section 3.1.

PART E – Summary of Facts

The evidence before the ministry on reconsideration included the following documents:

1. handwritten note from the appellant's doctor dated August 31, 2012;
2. quotation from healthcare provider dated September 24, 2012 for a holder and reacher; and
3. appellant's handwritten notes on Section 3 of the Employment and Assistance Request for Reconsideration dated October 10, 2012.

At the hearing the appellant's oral evidence included the following:

1. He has been designated by the ministry as a Person with Disabilities and receives income assistance.
2. He described his disabilities as degenerative peripheral neuropathy and osteoporosis. One of the symptoms of the neuropathy is what he described as phantom pain. Notwithstanding the unknown locus of this pain, the pain is significant and disabling. He treats it with medication. Additionally he is recovering from Stage 4 lung cancer.
3. His disabilities result in severely limited strength and mobility in his legs and feet and in his arms and hands. He is subject to falling and when this happens he regains his balance only with great difficulty. Indeed, if he falls in his home he has to make his way along the floor either to the sofa in his living room or the bathroom where he can, with great discomfort, struggle into an upright position.
4. His disabilities plateau for a time and then worsen. There is no prospect of improvement.
5. He lives alone in an apartment and requires a careworker to assist him with his daily living activities.
6. He achieves mobility outside his home with a motorized wheelchair and inside the home with a walker. The ministry supplied the walker earlier this year following a request from his Occupational Therapist. The OT had also requested other assistive devices which the ministry provided including bathroom support bars, a back support for his wheelchair, blocks to raise and slant his sofa to make it easier to get onto and off, and a device he described as a leg puller to assist him to put on socks, shoes and pants.
7. The OT had also recommended that he get a reacher but initially he resisted doing because he felt that each time he was forced to rely upon assistive devices he lost some of his waning autonomy and dignity.
8. By the summer he concluded he needed a reacher and a holder and he asked the healthcare provider which had provided the walker to request it from the ministry. The ministry refused and this appeal was the last stage of that refusal.
9. In the course of seeking ministry approval for the holder and walker, the appellant's doctor provided a handwritten note (referred to in documentary item 1, above). In that note the doctor stated that the appellant "requires a prescription for an adjustable drink holder and reacher 30".
10. He requires the reacher because he is unable to bend down to retrieve objects that are on the floor or in other locations that are out of his immediate reach. He related a recent incident in which he knocked a tea kettle on the floor and in an effort to retrieve it his legs gave out and he fell to the floor, injuring himself to the point that he had to be taken to the hospital for twenty stitches.
11. Despite the lack of strength and flexibility in his hands, he is able to operate a reacher because the required grasping motion is within his limited physical capability.
12. He requires the holder because he cannot take a glass or cup of water from the kitchen to another place in his apartment because of his unsteadiness in manoeuvring the walker. This

problem is exacerbated because his apartment floors are made of carpet, linoleum and hardwood, the latter two of which are for him comparable to a person walking on ice.

The ministry did not question or attempt to controvert any of the foregoing evidence of the appellant. The panel admitted this oral evidence under subs. 22)4) of the Employment and Assistance Act as being in support of the evidence that was before the ministry on reconsideration. Indeed, the panel noted that much of it was part of the appeal record or was implicit in that record and simply added detail.

The ministry did not lead any evidence on appeal and asked only one question of the appellant to clarify whether the holder was an accessory to his wheelchair or his walker. The appellant confirmed that it was his walker. He said he did not need a holder on his wheelchair. He needed it to assist him in carrying water from one part of his apartment to another, primarily for the purpose of taking his medications.

The panel finds as fact the twelve statements set out above. The panel also admitted into evidence the quotation for the holder and reacher provided by the healthcare provider (referred to in documentary item 2, above). The quotation was for \$90.00 to supply and install these devices.

PART F – Reasons for Panel Decision

The ministry's October 31, 2012 reconsideration decision was based on the ministry's conclusion that the appellant had not satisfied all the requirements set out in Schedule C, section 3.1 of the EAPWDR. In particular, the ministry held that neither the holder nor the reacher were "medically essential to achieve or maintain basic mobility". At the hearing of the appeal the ministry further submitted that even were this not correct, neither the holder nor the reacher were an "accessory" to a walker and so, for this further reason, the ministry had no authority to provide the appellant with these supplements. Accordingly, the issue on this appeal is whether the October 31, 2012 decision to deny the appellant's request for the holder or the reacher was a reasonable application of the applicable legislation in the circumstances of the appellant.

The relevant legislation is as follows:

EAPWDR

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,

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.

Medical equipment and devices – canes, crutches and walkers

3.1 (1) Subject to subsection (2) of this section, the following items are health supplements for the

purposes of section 3 of this Schedule if the minister is satisfied that the item is medically essential to achieve or maintain basic mobility:

- (a) a cane;
- (b) a crutch;
- (c) a walker;
- (d) an accessory to a cane, a crutch or a walker.

(2) A walking pole is not a health supplement for the purposes of section 3 of this Schedule.

The appellant's submission, set out in the Notice of Appeal and in his oral presentation, was that the decision to deny him the holder and reacher were made without reference to his medical condition, a condition which was well known to the ministry. He argued that it was self-evident to the ministry that he required these devices to cope with his disabilities and to fail to assist him was, to use his word, capricious. Without these aids he was needlessly placed at risk of injury and, indeed, had recently suffered from a serious injury that required hospitalization as a result of falling to the floor as he attempted to retrieve something he had dropped. This was not an isolated incident. Indeed, several times during the hearing the appellant stated that increasingly he feared for his safety in his apartment because of the number of times that he has fallen, particularly when he tries to pick up objects on or near the floor.

The appellant also submitted that the ministry in the past had provided him with medical supplements that assisted him in his daily living activities and the failure to do so at this time was both objectively and subjectively unreasonable. He stated that it appeared to him that the ministry applied the regulations (he referred to them as protocols) in a blunt fashion and relied upon the reconsideration and appeal process to provide the context to make a more nuanced decision that took into account the particular circumstances of the person with disabilities.

While the panel was not unsympathetic to the appellant's position on these two submissions, it did not agree that the ministry had shown itself to be unaware of his medical condition nor that it did not appreciate the nature and severity of his disabilities and challenges. Nor did the panel agree with the appellant's views on the purpose of the review mechanism provided in the legislation. However, given the manner which the panel dealt with the appeal, the panel decided that it did not need to address these submissions of the appellant.

The appellant also submitted that since the ministry had provided other medical supplements – he mentioned in particular the backrest for his wheelchair and what he described as a leg puller – that were not specifically prescribed in the regulations, the ministry could not now refuse to supply supplements which he maintained were both necessary and of a similar nature. The panel did not accept this submission. There may be times when such analogies are useful but this did not appear to the panel to be such an occasion. The provision of a gratuitous benefit, if such it was, on one occasion does not oblige the provider of that benefit to continue to act gratuitously in the future. In any event, the panel was of the opinion that this appeal could and should be decided without reference to this argument put forward by the appellant.

The appellant was at pains to make it clear to the panel that one of the primary reasons he required both the holder and the reacher was to assist him to take his daily medications. This activity required what was for him a rather significant level of mobility. The ability to grasp objects and carry them a

distance in a safe manner was pre-eminently important for him.

The submission of the ministry was simply that the appellant did not satisfy all the eligibility requirements set out in the EAPWDR. He satisfied the criterion set out in clause 62(1)(a) and, therefore, Schedule C, subs. 3(1) – he was a recipient of disability assistance. He also satisfied the criterion set out in Schedule C, s. 3(2)(a) – the holder and reacher had been prescribed by a medical practitioner. (The criteria set out in Schedule C, s. 3(2)(b) were not referred to in the reconsideration decision nor by the ministry on appeal and so the panel deemed these criteria not to be relevant to the appeal.) However, the ministry was of the view that the appellant had not satisfied the criterion set out in Schedule C, subs. 3.1(1), that is the minister was not satisfied that the holder and reacher were accessories to the walker that were “medically essential to achieve or maintain basic mobility”. At the hearing the ministry agreed that the holder and reacher would *improve* the appellant’s basic mobility but a mere improvement, the ministry submitted, did not reach the more demanding threshold of being *medically essential to achieve or maintain* basic mobility

As stated above, the ministry argued on the appeal that neither the holder nor the reacher were accessories to the walker as that term is used in the Schedule C, subs. 3.1(1). While the panel was of the preliminary view that such an interpretation of the term “accessory” was needlessly narrow, the panel decided that since this position was not put forward by the ministry on reconsideration, and since the task of the panel was to decide whether the decision on reconsideration was reasonable in the circumstances of the appellant, it did not need to reach any conclusion on this issue. Indeed, it is the opinion of the panel that any attempt to decide this issue would be to engage in an analysis that was beyond its jurisdiction.

Accordingly, this appeal is to be decided on the question of whether or not the minister could reasonably have been satisfied that the holder and reacher were not “medically essential [for the appellant] to achieve or maintain basic mobility”. In deciding this question the panel must be cognizant of the general rule of interpretation of welfare statutes that such legislation is remedial in nature and is to read purposively and liberally.

The panel found as a fact that the appellant suffers from significant, and ever worsening, disabilities which affect, among other functions, his mobility. He relies on a walker to get around his apartment and a power wheelchair for outside mobility. Without these he would be largely sedentary. His extremities are weak and minimally functional. Transferring objects by placing them on the seat of his walker is difficult and significantly increases the prospects of an accident as he contends with the difficulty of manoeuvring his walker at the same time as he tries to keep the object on the seat. He needs some secure place to put those objects, particularly if they are liquid and so subject to spillage. Retrieving objects that are not immediately at hand, particularly if they require bending, is possible only with inordinate difficulty and at a considerable risk of falling and injury. His OT said he needed a holder and a reacher. So did his medical doctor.

The panel is of the view that transferring and retrieving objects, particularly for a person who relies upon a walker are as much a part of “basic mobility” as is physically moving from one place to another. The appellant cannot perform some of these simple acts at all and some others only with difficulty and risk. In the opinion of the panel the holder and the reacher would materially enhance the appellant’s ability to perform these transferring and retrieving tasks, thereby extending the limited functionality of the appellant with basic mobility. To achieve a greater degree of basic mobility, the

holder and reacher are, in the opinion of the panel, medically essential.

Accordingly, the panel concluded that the decision of the ministry – that the appellant had not satisfied the statutory requirements for being provided with a holder and a reacher – was not a reasonable application of the relevant statutory provisions in the circumstances of the appellant. The October 31, 2012 reconsideration decision is rescinded.