

PART C – Decision under Appeal

The decision under appeal is the Reconsideration Decision dated April 4th, 2013 in which the Ministry of Social Development (the “ministry”) declared that the appellant had been provided with a wheelchair seating system that met the legislative requirements and, accordingly, she was not eligible for a different system that she preferred. The ministry decided that, pursuant to section 3(1)(b)(iii) of the *Employment and Assistance for Persons with Disabilities Regulation*, the system that had been provided was “the least expensive appropriate” system. Further, the ministry held that, pursuant to section 3(2)(b) of the said Regulation, the appellant’s occupational therapist had not confirmed that the system the appellant preferred was medically essential and that the system that had been provided met the appellant’s needs.

PART D – Relevant Legislation

Employment and Assistance for Persons with Disabilities Regulation (EAPWDR), Schedule C, subsections 3(1) and (2)

PART E – Summary of Facts

The written evidence before the ministry on reconsideration which was included in the appeal record was comprised of the following documents:

1. Quotation (the "First Quotation") dated October 25, 2012 for a wheelchair and accessories. This quotation was prepared by a medical equipment supply company (the "Supplier") and includes a Solus Medical – Pro Flex II Cushion (the "Solus Cushion") at a price of \$830.00 and a Corpus 3G Ergo Backrest (the "Corpus Backrest") at a cost of \$806.08 in the list of accessories.
2. Letter (the "First OT Letter") dated October 31, 2012 to the ministry from the appellant's occupational therapist (the "OT") requesting a new power wheelchair and accessories for the appellant. In this letter the OT included the provision of the Solus Cushion and the Corpus Backrest as accessories. Enclosed with this letter was the Ministry form titled Medical Equipment Request and Justification prepared by the OT and dated October 30, 2012.
3. Form titled Medical Equipment Request – Tracking Sheet (the "Tracking Sheet") on which the ministry recorded discussions and decisions relating to appellant's new wheelchair and accessories from January 9 through 29, 2013.
4. Quotation (the "Second Quotation") for a wheelchair and accessories dated January 25th, 2013 prepared by the Supplier. This quotation includes a Blake Medical – Silver Cushion (the "Blake Cushion") at a price of \$642.40 and an Invacare – Matrix P (the "Invacare Backrest") at a price of \$603.08.
5. Letter dated January 29, 2013 from the ministry to the appellant advising her that her request for a new wheelchair and accessories had been approved and enclosing a Purchase Authorization.

In Section 3 of the Request for Reconsideration (the "Request") the appellant wrote:

- (a) That the medical issue which had led to her appeal was "chronic abscesses which cause severe pain while sitting, therefore comfort is essential to my ability to sit on the power wheelchair for an extended period of time."
- (b) "I have trialled the cushions and I can tolerate the ... [Solus Cushion] much better."
- (c) "The [Corpus Backrest] is more comfortable than the [Invacare Backrest]."

Subsequent to the reconsideration decision the appellant provided the ministry with two letters, one from the OT dated April 11, 2013 (the "Second OT Letter") and the other from the appellant's doctor (the "Doctor") also dated April 11, 2013 (the "Doctor Letter"). The ministry observed that the letters contained new evidence but agreed that this evidence was in support of the evidence that was before the ministry on reconsideration. This was also the view of the panel. Accordingly, in accordance with s. 22(4) of the *Employment and Assistance Act*, the panel admitted these letters into evidence as being in support of the information and records that were before the minister at the time of reconsideration.

The Second OT Letter included the following statements written in support of the appellant's position that she was eligible for the Solus Cushion and Corpus Backrest:

- (a) "[The appellant] had strong preferences regarding the seating because of her pronounced bony prominences and chronic anal abscesses."
- (b) "... because she sits on the wheelchair all day, comfort is of utmost concern to her and she considers this a need."
- (c) "I do agree with [the appellant] that ... ultimately, comfort may be the most important factor to

the successful experience and application of this equipment, not just meeting basic medical needs."

The Doctor Letter was also written in support of the appellant's position. The Doctor wrote:

- (a) "[the appellant] suffers from complications of Transverse Myelitis and has been Paraplegic since 1990."
- (b) "... she requires electric wheelchair transportation ... she has unique medical complications and conditions that prevent her from using most wheelchairs as a result of inadequate support from their cushion and back rest."
- (c) "She suffers from hypothyroidism, hypoparathyroidism, osteoporosis, kyphoscoliosis, and also a neurogenic bladder that keeps her pelvic area moist and susceptible to pressure sores. In addition to this, she also has extensive ano-rectal fistulae and recurrent anal abscesses."
- (d) "She has tried many different chairs but as a result of these medical complications she requires ... the [Solus Cushion and Corpus Backrest]."
- (e) "To be specific the [Blake Cushion] is unable to support her spine and is not comfortable or safe for her and is much more likely to result in infection and breakdown of skin and wound. For these reasons the Blake [C]ushion is inappropriate for this patient."

The appellant was accompanied by an occupational therapist (not the OT who had been involved in the selection of the wheelchair) who had known her professionally for some time. The appellant and the occupation therapist led oral evidence which included the following:

- (a) Following trials of the wheelchair seating systems for approximately two weeks each, the appellant was clear that she wanted her new wheelchair to have a Solus Cushion and a Corpus Backrest. It was more comfortable, reduced the posterior pain she experienced sitting much of day and held her in a safer, more upright position in the wheelchair. It also alleviated some of the stress caused by her scoliosis. Instead she was given the significantly less comfortable and appropriate Blake Cushion and Invacare Backrest.
- (b) The OT had initially requested, in the First Quotation, a Solus Cushion and a Corpus Backrest. Subsequently, the ministry persuaded the OT to include in the Second Quotation a Blake Cushion and an Invacare Backrest that the ministry said would meet the appellant's medical needs. The occupational therapist who attending the hearing said that she did not think that the discussions between the ministry and the OT could be construed as the OT having approved the Blake Cushion and Invacare Backrest; rather it was a matter of the ministry seeking some cost reduction and the OT wanting to bring the discussions to an end so that appellant would have her new wheelchair.
- (c) The cost difference between the two cushions was approximately \$188 and between the two backrests about \$176. The ministry's choices were the less expensive.
- (d) Within about two weeks of being provided with the Blake Cushion and the Invacare Backrest in or about last February, the appellant obtained a Solus Cushion and Corpus Backrest on loan and has been using them ever since.
- (e) The anal abscesses and other pressure sores from which the appellant suffered were chronic and resulted in significant pain. She had trialed a number of wheelchair cushions but only the Solus Cushion provided much relief from the pain. She had undergone three surgeries over the years in relation to these conditions.
- (f) The appellant's scoliosis causes her to twist and lean to the left. This exacerbates the scoliosis. Moreover, the leaning is unsafe as it renders her at risk of falling out of her wheelchair. To counteract this she requires a particular type of backrest. She has found that

the Corpus Backrest provides the best and safest support for her. Since she is paraplegic she is unable to shift herself in her wheelchair so she must be properly positioned from the time she is helped into her wheelchair.

- (g) The Solus Cushion is better than other cushions that she has tested – including the Blake Cushion - because in addition to it providing more support, it is made of a material that wicks away the moisture from her pelvic area and it allows some air to circulate through the cushion. These qualities, by helping to keep skin dry, inhibit the formation of abscesses and skin breakdown. The Blake Cushion does not have these qualities.

The panel admitted the oral evidence of the appellant and the occupational therapist who attended the hearing with her in accordance with s. 22(4) of the *Employment and Assistance Act*. This evidence was in support of the information and records that were before the ministry on reconsideration.

The panel found as facts:

1. The appellant suffers from the complex medical conditions set out in the foregoing summary. In particular, in the context of this appeal, the appellant is a paraplegic with scoliosis, recurrent anal abscesses, ano-rectal fistulae, neurogenic bladder (resulting in pelvic moisture), pressure sores and skin breakdown.
2. The appellant, having trialed several cushions and backrests, including the Blake Cushion and the Invacare Backrest, determined that the Solus Cushion and the Corpus Backrest are most comfortable and result in the greatest relief from severe pain due to her medical conditions.
3. The Solus Cushion is superior to the Blake Cushion in ameliorating the pelvic moisture problem because of the wicking property of the material and because of the air that circulates through it.
4. The Corpus Backrest holds the appellant more securely and upright thereby reducing the negative effects of the appellant's scoliosis and the risk of falling out of the wheelchair.
5. The OT originally recommended the Solus Cushion and Corpus Backrest and only agreed to provide a substitute quotation the Blake Cushion and Invacare Backrest after being urged to do so by the ministry.
6. At no time did the appellant abandon her firm conviction that she needed the Solus Cushion and Corpus Backrest, not the Blake Cushion or the Invacare Backrest.
7. The unqualified opinion of the Doctor is that she requires the Solus Cushion and the Corpus Backrest and the Blake Cushion is inappropriate for her.

PART F – Reasons for Panel Decision

The issue

There are two issues on this appeal. First, whether, pursuant to section 3(1)(b)(iii) of Schedule C of the EAPWDR, the minister reasonably decided that the Blake Cushion and the Invacare Backrest were the “least expensive appropriate medical equipment” and, second, whether, pursuant to section 3(2)(b) of Schedule C of the EAPDWR, the OT had “confirm[ed] the need for the Blake Cushion and the Invacare Backrest.

The relevant legislation

EAPWDR, Schedule C

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 3.12 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 or section 3.12, 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.

The appellant's position

The position of the appellant on appeal was that her medical conditions were such that she required the Solus Cushion and the Corpus Backrest. The Blake Cushion and Invacare Backrest exacerbated some of her medical conditions resulting in greater pain, increased probability of medical complications and risk of injury. So convinced was she of these negative consequences that she had, after about two weeks of trying the cushion and backrest provided by the ministry, replaced them with the models that she had requested with the result that she had less pain, a reduced possibility of medical complications and little risk of injury. Referring to the legislation, the equipment that the ministry had provided was not “appropriate” for the appellant nor had the OT given the ministry with an assessment “confirming the medical need for the medical equipment or device” that had been provided.

The ministry's position

The position of the ministry on appeal was that the decision to provide the appellant with the Blake Cushion and the Invacare Backrest was made strictly in accordance with the legislation. Clearly this equipment was less expensive than the equipment the appellant had requested and it was appropriate. It was appropriate because it did what it was designed to do, that is it was "a wheelchair seating system" that permitted the appellant "to achieve or maintain [her] positioning in a wheelchair". Moreover, the OT had recommended the Blake Cushion and Invacare Backrest by virtue of having submitted to the ministry the Second Quotation in which that equipment was specifically included.

Least expensive and appropriate

The legislative criterion set out in section 3(1)(b)(iii) of Schedule C of the EAPWDR requires that the ministry reasonably decide that the Blake Cushion and the Invacare Backrest were the "least expensive appropriate medical equipment". Clearly this equipment was the "least expensive". Equally clearly, however, the panel found that it was not "appropriate". The evidence of the appellant buttressed by the somewhat equivocal evidence of the OT in the Second OT Letter and the uncontradicted evidence in the Doctor Letter was that the equipment that was supplied was unsuitable and unsafe for the appellant. Moreover, the deficiencies in that equipment were such that some of the appellant's medical conditions – particularly the scoliosis and the pressure-related complications such as anal abscesses and ano-rectal fistulae – would be exacerbated by the supplied equipment. In the words of the Doctor, the equipment that was supplied "is unable to support her spine and is not comfortable or safe for her and is much more likely to result in infection and breakdown of skin and wound".

But the issue is not the conclusion of the panel with respect to the equipment but, rather, whether the ministry acted reasonably in deciding that the Blake Cushion and Invacare Backrest were appropriate. The ministry knew that the appellant wanted the Solus Cushion and the Corpus Backrest and knew also that the OT had recommended this equipment in the First OT Letter to which the First Quotation was attached.

It appears, however, that the parties were separated by a semantic misunderstanding. The appellant – and, in turn, the OT – couched her request in terms of her "preference". The ministry appears to have interpreted that word as meaning something rather subjective, as in a "mere preference", and, as such, unrelated, or insufficiently related, to the notion of a medical need. The panel is satisfied – based on the appellant's oral comments and her very clear written statements in the Request (which were before the ministry on reconsideration) – that the appellant did not mean the word in that sense. Her preference was based upon her experience, having trialed both the "preferred" equipment and the "supplied" equipment, of which provided her the greatest support and safety and the least pain and discomfort. As well, the evidence subsequently provide by the Doctor confirmed that, as a result of the appellant's medical complications, she requires the Solus Cushion and the Corpus Backrest. These are clearly matters within the scope of "medical needs". The panel finds that the ministry did not reasonably determine that Blake Cushion and the Invacare Backrest were the "least expensive appropriate medical equipment in the unique and challenging medical circumstances of the appellant.

Confirmed the need

The legislative criterion set out in section 3(2)(b) of Schedule C of the EAPDWR required that the OT provide an assessment which confirmed the medical need for the Solus Cushion and the Corpus Backrest. The ministry says that the OT did not do so. Indeed, the ministry says that the OT

confirmed the need for the Blake Cushion and the Invacare Backrest by submitting the Second Quotation to the ministry.

It is not clear from the reconsideration decision that the Second Quotation could be viewed as a confirmation. At the hearing of the appeal the ministry pointed to the January 24, 2013 entry in the Tracking Sheet which states "OT not completely happy [with] Corpus seating hw this is what client wanted. Asked [OT] to get [Supplier] to quote on [Invacare Backrest]. Then we will review again & client may need to trial a different configuration." This appears to leave the matter of the choice of equipment subject to further trialing by the appellant. Yet on the same day the Second Quotation was prepared and approved four days later by the ministry. The notion of further trialing seems to have been lost during the approval stage. By the time the appellant had in fact conducted her own trialing and had found that the approved equipment did not meet her medical needs, the ministry had taken the position that she was not eligible for the Solus Cushion and the Corpus Backrest. The expectation of further trialing is not discussed in the reconsideration decision.

The only clear statement by the OT regarding her assessment of the appellant's medical needs are found in the First OT Letter, dated October 31, 2012, in which she wrote that "the seating on her current wheelchair is not suitable for her anymore" and "recommended" the Solus Cushion and the Corpus Backrest. It appears to the panel that the OT's apparent endorsement of the approved seating system – and the panel cannot find any direct evidence that she in fact endorsed the change – was the result of the ministry urging her to agree to provide "a comparison quote which would give [the appellant] with more cost-effective options which still meets clients preferences". As the OT writes in the Second OT Letter, "... I was told that MSD funding is provided to meet basic medical needs and not necessarily client preferences." She then goes on state that the since the appellant "sits on the wheelchair all day, comfort is of utmost concern to her and she considers this a need."

As discussed in the previous section of this decision, the ministry treated the notion of the appellant's preference as relating to something other than a medical need. However, as the evidence before the ministry on reconsideration and the evidence subsequently provided by the Doctor confirms, the appellant requires the Solus Cushion and Corpus Backrest and the approved equipment is not appropriate for her. The panel finds, on a balance of probabilities, that the OT did not provide a revised assessment confirming the medical need for the approved equipment but had merely forwarded the Second Quotation as a less costly option to be reviewed. The panel finds that the ministry's determination that the OT had provided an assessment confirming the medical need for the Blake Cushion and the Invacare Backrest was not reasonably supported by the evidence.

Conclusion

The panel found that the decision of the ministry in respect of whether or not the Blake Cushion and Invacare Backrest were appropriate was not reasonable in the circumstances of the appellant. As well, the decision of the ministry in respect of whether or not the OT had conducted an assessment and confirmed that this equipment met the medical needs of the appellant was not reasonable. Since the ministry had to succeed on both criteria, and in fact succeeded on neither, it follows that the decision of the ministry - that the appellant was ineligible for the Solus Cushion and the Corpus Backrest – was not reasonably supported by the evidence and was not a reasonable application of the relevant statutory provision in the circumstances of the appellant. The April 4, 2013 reconsideration decision is rescinded.