APPEAL #

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development (the ministry) reconsideration decision dated August 4, 2011 which denied the appellant's request to be provided with a Flexible Array accessory (the Flexible Array) for the InterX 5002 Neurostimulation Device. The ministry considered the appellant's request based on the *Employment and Assistance for Persons with Disabilities Regulation* (EAPWDR) as it read on March 31, 2010, the date on which the appellant's original request was received. The specific bases of denial are as follows:

Schedule C, s. 3 [as it read on March 31, 2010]
The ministry determined that not all of the criteria set out in s. 3 of Schedule C for the provision of medical equipment and devices were met. The ministry was satisfied that the equipment, including the Flexible Array, had been prescribed by a medical practitioner and that an assessment by a physiotherapist (PT) had been provided as required by s. 3(2)(a) and (b). However, the ministry determined that the Flexible Array was not any of the medical equipment and devices set out in s. 3(1) and, in particular, was not a positioning device under s. 3(1)(d), and exceeded the policy parameters for the provision of electrotherapy in terms of functionality, quantity, and cost.

Schedule C, s. 2 [as it read on July 4, 2002]
The ministry determined that the appellant is not eligible for the Flexible Array on the basis that she was approved for electrotherapy equipment under the legislation in effect on July 4, 2002 which included a broader category of "durable medical equipment and appliances" not found in the legislation in effect at the time of the appellant's request for the Flexible Array. Further, the ministry determined that previous approval of an electrotherapy device does not establish a precedent that requires the ministry to continue to provide electrotherapy devices indefinitely and the Flexible Array exceeded the policy parameters for the provision of electrotherapy equipment in terms of functionality, quantity, and cost.

s. 69 Life-threatening health need [as it read on March 31, 2010]
The ministry also determined that the appellant was not eligible for the Flexible Array under s. 69 of the EAPWDR [life-threatening health need] because (i) the information does not establish a life-threatening need for the Flexible Array and (ii) the parameters set out in policy are exceeded for the provision of electrotherapy equipment in terms of functionality, quantity and cost.

PART D – Relevant Legislation

Employment and Assistance for Persons with Disabilities Act (EAPWDA), s. 16

Employment and Assistance for Persons with Disabilities Regulation (EAPWDR), s. 69 and Schedule C, s. 3 in effect on March 31, 2010

Employment and Assistance for Persons with Disabilities Regulation (EAPWDR),Schedule C, s. 3, 3.5 and 3.6, in effect on April 1, 2010

Disability Benefits Program Regulation, s. 2, in effect on July 4, 2002

APPEAL #

PART E – Summary of Facts

Preliminary Matters

- The hearing was originally scheduled for September 9, 2011 but was adjourned on September 7, 2011 at the written request of the appellant with the consent of the ministry and the Tribunal chair. The appellant's submission includes the following bases for the adjournment request: her representative is unable to attend (letter from the representative attached); the appellant is unable to proceed until she has her own computer at home; and, the ministry has not provided the appellant with the documents she requires in order to prepare for the hearing.

- A rescheduled hearing was to be conducted on October 26, 2011 but was adjourned for a second time on October 12, 2011 at the written request of the appellant with the consent of the ministry and the Tribunal chair. The appellant's submission includes the following basis for the adjournment request: the ministry provided new reasons for denial at the adjudication stage which is a matter that should be resolved by the Ombudsperson prior to the appeal hearing.

- The hearing was rescheduled to take place on June 12, 2012 but was adjourned for a third time on May 23, 2012 at the written request of the appellant with the consent of the ministry and the Tribunal chair. The appellant's submission includes the following basis for the adjournment request: the appellant suffered a flare-up of her chronic fatigue and myofascial pain and requires a period of recovery, as set out in the May 11, 2012 letter from a physician.

- The hearing was rescheduled to be conducted on May 10, 2013 but was adjourned on May 1, 2013 at the written request of the appellant, with the consent of the ministry and the Tribunal chair. The appellant's submission includes the following bases for the adjournment request: the appellant needs additional time to obtain legal advice; the appellant has been too ill to prepare during the last year due to the "ministry causing prolonged physical and mental exhaustion"; the hearing should be delayed until the Ombudsperson investigation, which has not begun, is complete; and, the appellant has an out-of-town family member coming to visit and is unable to prepare for this visit and the appeal at the same time due to her disability.

- The hearing was rescheduled for November 13, 2013. On November 5, 2013, the appellant submitted a written request for an adjournment which includes the following bases for the adjournment:
    1. She does not have a copy of the Request for Reconsideration needed to prepare her submission which has been requested from both the ministry and the Tribunal and not provided.
    2. Matter of administrative fairness has to be resolved by the Ombudsperson regarding the ministry adding Section 69.
    3. Need for recovery from a flare-up since the last hearing of September 18, 2013.
    4. Need additional time to get medical information.
    5. Need additional time to consult with a lawyer about issues that have arisen as a result of the last appeal and have not been able to due to health and the lawyer's schedule.
    6. Judicial review of the decision for the main InterX device needs to be settled first.

- The ministry consented to the adjournment request but the adjournment was not approved by the Tribunal chair. The Tribunal chair declined to consent to the adjournment request dated November 5, 2013 for the following reasons:

1. Section 85 of the *Employment and Assistance Regulation* states that a "hearing must be held within 15 business days after the appeal form is delivered under section 84, unless it would be procedurally unfair to do so. The appellant has not demonstrated that there would be any procedural unfairness in proceeding with the appeal hearing on November 13, 2013, particularly in view of the fact that this appeal has already been adjourned on four previous occasions at the request of the appellant.
2. The Tribunal provided the appellant with the same record of the ministry decision which contains the Request for Reconsideration on three separate occasions.
3. The appellant's complaint to the Ombudsperson is a separate matter from this appeal and is not a basis for adjourning this appeal.
4. The appellant has not provided any verification from her physician as to the nature of the flare-up or her inability to participate in the upcoming hearing. The appellant previously requested that her hearings be limited to one per month due to health issues and this hearing has been scheduled to take place 8 weeks after the appellant's last Tribunal hearing, which should have afforded sufficient time to recover.
5. The appellant has had 8 weeks from the last hearing to seek legal advice and prepare submissions for this hearing and, in view of the four adjournments she has already been granted, this is not a sufficient basis for further delay.
6. A judicial review application is not a bar to proceeding unless the court has issued a stay, and a judicial review of a past Tribunal decision is not a bar to proceeding with a new appeal.

- On November 12, 2013, the appellant submitted a second written request for an adjournment on the following grounds:
    1. Medical reasons- the appellant submitted a note dated November 7, 2013 from a physician at an emergency medical clinic.
    2. Timing- the appellant wrote that she is mobility impaired and has no way to get her submissions to the Tribunal's offices to meet the timeline for submissions.

- The ministry consented to the adjournment request but the adjournment was not approved by the Tribunal chair. The Tribunal chair declined to consent to the adjournment request for the following reasons:
    1. The intent of the legislation is to hold a timely hearing (within 15 business days) unless it would be procedurally unfair to do so. This hearing has previously been adjourned 4 times, all at the request of the appellant. In this context, the physician's note is not sufficient evidence of the need to adjourn the hearing in order to accommodate the appellant's disability.
    2. The appellant has had more than two years from the date of the reconsideration decision that is the subject of this appeal in which to make her submissions and provide documentation to the Tribunal. She has made voluminous submissions with respect to the appeal. If there is a compelling rationale for the late submission of information, the appellant may submit the information to the panel for a decision on admissibility. The Tribunal chair was not satisfied that the appellant requires additional time in which to provide her information to the appeal panel.

- In her adjournment application, the appellant stated that her health was affected by the length of her last hearing [on September 18, 2013] and that she needed time to recover. At her previous hearing, the appellant took close to 5 hours to present her case. Prior to the hearing,

the Tribunal chair forwarded a letter to the appellant advising that 3 hours had been allowed for the hearing of this appeal, even though hearings are typically completed within a 2-hour time frame, and that the panel chair will manage the hearing within the 3 hours allotted.

- The hearing convened on November 13, 2013, with the appellant attending by telephone. The panel chair reminded the appellant that 3 hours had been allotted by the Tribunal for the hearing of the appeal. The appellant stated she was requesting an adjournment and would not commence until her advocate arrived. The advocate's arrival was delayed by 40 minutes. The panel chair cautioned that, given the timeline for the hearing, if an adjournment was requested and not granted, the time remaining for hearing from the parties would be much shorter.

- The appellant presented her request for an adjournment over the course of 1 hour and 20 minutes and stated that she can make these submissions but not continue with the hearing because the adjournment submissions are "not complex legal arguments." During the course of the appellant's arguments, the panel chair repeatedly reminded the appellant that time was of the essence. The appellant requested an adjournment on the following bases:
    1. Medical reasons- the appellant submitted a note dated November 12, 2013 from a physician at a medical clinic stating that the appellant is "...unable to attend the hearing November 13, 2013 because of a medical condition that would worsen if she attended. She needs an adjournment for 2 months. Any future hearings need to be limited to 1-hour segments. Due to a cognitive impairment, she needs a longer time than standard to make her case." The appellant stated that she is not physically or mentally well enough to attend the hearing. She has only slept for 2 hours each night since her last hearing in September 2013. The appellant stated that she slept all of the previous night but that was not restorative sleep and that "sleep walking doesn't count." She damaged her back muscles and has been too ill to get organized for this hearing. The appellant has another appeal pending with the ministry regarding her need for a special chair with arms, and she needs this chair to safely participate in the hearing since she has osteoarthritis and has already suffered a fall which fractured her hand and ribs.
    2. The appellant's advocate stated that she has experienced a difficult staffing situation, with people quitting, since August 2013, and has not been able to meet with the appellant to get organized for the hearing. The advocate stated that the sole purpose of the hearing is for the appellant to have her say, and natural justice requires that the appellant be given a full hearing to ensure that her case is heard and understood. There is no undue hardship caused to the ministry by granting an adjournment, and the ministry previously consented to an adjournment.
    3. There this an ongoing FOI request since the ministry failed to release information requested by the appellant. The appellant made a FOI request about 1 to 1 ½ years ago and there is still no response. This information will show the authority relied on by the ministry to issue electrotherapy devices, is important to one of the appellant's arguments, and she does not want to proceed without it. The appellant provided an email dated November 12, 2013 from an investigator with the Information and Privacy Commissioner indicating that she is working on the appellant's complaint but is "unable to give you a time frame within which my work will be completed, or any indication of the outcome."
    4. Matter of administrative fairness has to be resolved by the Ombudsperson regarding the ministry adding Section 69 as a reason for denial. She has a letter from her doctor that she had a life threatening need for the item at the time she made her request [March

2010] and she needs an opportunity to provide evidence without the chance that the panel will say it is new evidence and not admissible.

5. The appellant does not have a copy of the Request for Reconsideration needed to prepare her submission, which has been requested from both the ministry and the Tribunal and not provided.

- The appellant also requested that the panel go through each of 10 Appendices, which she submitted subsequent to reconsideration, consisting of more than 400 pages, and describe each document to her so that she could decide whether the panel should consider it on this appeal, as it may have been meant for another appeal. The panel pointed out that these Appendices, A through J, had been submitted to the Tribunal by the appellant and included correspondence from her requesting that the attached documents be submitted either on this appeal specifically or on all of the appellant's appeals, including this one. As the panel declined to dedicate hearing time to reviewing each of the Appendices, the appellant argued that the panel must disregard all of the submissions and evidence provided by her after the reconsideration decision, including Appendices A through J, unless specifically referred to by her. The appellant requested that the panel consider the court cases and the *Interpretation Act*, but not the Tribunal decisions and none of the previous definitions with the exception of the definition of "range of motion."

- The ministry objected to an adjournment on the basis that this appeal has gone on "long enough" and that there needs to be a resolution.

- The panel deliberated for approximately 20 minutes and was not prepared to grant an adjournment of the hearing for the following reasons:
    1. When viewed in the context of the history of this appeal, including the 4 previous adjournment requests by the appellant over the course of more than 2 years and the voluminous submissions already provided by the appellant on appeal, the note by the physician dated November 12, 2013 is not sufficient evidence that the appellant is unable to proceed with the hearing.
    2. While the panel recognizes the challenges the appellant's advocate has experienced with staffing problems, these issues have been ongoing since August 2013 and is not a sufficient reason to delay the hearing at this point in the process. The ministry is also a party to this appeal and is entitled to object to a new adjournment request.
    3. The appeal cannot be adjourned indefinitely for the purposes of waiting for the results of the FOI request. The email provided by the appellant does not provide any defined time for completion of the process.
    4. The ministry relied upon Section 69 in its reconsideration decision, which is the decision that the panel has the jurisdiction to review for reasonableness. The panel can consider the appellant's evidence respecting Section 69 not previously before the ministry, if it is in support of the information and records the ministry had at reconsideration. Waiting for the results of an investigation by the Ombudsperson about the ministry's past conduct is not a sufficient reason to adjourn the hearing.
    5. The Tribunal provided the appellant with the same record of the ministry decision which contains the Request for Reconsideration on three separate occasions since 2011, and there has been sufficient opportunity for the appellant to provide her submissions.

- The appellant requested that her objection to the panel's decision not to grant the adjournment

be noted on the record as a contravention of Human Rights law. The appellant stated that she was not being given a level playing field.

- The appellant requested that the ministry proceed first with its presentation, which took approximately 5 minutes. The appellant stated that she had been able to prepare her questions for the ministry in advance, and she asked several questions taking approximately 15 minutes. Neither the advocate nor the panel had any questions for the ministry.

- The appellant presented her oral submissions over the next 30 minutes and also provided the panel with 2 written submissions, one stamped received by the Tribunal on May 30, 2012 (10 pages), and the other received September 18, 2013 (22 pages). Though these submissions pre-date this hearing, they were not submitted for this appeal until provided to the panel at the hearing.

- At the end of the 3-hour time period allocated for the hearing, the panel chair alerted the parties that it was time to conclude the hearing. The appellant stated that she was not finished with her submissions and she requested that the hearing be re-convened at another date. At this time, the appellant proposed to submit a large binder of further documentary evidence to the panel. The advocate stated that the additional materials are mostly copies of documents in the Appeal Record, with some additional information.

- The panel denied the appellant's request for the hearing to be re-convened, as the total time available for the hearing been made clear at the outset. Despite repeated reminders to the time allowed for the hearing, the appellant elected not to start her adjournment request until the advocate arrived 40 minutes after the designated start time for the hearing, and to spend 1 hour and 20 minutes reviewing her reasons for requesting an adjournment, which were similar to those presented to the Tribunal Chair prior to the hearing. The appellant had presented arguments regarding the issues on the appeal, with some evidence, and neither the ministry nor the panel had any questions of the appellant. The panel concluded that the appellant had been provided a sufficient opportunity to be heard on the appeal.

- The panel refused to accept further documentary evidence at the conclusion of the time allotted for the hearing, as there was no opportunity remaining for the ministry to review each document in the binder and to provide its position on admissibility. The appellant, who had the assistance of an advocate at the hearing, did not submit the binder of documents until the conclusion of the hearing. Since filing the Notice of Appeal dated August 19, 2011, the appellant has provided over 400 pages of documentary evidence and submissions in addition to the Appeal Record of 411 pages. The appellant submitted some documents at the commencement of the hearing for the panel's consideration. The panel concluded that the appellant had already been afforded a sufficient opportunity to provide her submissions on this appeal.

The appellant again objected to the panel's decision on the procedural issues and stated that it was in contravention of Human Rights law.

Substantive Matters

Documentary evidence before the ministry at reconsideration relevant to the issue under appeal included:

1) Ministry of Human Resources BC Benefits Reconsideration Decision dated July 4, 2002 stating that the appellant is eligible for a CellStim 600 patient portable microcurrent unit as recommended by her chiropractor. Documentation respecting the original denial and the CellStim microcurrent unit. Attached is a March 22, 2002 physician's letter which repeatedly relates the need for the "biofeedback device" to "essential functions of life." The panel notes that the phrase "essential functions of life" reflects the legislative language in s. 2(1)(a) of the Disability Benefits Program Regulation, the legislation in effect at that date.

2) Ministry policy respecting Eligible Health Supplements dated December 2, 2008 (also May 1, 2005 and December 1, 2003) stating in part:

   Electrotherapy (Medical Equipment and Devices) – The following are covered:

   -basic TENS unit (cost should not exceed the amount shown in Rate Table: Health Supplements and Programs – Eligible and Non-Eligible Health Supplements)
   -gels
   -electrodes or accessories

   Positioning Devices – Standing frames are covered.

   The policy includes the following statements:
   "The following general guidelines are provided to assist in determining which items are eligible for coverage by the ministry. **This list is a general guide and is NOT all-inclusive**." [Emphasis included]

3) Ministry policy respecting Non-Eligible Items: General Guide dated April 22, 2008.

4) Ministry of Employment and Income Assistance BC Employment and Assistance Rate Tables showing that the maximum amount that may be paid for a Basic TENS unit is $250.

5) Letter dated March 29, 2010 from the appellant's physician stating that the appellant requires positional devices, including the InterX device and accessories, including the Flexible Array, to treat myofascial trigger points throughout her body, muscle imbalances, sacral-iliac joint dysfunction and a displaced coccyx. The appellant requires equipment that allows for home treatment to enable upright positioning through the delivery of electrical current without having to grasp electrodes.

6) Medical Equipment Request & Justification form (the MERJ) dated March 31, 2010 completed by a physiotherapist requesting the InterX device and other medical equipment, including the Flexible Array.

7) The ministry's original decision dated May 14, 2010, which held that "the requested positional devices and accessories are not an eligible item...." and the reconsideration decision dated November 10, 2010, denying the appellant's request for the InterX device and other devices under the legislation in effect as of April 1, 2010. A copy of an Employment and Assistance Appeal Tribunal (the Tribunal) decision dated March 23, 2011, which determined that the ministry should have considered the request under the legislation in effect at the time of the

appellant's request on March 31, 2010.

8) Letter dated July 7, 2010 from the appellant's physician stating that "the following positional supports are necessary to meet her basic needs, to provide assistance with daily living activities, to make her more independent and more able to participate socially." Included in the list of requested items is the InterX device which the physician describes as being a different technology from microcurrent. It is "a battery operated device that delivers high amplitude electrical pulses through a biofeedback interactive loop with the body. It takes a reading from the skin and delivers what it determines to be the appropriate pulse to deliver. As the electrophysiology of the tissue changes the pulses that are delivered change. The pulses stimulate delta fibers, stimulates the release of endomorphine and dopamine and activates the body's natural pain relieving mechanisms (segmental and descending inhibition) thus decreasing acute, chronic and neurophathic pain, muscle spasm and increasing range of motion." The appellant requires the Flexible Array to treat areas in her legs, upper arms and low back. She is unable to reach all the areas. The Flexible Array is a pad that attaches in the InterX and by positioning it so it wraps around a portion of a limb or spreading it out flat and lying down on it.

9) Letter dated October 14, 2010 from the appellant's physician described by the physician as a continuation of the MERJ. The physician writes that the appellant's upright positioning is severely restricted and she has to spend most of her day lying down. The listed equipment, including the InterX and the Flexible Array, is necessary for treatment to enable upright positioning.

10) Letter dated November 2, 2010 from the appellant's physiotherapist to the ministry stating in part that the physiotherapist understands that the appellant "has electrotherapy devices to help her pain management. These however don't bring her long-lasting relief from her symptoms anymore. Her Dr. [name of doctor] therefore recommended the use of two different machines which allow multiple currents and appliances. I am not familiar with those machines myself, but I trust [the doctor's] opinion on this matter."

11) Letter dated November 9, 2010 from the appellant's physiotherapist stating that she believes the appellant will benefit from the InterX device, "along with dome, comb and soft tissue accessories."

12) Letter dated November 9, 2010 from the appellant's physician in response to the ministry's request for additional information respecting trials and costs of the requested items (the InterX device and two other devices). The physician describes the InterX device as an interactive neuro-stimulation device that costs $3,995 US plus the cost of the attachments, including the Flexible Array for $650 US. The physician adds that the appellant's use of self-adhesive electrodes for microcurrent treatment will decrease if provided with the requested devices.

13) Letter dated January 17, 2011 from the appellant's physician stating in part that the InterX device is an electrotherapy device and that, like a TENS unit, delivers electric current to the body. "However the type of current varies as does its therapeutic effect and the method of current delivery." The physician goes on to describe accessories for the InterX device including the Flexible Array which is described as a positional device that wraps around the leg or can be positioned so she can lie on it so the back or leg can be treated. The InterX device is

described as a positional device that through effects including decreasing pain, abnormal muscle hyper tonus, muscle spasm, inflammation, trigger point irritability increases the amount of time the appellant can spend in weight bearing positions (of sitting, standing, walking), increases mobility and enables her to tolerate positions of side lying and supine lying so that sleep is not disturbed.

14) Letter dated March 4, 2011 from the ministry to the appellant stating in part that "TENS machines were being issued as positioning devices but upon review it was deemed that they do not meet the criterion for positioning devices."

15) Letter dated March 11, 2011 from the ministry to the appellant stating in part "I have been unable to find an exact date when TENS devices would have first been included as an eligible item..." and "I have been unable to find a rational (sic) for defining TENS devices as a positional device in the past, they do not fit into the definition of a positional device."

16) Letter dated May 18, 2011 from the appellant in which she describes the differences between various devices she has requested and describes the InterX device as a device that locates and then treats areas of low electrical impedance. The Flexible Array electrode attaches to the InterX and can be strapped around certain parts of the body for hands-free treatment delivery.

17) Manufacturer's Product Information for the CellStim CS600 "a convenient easy-to-use patient handheld microcurrent stimulator" which is reported to provide significant and lasting pain reduction by stopping pain at the cellular level resulting in an increase in mobility with day-to-day activities becoming less painful. "This form of therapy is a major advancement over TENS...which temporarily mask pain and inhibit the healing process."

18) Manufacturer's Product Information for the "InterX 5002 Pain Management Neurostimulation Device" described as being designed specifically for pain and rehabilitation specialists and "InterX Therapy" which "delivers gentle dynamic electrical impulses and stimulates the skin at the area of pain or inflammation." The manufacturer states that the InterX device provides "Dynamic and active therapy" with "Unique damped, pulsed, sinusoidal, impedance sensitive waveform which provides dynamic, targeted, high density stimulation on these areas" in contrast with TENS or other E-Stim which provide "Passive therapy." The Flexible Array is "designed to deliver effective neurostimulation through a series of electrodes. It is placed on the skin and can offer unattended treatment options as stimulation is delivered safely and effectively with a range of 5 to 10 minute treatment cycles."

19) Industry White Paper- Electrical Neruostimulation, Neuro Resource Group (NRG).

20) Online definitions of TENS (transcutaneous electrical nerve stimulation) – a self-operated portable device used to treat chronic pain by sending electrical impulses through electrodes placed over the painful area.

21) Online definitions of "position", "device", "electrotherapy", "may", "medical", "positioning".

22) Wikipedia information about electrotherapy.

23) Written submission on behalf of the appellant received March 18, 2011.

24) Case law, including the decisions in Abrahams, Choi, Forty-Ninth Ventures, Gustavson Drilling, Hudson, Puskas, Rizzo Shoes Ltd. and Waldock.

25) Request for Reconsideration- Reasons dated June 24, 2011.

The following documents were submitted by the appellant to the Tribunal subsequent to the reconsideration decision but prior to the hearing and are identified as a subsequent submission in the Appeal Record, as well as Appendices A – J:

1) Print out of the ministry information for eligibility for a diet supplement; excerpt from the Canadian Encyclopedic Digest for administrative law; email correspondence with the Tribunal; print out of the ministry reconsideration procedures;

2) Online definitions of "and."

3) Letter dated July 21, 22011 (sic) from the appellant's physician stating in part that trigger points are causing the appellant to experience pain and difficulty with adjusting and maintaining positions. The InterX and Flexible Array, along with other equipment, "are medically essential" to facilitate the appellant: (a) adjusting and maintaining positions, and (b) transferring from different positions. Floor to ceiling poles would not eliminate the need for this equipment and slings also are not a suitable option.

4) Letter dated September 8, 2011 from the appellant's physician stating, in part, that the InterX and other requested devices "are not traditional TENS devices. They use different forms of electrical current and function differently in the body. Traditional TENS treatment worsened [the appellant's] pain. Therefore, a traditional TENS device is not an appropriate manner of providing electrotherapy treatment to [the appellant]." The physician continues "Of the different Inter X models only the Inter X 5002 provides the range of features needed because of [the appellant's] complex needs: sufficient treatment protocols, has the activity reading feature and is capable of attaching to all the electrodes." (Dome, Comb, Soft Tissue and Flexible Array)

5) Letter dated May 11, 2012 from a second physician recommending the Inter X 5002 neuro-stimulation device as a positioning device for the appellant in order to facilitate: (a) adjusting and maintaining positions (e.g. side lying, lying supine, and upright weight bearing positions of standing, sitting and walking); (b) transferring from different positions (e.g. sitting to standing, rolling over; and (c) movement of excess body fluids in her lower legs up toward the pelvis. The physician also recommends the InterX device "as a positioning device" for (a) locating positions of low electrical impedance, areas in the skin that are neurologically related to injured tissues, and identifying the optimal treatment locations for delivery of the interactive, damped, pulsed, sinusoidal, high impulse, high density current; and (b) increasing range of motion and improving postural problems.

6) Letter dated October 4, 2012 from a consultant in rheumatology and internal medicine who diagnoses the appellant with a number of medical conditions and past treatment interventions which provided inadequate pain control. The physician prescribes the InterX device to reduce pain to manageable levels, reduce the risk of suicide and improve sleep and function. The physician notes that the InterX device apparently has distinct proven advantages over regular

TENS therapy and has additional features not available with regular TENS equipment.

7) Letter dated October 18, 2012 from a third physician stating in part that in March 2010 the appellant's physician wrote a letter to the ministry advising of the need for the specific modal devices outlined and these were required to help control pain and reduce the risk of suicide at that time.

8) Letter dated July 22, 2013 from a sports medicine physician stating in part that he prescribes the InterX and its accessory electrodes [Flexible ray (sic), comb, dome and soft tissue]. He believes that a positioning device is not solely an external device used to assist individuals to transfer and adjust positions. He believes the InterX meets the criteria for positioning device because it has to be applied to the areas which have the lowest amount of impedance or resistance in different areas of the body.

9) Letter dated July 29, 2013 from the same sports medicine physician stating in part that the InterX delivers high amplitude electric pulses through a biofeedback interactive loop with the body. Based on the readings, the user is able to identify the points of lowest impedance, which are the optimal sites for treatment.

10) Email correspondence between the appellant and a legal advocate.

11) Email dated July 26, 2013 from the appellant regarding conduct of both the ministry and the panel at the previous hearing.

12) Copies of past Tribunal decisions respecting a lift chair, mattress and cushions and Rollabout chair as positioning devices. Tribunal decision applying a section of the *Disability Benefits Program Regulation.*

13) On line definition of "limited range of motion": a reduction in the normal distance and direction through which a joint can move.

14) Additional online definitions of "position", "device", "positioning".

15) Additional online definitions of TENS– a type of treatment in which electrodes are attached to the skin and a low amount of electricity is sent to the affected nerves to block the pain sensation.

16) Copies of s. 16 of the EAPWDA as it read December 1, 2007 – May 31, 2010 and the current version which took effect June 1, 2010.

17) Print out from the ministry website of the Persons With Disabilities Fact Sheet.

In her Request for Reconsideration, the appellant wrote that she refers to all records in the previous appeal on this issue, and all of her doctor's letters on the subject, and all letters from physio clinic and Medical Equipment Justification form, and the HAB earlier denial form.

In her Notice of Appeal, the appellant expressed her disagreement with the ministry's reconsideration decision. The appellant wrote that the ministry erred in saying that the Flexible Array cannot be a

positioning device.

At the commencement of the hearing, the appellant submitted the following additional documents:

1) One page of a letter dated October 28, 2013 from the ministry to the appellant responding to the appellant's questions posed in an email of October 25, 2013, and stating in part that the EAPWDA and EAPWDR prescribe benefits and supplements that may be issued by the ministry and the criteria for issuing them and further details may be specified by ministry policy and procedure which conform to the requirements of the Act and the Regulation. Policy must conform to the EAPWDA and the EAPWDR;
2) Copy of an email dated November 12, 2013 from a representative of the manufacturer to the appellant supporting the appellant's statements regarding the Flexible Array. The appellant wrote that the Flexible Array electrode is more than a pain device. It is an electrotherapy device that is a rehabilitation tool used clinically to: deliver high amplitude electrical stimulation through electrodes that only stimulate cutaneous level nerves, provide unattended (hands free) delivery of electrical stimulation, strap onto the body so electrical stimulation can be delivered to an area while dynamic movement exercises are being performed, and treat pain by treating areas that elicit pain with movement and results in increases in pain-free range of motion and improvements in posture and joint positioning;
3) Physician's note dated November 12, 2013 stating in part that the Flexible Array is prescribed because of its ability to deliver current to cutaneous nerves. It has the ability to deliver current to a painful muscle while it is moving; and,
4) Excerpts from the *Interpretation Act*, Sections 35 and 36, in effect in 2010.

The ministry did not object to the admissibility of these documents. The panel admitted the additional documentary evidence as relating to the appellant's medical condition or the features of the requested device and being in support of the information and records that were before the ministry on reconsideration, pursuant to Section 22(4) of the *Employment and Assistance Act* (EAA). The panel accepted the additional information as argument.

At the hearing, the appellant stated that she has limited range of motion. She cannot bend her hip joints forward. She cannot get into certain positions. The Flexible Array is strapped on so that the electrical current can be delivered during movement.

The ministry relied on its reconsideration decision. The appellant submitted a request to the ministry for the Flexible Array accessory for the InterX 5002 Neurostimulation Device on March 31, 2010. The *Employment and Assistance for Persons With Disabilities Regulation* was amended, effective April 1, 2010. At the hearing, the ministry stated that the Flexible Array accessory cannot be viewed in isolation, that it is useless unless used with the InterX Device. The ministry stated that a previous Tribunal decision dated September 18, 2013 confirmed the ministry decision which found that the InterX is not an eligible item.

APPEAL #

PART F – Reasons for Panel Decision

The issue under appeal is whether the ministry reconsideration decision denying the appellant's request for with a Flexible Array accessory (the Flexible Array) for the InterX 5002 Neurostimulation Device (the InterX device) is reasonably supported by the evidence or is a reasonable application of the applicable enactment in the appellant's circumstances.

Legislation

EAPWDA [as it read on March 31, 2010]

Reconsideration and appeal rights

16. (1) Subject to section 17, a person may request the minister to reconsider any of the following decisions made under this Act or the regulations: ...

(d) a decision in respect of the amount of a supplement provided to or for someone in the person's family unit if that amount is less than the lesser of

(i) the maximum amount of the supplement under the regulations, and

(ii) the cost of the least expensive and appropriate manner of providing the supplement. . . .

EAPWDR [as it read on March 31, 2010]

Part 5: Division 4- Health Supplements

General health supplements

62.(1) 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 . . .

EAPWDR Schedule C- Health Supplements, s. 3 [as it read on March 31, 2010]

Section 3 – Medical equipment and devices

(1) The following medical equipment and devices are the health supplements that may be paid for by the ministry if the supplements are provided to a family unit that is eligible under section 62 *[general health supplements]* of this regulation:

(a) wheelchairs, personal motorized mobility devices, canes, crutches and walkers, if . . .

(b) orthotics and bracing, if . . .

(c) hearing aids, if . . .

(d) positioning devices, if

(i) repealed

(ii) repealed

(iii) the person has received the pre-authorization of the minister for the positioning device requested, and

(iv) there are no resources available to the person's family unit to pay the cost of the health supplement;

(e) breathing devices, if . . .

(2) In addition to the requirements of subsection (1)(a) or (d), the minister must require one, and may require both, of the following:

(a) a prescription of a medical practitioner or nurse practitioner for the wheelchair, personal motorized mobility

device, cane, crutches, walker or positioning device;

(b) an assessment by an occupational therapist or physical therapist confirming the need for the wheelchair, personal motorized mobility device, cane, crutches, walker or positioning device.

EAPWDR Schedule C- Health Supplements, s. 3 [as it read on April 1, 2010]

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.

Medical equipment and devices – bathing and toileting aids

3. 5 (1) 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 facilitate transfers of a person or to achieve or maintain a person's positioning:

(a) a grab bar in a bathroom;
(b) a bath or shower seat;
(c) a bath transfer bench with hand held shower;
(d) a tub slide;
(e) a bath lift;
(f) a bed pan or urinal;
(g) a raised toilet seat;
(h) a toilet safety frame;
(i) a floor-to-ceiling pole in a bathroom;
(j) a portable commode chair. . . .

Disability Benefits Program Regulation, Schedule C, s. 2 [as it read on July 4, 2002]

2(1) The following are the health benefits that may be paid for by the minister if the services or benefits are provided to persons who are eligible under section 32(1) of the regulation:

(a) durable medical equipment and appliances that are medically necessary to provide for basic mobility, positioning, breathing or other functions essential to the sustenance of life and for which no alternate sources of funding are available to the applicant.

EAPWDR Life-threatening Health Need s. 69 [as it read on March 31, 2010]

69. The minister may provide any health supplement set out in Schedule C to a family unit that includes a person with disabilities, 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

(a) the person faces a life-threatening health need and there are no resources available to the person's family unit with which to meet that need, and

(b) the minister determines that the health supplement is necessary to meet that need.

Parties' Positions and Panel's Reasons for Decision

Application of section 16 of the EAPWDA

Ministry's Position

The reconsideration decision concluded that the parameters for the provision of electrotherapy equipment are exceeded, making reference to section 16 of the EAPWDA.

Appellant's Position

The appellant's position is that section 16 of the EAPWDA has no application to this appeal and, in the alternative, if found to be applicable, the criteria in the section have been met.

Panel's Reasons
The panel concludes that section 16 of the EAPWDA, which addresses an applicant's right to reconsideration, is not at issue in this appeal and, based on the ministry's lengthy analysis within the reconsideration decision, was not a basis for denial of the Flexible Array.

EAPWDR, Schedule C, s. 3 [as it read on March 31, 2010]

Application of section 3(1)(d) – meaning of "positioning device"

Ministry's Position- Legislation
The appellant is eligible to receive health supplements under section 62 of the EAPWDR but the requested item, the Flexible Array, is not an eligible item as medical equipment or devices under section 3 of Schedule C of the EAPWDR, including "positioning devices" under subsection (1)(d). The ministry noted that the legislation does not define "positioning devices" and submitted that, in terms of medical equipment, "positioning devices" provide a direct external support when there is a deficiency in the ability to perform transfers or adjust one's position such as hospital beds, pressure relief mattresses, custom seating for wheelchairs, lifts, grab bars, raised toilet seats, and floor-to-ceiling poles. The Flexible Array is electrotherapy equipment intended primarily for pain management and is not inherently a positioning device; it is medical equipment used to administer electrotherapy.

When the appellant's request for a Cellstim 600 patient portable microcurrent unit was approved by reconsideration decision dated July 4, 2002, the *Disability Benefits Program Regulation* was in effect, but the decision did not reference the section or part thereof that was relied upon. Ministry information does not describe medical equipment used for electrotherapy as a "positioning device" or that it was provided to the appellant as a "positioning device", notwithstanding the ministry's March 4, 2011 letter to the appellant. Medical equipment used for electrotherapy appears to be a "legislative orphan."

Appellant's Position- Legislation
The requested item, the Flexible Array, is an eligible item as a "positioning device" under section 3(1)(d) of Schedule C of the EAPWDR. The appellant argued that the ministry failed to reasonably interpret the meaning of "positioning device," as the only limiting parameter set out in the legislation is

that a positioning device must be a medical device. Since the legislation does not define the term "positioning device", the phrase must be interpreted according to the principles of statutory interpretation as set out in the case law in *Re Rizzo & Rizzo Shoes Ltd.* [1998] 1 S.C.R. 27, *Abrahams v. Canada* (1983), 142 D.L.R. (3d) 1, and *Hudson v. EAAT* (2009) BCSC 1461, and section 8 of the *Interpretation Act* RSBC 1996, c. 238. The appellant argued that *Re Rizzo & Rizzo Shoes Ltd.* is authority for the position that the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament (Re: Driedger on Construction of Statutes). The appellant argued that the stated objectives of the subject legislation include promoting greater independence, enhanced well-being and greater participation in the community for persons with disabilities. The appellant argued that careful thought should be given to the pain and threat of loss of health that she will suffer if the medical equipment is not provided.

Case law and s. 8 of the *Interpretation Act* require that the term "positioning device" must be interpreted in a large and liberal manner and any ambiguity in the legislative language must be resolved in the appellant's favour. Ambiguity in this case arises from the lack of a clear meaning and the possibility of interpreting an expression more than one way. The appellant argued that the ministry offered no reason or support for its definition of a "positioning device" as "intended to provide a direct external support when there is a deficiency in the ability to perform transfers or to adjust one's position", that this definition is too restrictive. The appellant noted that only the new legislation, which does not apply to this appeal, limits the type of positioning device to external supports.

The appellant argued that the Supreme Court of Canada held that words from legislation are to be read in their ordinary sense and, the appellant argued, since dictionaries provide the ordinary meaning of a word, dictionary definitions can be used to establish the meaning of a legislative term; therefore, the definition that best favours the appellant must be used. The appellant relied on a dictionary definition of "positioning" as "...to put in place or position, or to determine the position of, locate", and argued that "positioning device" is better defined as "a device that locates the sites on the body that need to be treated." Dictionary definitions of "positioning" are consistent with language used in the manufacturer's information for the InterX equipment, including the Flexible Array, stating that it is able to scan and identify optimal treatment points and treat only those areas that are injured. At the hearing, the appellant argued that the information about the equipment in the email from the manufacturer and in the industry White Paper indicates that the Flexible Array delivers the electrical current while a person is moving, that it is strapped on to the body and treats areas that elicit pain with movement.

The appellant argued that the ministry cannot provide a benefit/supplement without legislative authority. The policy manual respecting the legislation in place on March 31, 2010 lists electrotherapy devices as approved benefits. In this case, the legislative authority is section 3 of Schedule C, specifically subsection (1)(d) which identifies the medical equipment and devices which may be provided. As TENS machines are not wheelchairs, personal motorized mobility devices, canes, crutches, or walkers, the ministry must have provided them under the authority to provide "positioning devices" as confirmed by the March 4, 2011 ministry letter stating that up until April 1, 2010, TENS machines were issued as "positioning devices". The appellant argued that the ministry provided no medical evidence to support its assertion that electrotherapy equipment is not inherently a "positioning device."

The appellant argued that the ministry failed to give reasonable weight to the appellant's medical

evidence and information from the manufacturer that the medical function of the Flexible Array, in her case, is to position her. The appellant argued that the medical evidence establishes that she experiences severe pain when lying down and this prevents her from getting adequate sleep. The appellant argued that the medical evidence clearly establishes that, in her particular case, the overall purpose and intended use of the Flexible Array is as a positioning device and that this positioning cannot be attained by other means. The fact that the InterX equipment, including the Flexible Array, functions by means of electrotherapy does not change the fact that it qualifies as a "positioning device." The appellant argued that the ministry invented criteria for "positioning devices" that are not supported by law, by applying the parameters for electrotherapy as set out in the policy.

Panel's Reasons- Legislation
Defining "Positioning Device"
When considering the application of section 3(1)(d) to the circumstances of this case, at issue is the meaning of the term "positioning device." The appellant referred to the modern principle of statutory construction formulated by Driedger: "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament." While the appellant argued that the words "positioning" and "device" should be considered separately and are thereby rendered ambiguous as capable of two or more plausible meanings, the panel finds that the ministry reasonably considered the words, in the context of section 3 which includes a list of particular medical equipment and devices, to jointly refer to an adjective and noun combination. There is no need to dissect the words when, together, there is plain and common sense meaning, consistent with the other listed items in section 3, such as "hearing aids" and "breathing devices." Statutory "interpretation," or relying on extra-textual considerations, is only required when a text is found to be ambiguous, or capable of two or more plausible meanings, in order to decide which of two or more plausible alternatives is better.

In the context of the section setting out various types of medical equipment and devices, the ministry provided a reasonable and plausible definition of "positioning device" as a device which provides external support to address a deficiency in a person's ability to independently position." Although the appellant argued that this definition is too restrictive, the appellant acknowledged that the new legislation, which came into effect the day after the appellant submitted her request, limits the type of positioning device to external supports and, the panel finds, gives legislative expression to the definition used by the ministry. Under the amended legislation, the ministry must be satisfied that the item is medically essential to achieve or maintain a person's positioning and includes a list of specific items, in dedicated sections, which serve this purpose, such as a bath or shower seat, a raised toilet seat, a toilet safety frame, and a hospital bed.

The appellant pointed to a dictionary definition of "positioning" as "...to put in place or position, or to determine the position of, locate", and argued that "positioning device" is better defined as "a device that locates the sites on the body that need to be treated," which is consistent with language used in the manufacturer's information for the Flexible Array, stating that it is able to scan and identify optimal treatment points and treat only those areas that are injured, including those areas that elicit pain with movement. However, the panel finds that while this is a possible definition of "positioning" as a verb and "device" it is not plausible in the context of section 3 listing specific medical equipment and devices, and the panel is not obliged to "favour" any possible definition that the appellant proposes.

Considering the larger context of Schedule C of the EAPWDR relating to health supplements, section 2 of the legislation already provides the option for various services employing pain relief therapies

under 'general health supplements.' Services for acupuncture, naturopathy, and physiotherapy, for example, include forms of treatment, using different types of techniques and equipment that are applied specifically to the site of the body that need to be treated. If the specific legislative eligibility criteria for section 2 of Schedule C of the EAPWDR are met, a person with disabilities is entitled to receive treatments to alleviate pain and, thereby, attain greater independence.

In the context of the health supplements section of Schedule C, the panel has considered the plain meaning of the term in Section 3 in which "positioning" is an adjective describing the noun "device", and on the face of it means a device that is used to position a person or a body part and hold in place for a period of time. This view is consistent with the definition proffered by the ministry – a device which provides external support to address a deficiency in a person's ability to independently position.

Applying "Positioning Device"
The panel finds that the Flexible Array does not fall within the plain meaning of "position device" which, as stated above, the panel finds consistent with the ministry's definition for "positioning device," as a device which provides external support to address a deficiency in a person's ability to independently position. The appellant provided numerous physicians' letters describing the InterX equipment, including the Flexible Array, as "positioning devices" which, the appellant argued, are consistent with the manufacturer's information before the ministry at reconsideration respecting the ability of the InterX equipment to locate or position optimal treatment points or to facilitate adjusting and maintaining positions through pain relief. The panel finds that the appellant's physicians' defining of the InterX equipment as a "positioning device" or purporting to interpret the legislative language is not determinative of the issue. The manufacturer's information repeatedly refers to the InterX equipment as electrotherapy treatment or therapy for pain relief. Further, the panel finds that the fact that a benefit of using the InterX equipment may be enhanced ability to mobilize or lie down to sleep is, in fact, a secondary result of the pain treatment provided by the InterX equipment and does not equate with the InterX equipment being a device that "positions" the appellant.

The appellant argued that TENS machines, as a type of electrotherapy equipment, are provided by the ministry and are not 'wheelchairs', 'personal motorized mobility devices', 'canes', 'crutches', or' walkers', so the legislative authority must be as "positioning devices," pursuant to section 3 of Schedule C. The appellant argued that this was confirmed by the March 4, 2011 ministry letter stating that up until April 1, 2010, TENS machines were issued as "positioning devices." The ministry described a basic TENS unit as a battery-powered device which attaches to the body with electrode pads to send impulses through nerve endings to the brain as artificial messages which causes the brain to produce endorphins to manage pain. The panel finds that electrotherapy equipment, as a pain management therapy, cannot be said to be a device which provides external support to address a deficiency in a person's ability to independently position and, therefore, does not fall within the plain meaning of "positioning device." The March 4, 2011 letter from one ministry worker stating that TENS machines were being issued as "positioning devices" was followed by a letter to the appellant dated March 11, 2011 stating that TENS devices "do not fit into the definition of a positional device." The ministry stated that electrotherapy equipment appears to be a "legislative orphan," which the panel finds means there was no legislative "parent" or authority for issuing this equipment in the past. If a TENS machine was provided by the ministry as a "positioning device" in the past, this may have been done in error, and this past practice would not be determinative of the appellant's request. The appellant's request is not for a TENS machine, as evidenced by the information from the manufacturer and the appellant's physician, but is for a different type of electrotherapy equipment.

The ministry acknowledged that electrotherapy equipment has been provided prior to April 1, 2010 and the ministry also considered the appellant's request under the ministry's policy that applies, as set out below.

For the above reasons, the panel is of the opinion that "positioning devices" as used in the context of section 3 of Schedule C of the EAPWDR is not ambiguous and is capable of a plain and common sense meaning that corresponds with a reasonable definition put forth by the ministry. The panel finds that the ministry reasonably determined that the Flexible Array does not fall within the "positioning device" definition and is, therefore, not an eligible item under section 3 of Schedule C of the EAPWDR.

Ministry's Position- Policy
Regarding the policy respecting section 3 of Schedule C [medical equipment and devices] in effect on March 31, 2010, the ministry argued that there are a number of items which may fall within the category of 'positioning devices' such as beds, specialized mattresses, and lumbar supports but that equipment used for electrotherapy is not included in this list. Rather, a separate category exists in the policy for "electrotherapy" specifically as medical equipment and devices under which only basic TENS (plus gels, electrodes or accessories) were provided within the set out parameters respecting functionality (basic TENS), quantity (single unit), and cost (maximum of $250).

Regarding functionality, the ministry argued that a basic TENS unit is a battery powered device which attaches to the body with electrode pads to send impulses through nerve endings to the brain as artificial messages which causes the brain to produce endorphins to manage the pain. Microcurrent is a low-volt battery powered TENS device which works in the same manner as TENS. The InterX device has a biofeedback component and, together with the Flexible Array, is therefore neither a basic TENS unit nor a microcurrent device. The ministry argued that the evidence from the manufacturer of the InterX device and the Flexible Array is that the equipment is intended for use by health care professionals in a clinical setting. The ministry argued that the functionality of the Flexible Array falls outside the policy parameters for the provision of a basic TENS as electrotherapy equipment.

The ministry argued further that the Flexible Array does not meet the other parameters with respect to quantity (single unit) and cost (maximum of $250). Regarding quantity, the ministry argued that the Flexible Array is an accessory to the InterX device and cannot provide electrotherapy alone, but must be used in conjunction with the InterX device; therefore, the appellant's request must be considered in conjunction with her eligibility for the InterX device. The ministry argued that the evidence from the appellant's physician in her letter dated July 7, 2010 is that the high amplitude pulses are delivered through the electrode on the InterX device by attaching one of the accessories, including the Flexible Array, to the InterX device, and that the appellant's needs cannot be met through only one of the units. With respect to cost, the ministry pointed out that the evidence from the appellant's physician in her letter dated November 9, 2010 is that the cost for the InterX device is $3,995 USD and the Flexible Array is $650 USD, for a total cost of $4,645 USD.

Appellant's Position- Policy
The ministry cannot provide a benefit/supplement without legislative authority. The policy manual respecting the legislation in place on March 31, 2010 lists electrotherapy devices as approved benefits. The appellant argued that the ministry policy document is a guideline only and is identified as being non-exhaustive, and to limit "positioning devices" to only those items referenced by the

heading "Positioning Devices" is illogical given that other guideline headings also list devices including hospital beds, lifts, and raised toilet seats, which are identified as "positioning devices" in the reconsideration decision. The appellant argued that although electrotherapy equipment and devices is under its own heading and not under the "positioning device" heading, the policy guideline cannot determine what items qualify as "positioning devices," and the arrangement of headings in this document is irrelevant to whether an item functions as a "positioning device" in a particular person's case.

At the hearing, appellant argued that breast pumps are listed as being eligible for coverage in the ministry's policy guideline and are categorized under "basic mobility, positioning and breathing devices", so that "mobility" must be seen in terms of providing the applicant mother with mobility through use of a breast pump to store milk. The advocate argued that these categories show wide latitude in how the ministry is to consider "mobility" or "positioning" devices. With a similar approach, electrotherapy equipment in the form of the Flexible Array can be used by the appellant to make her more mobile and to achieve increased range of motion and "positions." The appellant argued that the TENS device and the Flexible Array are both electrotherapy devices that deliver electric current to the body via electrodes placed in direct contact with the skin in order to decrease pain and increase function and, in this sense, both can function as "positioning devices."

Panel's Reasons- Policy
The panel concurs that the provision of positioning devices is not limited to standing bed frames, which is acknowledged in the reconsideration decision; however, the panel finds that the analysis within the decision demonstrates that the ministry considered the appellant's request under both the legislation, section 3 of Schedule C, and the ministry policy.

While the appellant asserts that the legislative authority for electrotherapy devices must be section 3(1)(d) – positioning devices – of Schedule C of the EAPWDR, the panel finds that given that the provision of electrotherapy devices precedes this legislation, the policy respecting the provision of electrotherapy devices may have originated from the much broader language of the predecessor *Disability Benefits Program Regulation*, namely the provision of "durable medical equipment and appliances" that are medically necessary to provide for "other functions essential to the sustenance of life." The panel notes that the physician's request for the CellStim electrotherapy device repeatedly references this legislative language, although the July 4, 2002 ministry decision finding the appellant eligible did not specify the section of legislation relied upon. The ministry stated in its reconsideration decision that electrotherapy equipment appears to be a "legislative orphan" and proceeded to consider the appellant's request, which is the subject of this appeal, under the parameters set out in the ministry policy at the time of the appellant's request on March 31, 2010.

It appears to the panel that ministry policy respecting electrotherapy in effect at the time of the appellant's request for the Flexible Array expands upon the health supplements provided under section 3 of Schedule C, as electrotherapy is not reasonably viewed as a "positioning device" or any of the other devices set out in that section. The panel finds that the ministry has considered this policy, which allows for the provision of a basic TENS machine (plus gels, electrodes or accessories) within certain parameters, and has reasonably concluded, based on the manufacturer's and physician's description of the Flexible Array, that the Flexible Array is outside the parameters set out in policy.

The ministry argued that the Flexible Array is an accessory to the InterX device and cannot provide

electrotherapy alone, but must be used in conjunction with the InterX device; therefore, the appellant's request must be considered in conjunction with her eligibility for the InterX device. In the July 7, 2010 letter from the appellant's physician, she wrote that the high amplitude pulses are delivered through the electrode on the InterX by attaching one of the accessories, including the Flexible Array, which is a pad that can wrap around a portion of a limb. In the recent email from a product representative, he confirmed the appellant's description of the Flexible Array as being used clinically to "provide unattended (hands free) delivery of electrical stimulation" and to "strap onto the body so that electrical stimulation can be delivered to an area while dynamic movement exercises are being performed."

By a decision of the Tribunal dated September 18, 2013, the ministry's decision denying the appellant's request for the InterX device was confirmed, and the panel finds that the Flexible Array, as an accessory to the InterX device, has no function without the device. With respect to cost, the ministry pointed out that the evidence from the appellant's physician in her letter dated November 9, 2010 is that the cost for the InterX device is $3,995 USD and the Flexible Array is $650 USD, for a total cost of $4,645 USD, which exceeds the maximum amount of $250 as set out in the policy.

Disability Benefits Program Regulation (DBPR), Schedule C, section 2 [as it read on July 4, 2002]

Ministry's Position

The ministry acknowledged that the appellant was provided with a CellStim device which is a microcurrent machine on July 4, 2002 at a cost of $631.30, but argued that it has not been established that it was provided as a "positioning device." Rather, the ministry pointed to the legislation in effect on July 4, 2002 which allowed for the provision of "durable medical equipment and appliances" for positioning and other set out purposes including "other functions essential to the sustenance of life." The ministry also noted that the decision to provide the CellStim device does not speak to the legislation that was applied or specify whether the microcurrent unit was necessary to provide basic mobility, positioning, breathing or other functions essential to the sustenance of life.

The ministry's position is that its past decision to provide the CellStim microcurrent device does not set a precedent obliging the ministry to continue to provide the appellant with electrotherapy equipment indefinitely or to provide electrotherapy equipment that exceeds the parameters set out in the policy in effect on March 31, 2010.

Appellant's Position

The appellant argues that the microcurrent device (CellStim) provided to her in July 2002 was provided as a "positioning device." At the hearing, the appellant argued that electrotherapy equipment has been provided as a benefit by the ministry since 2002 even though the legislation has been amended over the years and that it has been continually issued as a "positioning device." Alternatively, the appellant pointed to section 36(1)(f) of the *Interpretation Act* in force in 2010 and argued that if there is no authority in the new legislation (EAPWDR) relating to the same subject matter, or the provision of a microcurrent device, the former enactment (DBPR) must be construed as being unrepealed so far as is necessary to give effect to the unrepealed enactment," and she is thereby eligible for the Flexible Array as electrotherapy equipment.

Panel's Reasons

The July 4, 2002 ministry decision granting approval of the CellStim microcurrent device did not specify under which legislative criteria it was provided. The *Disability Benefits Program Act* was

repealed by the EAPWDA, which came into effect September 30, 2002, and the new Regulation provided for 'medical equipment and devices' in Schedule C by setting out the eligible items in detail. The new section did not make reference to the previous DBPR, and section 36(1)(f) of the *Interpretation Act*, which governs the interpretation of provisions referring to a repealed enactment, does not apply. The panel finds that the July 4, 2002 decision is of no value or assistance to interpreting section 3 of Schedule C as it read on March 31, 2010, the date of the appellant's request, given the substantial amendments that have been made to the legislation since 2002. Further, while administrative decisions may be persuasive, they are generally not binding on subsequent decision-makers. The panel finds that the ministry reasonably concluded that its decision to find the appellant eligible for the CellStim device in 2002 does not establish a precedent for the provision of the InterX equipment, including the Flexible Array, and that each request must be determined pursuant to the legislation in effect at the time of the request.

EAPWDR, section 69 Life-threatening Health Need

Ministry's Position

The ministry's position is that the appellant is not eligible for the Flexible Array for use in conjunction with the InterX device, under section 69 because: (1) information has not been provided to establish that the appellant faces a life-threatening health need for the requested equipment, and (2) the Flexible Array requested exceeds the parameters for the provision of electrotherapy equipment in terms of function, cost and intended user.

Appellant's Position

The appellant's position is that she had evidence of a life-threatening health need at the time of her request for the Flexible Array. However, since the ministry did not include an argument regarding section 69 until reconsideration, the appellant did not have an opportunity to provide her evidence and she has filed a complaint about the ministry's conduct with the Ombudsperson.

Panel's Reasons

The ministry relied upon Section 69 in its reconsideration decision, which is the decision that the panel has the jurisdiction to review for reasonableness. The panel has the jurisdiction to consider the appellant's evidence not previously before the ministry, if it is in support of the information and records the ministry had at reconsideration, pursuant to section 22(4) of the *Employment and Assistance Act*, but no further information was provided by the appellant.

On the plain meaning of the legislative language, there is insufficient evidence to indicate that the Flexible Array in particular was required to meet a life-threatening health need at the time of the original request in March of 2010, at the time of reconsideration, or at present.

Further, the panel finds that the ministry appears to have considered the request under s. 69 as a request for an electrotherapy device under policy given its conclusion that the parameters for the provision of TENS machines were exceeded.

Conclusion

Based on the foregoing reasons, the panel finds that the ministry's decision to deny the Flexible Array was a reasonable application of the legislation in the circumstances of the appellant and confirms the decision.