

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (ministry) reconsideration decision dated October 16, 2013, wherein the ministry determined that the appellant was not eligible for funding for intraocular lenses (IOL) on the bases that :

- The IOL did not meet the criteria set out in the Employment and Assistance for Persons with Disabilities Regulation (EAPWDR), Schedule C, section 2.1 since an IOL is not “eyewear” worn over the eye and since there was no pre-authorization for the purchase of the IOL.
- The criteria set out in section 69 of the EAPWDR were not satisfied, because: a) the evidence did not establish that the appellant faced a life-threatening health need for the IOL; (b) the appellant – being a person with disabilities – was otherwise eligible to apply for health supplements, and (c) an IOL is not a health supplement set out in Schedule C.

PART D – Relevant Legislation

EAPWDR, Schedule C, sections 1 *[definitions]*, and 2.1 *[optical supplements]*
EAPWDR, section 69 *[health supplement for persons facing direct and imminent life threatening health need]*

PART E – Summary of Facts

The appellant was represented at the appeal hearing by her parents, who are both designated as her legal representatives. The ministry did not attend. The panel having confirmed that the ministry and the appellant were notified of the hearing, the hearing proceeded in accordance with section 86(b) of the *Employment and Assistance Regulation*.

The information before the ministry at the time of reconsideration included the following:

- The appellant has multiple physical and cognitive impairments including a rare genetic disorder, global developmental delay, seizure disorder, autism, scoliosis, microcephaly, bipolar disorder NOS with psychotic features, hemiplegia, gastric reflux, hearing loss, divergent strabismus, and poor depth perception. She is designated as a person with disabilities (PWD) in accordance with section 2 of the *Employment and Assistance for Persons with Disabilities Act*.
- In July 2012 the appellant was diagnosed with bilateral cataracts by an ophthalmologist. The IOL were inserted during surgery on both eyes on May 28, 2013.
- In September, 2013, a request for reimbursement for the IOL was submitted to the ministry by the appellant (through her legal representatives) supported by a receipt showing payment of \$775.20 on May 28, 2013.
- In a letter to the ministry dated October 15, 2013, the ophthalmologist wrote that "...The lens accounts for one-third of the total focusing power of the eye and without placing an [IOL], [the appellant] would have been left with a significant visual disability in the un-refracted state. I would hope that the cost of her [IOL], totaling \$775.20 would be covered by the Ministry as this is significantly less than the cost of spectacle correction."

At the appeal hearing, the appellant's parents described the appellant's disabilities and explained the background of her eye problem. The basis for the appeal was stated as being the "life threatening health need" criterion in section 69 of the EAPWDR. The parents explained that safety is an important consideration because of the appellant's low level of cognitive awareness. They referred to the ophthalmologist's October 15 letter as confirmation that the appellant's vision would have been 1/3 less without the IOL. They also referred to the effect the IOL have on the appellant's quality of life, saying that with impaired vision she would have had a higher likelihood of her life being threatened by making poor choices.

With respect to the availability of resources to pay for the IOL, the appellant's parents said that they paid for the IOL themselves but that their financial resources are significantly strained.

In response to a question from the panel, the appellant's parents explained that they hadn't thought of getting approval from the ministry for the cost of the IOL until after surgery, because they had thought that their supplemental medical insurance would cover the cost. When the insurance wouldn't pay, the appellant applied to the ministry.

In response to another question from the panel, the appellant's parents confirmed that the appeal was focused on section 69, and that they thought the ministry was reasonable to conclude that the

IOL are not "eyewear" as defined in the EAPWDR. They said that the problem is fitting the appellant's situation into legislation that doesn't cover all circumstances.

The oral testimony of the appellant's legal representatives provided more detail with respect to the appellant's medical condition and the need for the IOL. The panel has assessed this information as being in support of the information and records that were before the ministry at the time of reconsideration, and accepts it as evidence in accordance with section 22(4) of the *Employment and Assistance Act*.

PART F – Reasons for Panel Decision

The issue on appeal is the reasonableness of the ministry's decision that the appellant was not eligible for funding for intraocular lenses (IOL) on the bases that :

- The IOL did not meet the criteria set out in the EAPWDR, Schedule C, section 2.1 since an IOL is not "eyewear" worn over the eye and since there was no pre-authorization for the purchase of the IOL.
- The criteria set out in section 69 of the EAPWDR were not satisfied, because: a) the evidence did not establish that the appellant faced a life-threatening health need for the IOL; (b) the appellant – being a person with disabilities – was otherwise eligible to apply for health supplements, and (c) an IOL is not a health supplement set out in Schedule C.

The relevant legislation is as follows:

EAPWDR

Health supplement for persons facing direct and imminent life threatening health need

69 The minister may provide to a family unit any health supplement set out in sections 2 (1) (a) and (f) [*general health supplements*] and 3 [*medical equipment and devices*] of Schedule C, if the health supplement is provided to or for a person in the family unit who is otherwise not eligible for the health supplement under this regulation, and if the minister is satisfied that

- (a) the person faces a direct and imminent life threatening need and there are no resources available to the person's family unit with which to meet that need,
- (b) the health supplement is necessary to meet that need,
- (c) the person's family unit is receiving premium assistance under the *Medicare Protection Act*, and
- (d) the requirements specified in the following provisions of Schedule C, as applicable, are met:
 - (i) paragraph (a) or (f) of section (2) (1);
 - (ii) sections 3 to 3.12, other than paragraph (a) of section 3 (1).

EAPWDR, Schedule C

Definitions

1 In this Schedule:

"basic eyewear and repairs" means any of the following items that are provided by an optometrist, ophthalmologist or optician:

- (a) for a child who has a new prescription, one pair of eye glasses per year consisting of the least expensive appropriate
 - (i) single-vision or bifocal lenses, and
 - (ii) frames;
- (b) for any other person who has a new prescription, one pair of eye glasses every 3 years consisting of the least expensive appropriate
 - (i) single-vision or bifocal lenses, and

- (ii) frames;
- (c) for a child or other person,
 - (i) new lenses at any time if an optometrist, ophthalmologist or optician confirms a change in refractive status in either eye,
 - (ii) a case for new eye glasses or lenses, and
 - (iii) necessary repairs to lenses or frames that come within this definition;

Optical supplements

2.1 The following are the optical supplements that may be provided under section 62.1 [*optical supplements*] of this regulation:

- (a) basic eyewear and repairs;
- (b) pre-authorized eyewear and repairs.

* * *

The appellant's position, as advanced by her legal representatives, is that without the IOL, the appellant's poor vision represented a life threatening health need. They argued that the IOL were necessary to meet that health need, since her vision would be 1/3 less acute and she would be at risk from traffic and would be more likely to make risky choices.

The ministry's position, as set out in its reconsideration decision, is that the IOL do not meet the prescribed definition of "eyewear", since they are not worn over the eye. The ministry also takes the position that there was no preauthorization for the purchase of the IOL. Finally, the ministry argues that the evidence does not establish that the appellant was facing a life-threatening health need, and that section 69 is not available to the appellant since she is otherwise eligible for health supplements.

Panel Decision

There is no dispute that the appellant is a PWD and that she accordingly satisfies the eligibility criteria for optical supplements set out in section 62.1 of the EAPWDR.

The ministry's decision was based on criteria set out in section 2.1 of Schedule C, and on criteria in section 69 of the EAPWDR.

Section 2.1, Schedule C – Preauthorized eyewear

The term "eyewear" is not defined in the pertinent legislation. The term "basic eyewear and repairs", however, is defined in section 1 of Schedule C of the EAPWDR. The intent is clear that eyewear refers to eye glasses consisting of frames and lenses, and ancillary items such as replacement lenses and a case for new eye glasses or lenses. Repairs to lenses or frames that come within the definition are also included. The appellant acknowledged on appeal that the IOL are not eyewear within the meaning of section 62.1. There is no dispute that the appellant did not have preauthorization from the minister for the IOL.

The panel acknowledges that the appellant's parents were acting in good faith with the best of intentions when they obtained and paid for the IOL. However, the fact is this was done without the

ministry's pre-authorization. Section 2.1 of Schedule C only authorizes the ministry to provide an optical supplement other than basic eyewear and repairs if prior approval is obtained – it does not give the ministry the discretion to provide the IOL otherwise. Accordingly, the panel finds that the ministry acted reasonably in finding that this legislative criterion was not satisfied.

Section 69 – Direct and imminent life threatening health need

The legislation uses the words “direct and imminent life threatening need.” In the panel's view, the word “need” means the need for the requested health supplement which arises from the underlying health condition. The word “direct” means that the “life threatening” aspect must arise directly from the “need” – there must be a causal relationship. An example would be a life threatening case of asthma giving rise to the need for a puffer. The examples of threats relied on by the appellant – traffic and making poor choices – are external threats that don't directly arise from her eye problems. Not having the IOL may increase the risk to the appellant, but does not directly cause the threat(s) and does not cause their “life threatening” nature.

Similarly, the word “imminent” denotes a degree of immediacy that was not present in the circumstances of the appellant. In the panel's view “imminent” means that the threatened loss of life is more likely than not going to occur very soon. Given the panel's interpretation of the word “direct”, the threats referred to by the appellant's parents are not relevant to the analysis of the word “imminent.” However, even if the panel is wrong in its interpretation of “direct”, there is no evidence that at the time of purchase of the IOL the appellant was likely to lose her life “very soon” to any of these threats.

Furthermore, section 69 requires the health supplement to be one that was identified in sections 2(1)(a) to (f) or (3) of Schedule C. The IOL are not a health supplement identified in those sections. Despite the appellant's parents submission that the legislation does not adequately address all situations, the panel does not have the authority to ignore or amend the legislation as written.

Based on this analysis, the panel concludes that the ministry reasonably determined that the IOL do not satisfy the criteria of section 69.

Conclusion

The panel acknowledges again that the appellant's parents acted in good faith in all respects. However, the panel is obliged to apply the law to the facts as it finds them, and based on the foregoing analysis of the legislation and the evidence the panel finds that the ministry's reconsideration decision was reasonably supported by the evidence.

Accordingly, the panel confirms the ministry's decision.