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PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development (the "Ministry's") Reconsideration Decision dated January 29, 2013. In that decision, the Ministry denied the appellant's request for a two-month CPAP machine and mask trial. The reason for the denial was that the request for the CPAP machine did not meet the legislated criteria set out in the *Employment and Assistance Persons with Disabilities Regulations (EAPWDR)*, Sections 62 and 69 and Schedule C, Sections 3 and 3.9.

The Ministry found that the appellant is in receipt of disability assistance and eligible to receive health supplements provided under Section 62 and that the request met the general requirements for provision of medical equipment and devices set out in the EAPWDR, Schedule C, sections 3(1)(a) and (b) and was prescribed by a medical practitioner as required by EAPWDR Schedule C, section 3.9(2)(a). However, the Ministry was not satisfied that the CPAP and mask were medically essential for the treatment of moderate to severe sleep apnea as required by EAPWDR Schedule C, section 3.9(2)(c) or that the appellant faces a direct and imminent life threatening health need as required by EAPWDR Section 69.

PART D – Relevant Legislation

Employment and Assistance for Persons with Disabilities Regulations (EAPWDR), Sections 62 & 69 & Schedule C, Sections 3 and 3.9.

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PART E – Summary of Facts

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

- Medical equipment request and justification form completed by a therapist and dated August 29, 2012 indicating that the appellant has Obstructive Sleep Apnea and is recommended to have a CPAP machine and heated humidifier/mask;

- Medical report from a sleep clinic dated August 9, 2012 (the "Sleep Clinic Report") indicating that the appellant has mild to moderate Obstructive Sleep Apnea and that he should consider a trial of Auto CPAP, or a referral for a sleep disorders consultation and nocturnal polysomnogram.

- ApneaLink Report dated August 13, 2012 detailing the appellant's oximetry test results which indicate that the appellant had a DEI (desaturation event index) of 14 AHI.

- Letter from a medical equipment provider dated August 28, 2012 with a quote for the cost of a 2 month CPAP machine and mask at a cost of $700.

- Trauma Activation Note from a hospital dated November 17, 2012 indicating that the appellant was involved in a motor vehicle accident and suffered a closed head injury and that he has chronic lung disease findings on imaging.

- Ministry medical equipment and devices decision summary dated November 28, 2012.

- Letter from the Ministry to the appellant dated November 28, 2012 advising that the Ministry determined that the appellant did not meet the criteria for a 2 month CPAP trial.

- Clinical record of the appellant's family physician dated December 12, 2012 noting the appellant's problems of dizziness, vertigo and insomnia, a sleep apnea assessment and recommendation for a CPAP device.

- Letter from the appellant's psychiatrist dated December 12, 2012, stating that the appellant suffers from significant mental illness (major depressive disorder) and that medical problems including obstructive sleep apnea worsen the course of his illness and make him refractory to the treatment with antidepressants. The psychiatrist states that the CPAP machine has improved the appellant's mental illness considerably and made him fully functional and that without the machine his mental illness will significantly deteriorate with substantial risk for his general health and mental health.

- Note for an appointment with a certified health unit coordinator.

- A completed Request for Reconsideration Form signed by the appellant on January 17, 2013 with attached letter of the appellant indicating that he was diagnosed with mild to moderate obstructive sleep apnea and was advised to consider a 2 month trial of the Auto CPAP machine. The appellant also states that he was diagnosed with chronic lung disease on November 19, 2012, that a representative from a medical equipment provider advised him that

the Ministry had approved him for a two month trial of the CPAP machine, and that since being on the CPAP machine, his quality of life has greatly improved.

In his Notice of Appeal, the appellant states that he has chronic lung disease and was referred to a specialist and is waiting for those results. The appellant also states that he has difficulty breathing without the CPAP machine and his quality of life has greatly improved since being on the CPAP machine. He also states that he cannot face the thought of going back to not being on the CPAP machine.

Admissibility of New Information

Before the hearing the appellant provided additional documentation as follows:

1. Letter from the appellant dated February 19, 2013 in which he states that he had further testing at a chest clinic on January 28, 2013 where he was diagnosed as having moderately severe airflow limitation and possibility of COPD (Chronic Obstructive Pulmonary Disease). The appellant states that he does not have any means to pay for the CPAP machine and feels that his health will worsen and be greatly affected if he does not have the aid of the CPAP machine at night.
2. Consultation report of the appellant's family physician dated January 17, 2013 indicating that the appellant needs spirometry and pulmonary function tests.
3. Report from the chest clinic dated January 29, 2013 which indicates that the appellant has moderately severe airflow limitation suggesting COPD.
4. Clinical record of the appellant's family physician dated February 18, 2013 noting an assessment of RAD, asthma and OSA, that his problem is asthma and that he needs a CPAP device to improve his overall health.

The panel has admitted the new documentation into evidence in accordance with section 22(4) of the *Employment and Assistance Act,* as being in support of information and records that were before the Ministry at the time of reconsideration as they relate to the assessment and diagnosis of the appellant's sleep apnea and airflow limitations.

The Ministry did not provide any further submissions before the hearing and relied on the Reconsideration Decision.

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

- The appellant has been diagnosed with asthma, chronic lung disease, mild to moderate Obstructive Sleep Apnea and Major Depressive Disorder

- The appellant has been found to have moderately severe airflow limitation, suggestive of COPD

- The appellant trialed a CPAP machine and mask for two months without prior authorization from the Ministry

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PART F – Reasons for Panel Decision

The issue on appeal is the reasonableness of the Ministry's Reconsideration Decision denying the appellant's request for a 2 month trial of a CPAP machine and mask on the basis that he did not have moderate to severe sleep apnea as required by section 3.9(2)(c) of the 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 section 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.

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.

Pre-Authorization for the CPAP Machine and mask

In the Reconsideration Decision, the Ministry has denied the appellant's request for the CPAP machine and mask on the basis that he did not meet the criteria required of EAPWDR Schedule C.

section 3.9(2)(c) and EAPWDR Section 69 so the panel notes that the issue of whether the appellant sought pre-authorization for the funding for the trial of the CPAP machine and mask is not at issue on appeal.

At the same time however, the Reconsideration Decision states that the Ministry had not provided authorization for the CPAP machine and mask rental to the appellant or a medical equipment provider and that they had denied the appellant's request for funding for the CPAP machine and mask trial on November 28, 2012 and have not authorized or approved the appellant's request for funding for the CPAP machine and mask trial at any point since then. The Ministry's position is that the matter of payment for the two-month CPAP trial is between the appellant and the medical equipment provider.

The appellant's evidence is that he was advised by a medical equipment provider that the Ministry had approved a two month trial of the CPAP machine and that on that basis he went ahead and rented the CPAP machine and mask and now owes the equipment provider $700 for the rental.

The panel notes that although the appellant requested approval for the trial of the CPAP machine and mask prior to incurring the costs for the medical equipment, the appellant has not provided any documentation from the medical equipment provider to confirm his evidence that he was advised that the Ministry had provided prior authorization for the CPAP machine and mask rental to the medical equipment provider on his behalf. However, as the Ministry has not denied the appellant's request on the basis that he did not have prior approval for funding of the CPAP machine and mask, that is not an issue for the appeal, so the panel will not make any findings with respect to this issue.

The Degree of Severity of the Appellant's Sleep Apnea

The Ministry's position is that EPAWDR Schedule C, Section 3.9(2)(c) which stipulates that the minister must be satisfied that the item is medically essential for the treatment of moderate to severe sleep apnea has not been met.

The Ministry's position is that although the medical practitioner and the respiratory therapist confirmed the medical need for a CPAP trial and that the appellant would benefit from treatment for sleep apnea, the ApneaLink Report with the oximetry test results indicates a DEI (desaturation event index) of 14 AHI which is consistent with mild sleep apnea. The Ministry's position is based on the current consensus of the American Academy of Sleep Medicine which indicates that a test value of 0-5 is normal, 5-15 is mild, 15-30 is moderate and 30+ is severe sleep apnea.

The Ministry notes that in the Apnea Hypopnea Index (AH1) on the Sleep Clinic Report the appellant scored 14 events per hour, consistent with mild to moderate Obstructive Sleep Apnea but as CPAP therapy is medically indicated for, and funded by the Ministry for moderate to severe obstructive sleep apnea, and as the appellant does not have moderate to severe sleep apnea he does not meet the required legislative criteria.

The appellant's position is that he has chronic lung disease, difficulty breathing without the CPAP machine, experienced significant improvement with the trial of the CPAP machine in that he has more energy, his throat is no longer sore from snoring, the mucus in his throat has cleared, and his breathing has improved significantly. The appellant states that he cannot face the thought of going

back to being without the CPAP machine.

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. It is not clear to the panel why the Ministry is relying on the American Academy of Sleep Medicine consensus for the scale to determine the severity of the appellant's sleep apnea and there has been no information provided to conclude that the medical profession views the American Academy of Sleep Medicine as the generally accepted authority in determining the degree of severity of sleep apnea.

At the same time however, the panel notes that while the Ministry has no discretion to fund CPAP in the absence of a diagnosis of moderate to severe sleep apnea, in the absence of an express definition in the regulation as to what constitutes "moderate to severe sleep apnea", the Ministry has the discretion to decide whether the appellant's condition amounts to "moderate to severe sleep apnea."

In addition, as the Ministry has the discretion to use the American Academy of Sleep Medicine consensus which indicates the appellant has mild sleep apnea and as the Sleep Clinic Report indicates that the appellant has mild to moderate Obstructive Sleep Apnea, the panel finds that the Ministry's decision that the appellant's sleep apnea is mild as opposed to in the moderate to severe category, was reasonable.

Furthermore, although the recent chest clinic test results indicate that the appellant has been found to have moderately severe airflow limitations suggestive of COPD, the panel notes that there is no further medical evidence indicating that the appellant's sleep apnea is now in the moderate to severe range or that he has a definitive diagnosis of COPD.

Based on the foregoing, the panel finds that the Ministry was reasonable in concluding that the appellant's sleep apnea was mild rather than moderate to severe and that he did not meet the legislated criteria required in EAPWDR Schedule C, Section 3.9(2)(c).

Life Threatening Health Need

The Ministry's position is that while they sympathize with the appellant and recognize that the medical evidence indicates that the appellant may benefit from treatment for sleep apnea and would benefit with the use of the CPAP machine, 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 as required by EAPWDR Section 69.

The appellant's position is that the quality of his life has greatly improved with the use of the CPAP machine and that he does not want to imagine having to go back to sleeping without the CPAP machine.

Panel Decision

EAPWDR Section 69 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. While the panel notes that the appellant has benefitted greatly from the use of the CPAP trial, there is no medical evidence from the appellant's physician, psychiatrist, respiratory technician or other specialist, that the appellant faces a direct and imminent life threatening need or that the CPAP machine and mask are necessary to meet a direct and imminent life threatening need.

Although the appellant's psychiatrist states that the appellant's mental health will deteriorate significantly with substantial risk for his general health and mental health, the medical evidence does not indicate a direct and imminent life threatening health need. 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 EAPWDR Section 69.

Conclusion

In conclusion, the panel finds that the Ministry's Reconsideration Decision to deny the appellant's request for a CPAP machine and mask trial was reasonable based on the evidence and was a reasonable application of the legislation in the appellant's circumstances. The panel confirms the Ministry's Reconsideration Decision.