

## PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation's (ministry) reconsideration decision dated November 28, 2013 in which the ministry denied the appellant's request for abdominal binders as health supplements under the Employment and Assistance for Persons with Disabilities Regulation (EAPWDR). The Ministry found that the legislated criteria set out in the regulation had not been met as follows:

- 1) The requested items are not health supplements under Schedule C, section 3.10 and are specifically listed as non-eligible items under subsection 3.10(11);
- 2) The appellant's current circumstances did not substantiate that she faces a direct and imminent life-threatening need and that the health supplement is necessary to meet that need as required by section 69 of the regulation;
- 3) The requirements of Schedule C section 2(1)(a) have not been met in that the requested items are not medical or surgical supplies required for any of the reasons listed in the section and the ministry was not satisfied that the supplies are necessary to avoid an imminent and substantial danger to health.

## PART D – Relevant Legislation

Employment and Assistance for Persons with Disabilities Regulation (EAPWDR) section 69 and Schedule C, Health Supplements, sections 2 and 3.10.

## PART E – Summary of Facts

The evidence before the Ministry at reconsideration included:

- The appellant's request for reconsideration dated November 26, 2013 in which she states that she is requesting two extra-large hernia belts as per an attached note from her doctor. She needs two belts as it is imperative for her to avoid surgery and due to her hernia there is a risk of becoming incarcerated. She notes that they will need to confirm sizing as she is 440 lbs.
- A letter from the appellant's family physician dated November 19, 2013 stating that the appellant is morbidly obese, approximately 440 lbs, and has a very large umbilical/incisional hernia. The physician wrote: "Should this hernia become incarcerated (as it is at risk to do), surgery would be extremely difficult and potentially fatal. In addition, when she's had surgeries in the past, she suffered from post-op wound infections, slow healing, and hemorrhage. As such, it is imperative to avoid surgery at all cost." The physician added that the appellant's surgeon has recommended that the appellant wear an abdominal binder at all times, and has requested two of them so that the appellant can wear one while the other is being washed. The physician states that this is an absolute medical necessity and the appellant is at risk of serious harm if she does not receive the item; and
- A letter from the appellant's surgeon's secretary on behalf of the surgeon stating that the appellant requires an abdominal binder to treat her abdominal/incisional hernia; that she must wear the binder at all times; and that she requires two binders, one to wear while the other is being washed.

In her Notice of Appeal dated December 6, 2013, the appellant wrote: "The medical equipment requested has been deemed by my physician as well as my surgeon as being 'an absolute medical necessity and she is at risk of serious harm if she does not get it.' My income assistance payments are for food, clothing, and toiletries; this unexpected medical expense is outside of my survival budget."

Attached to the Notice of Appeal is a written submission from the appellant's advocate dated December 6, 2013. The advocate states that the appellant's case is quite unusual and that the appellant requires abdominal binders as requested by her physician and supported by her surgeon. This item is an absolute medical necessity and the appellant is at risk of serious harm if she doesn't receive it. The appellant has no available funds to cover this unexpected and essential cost.

The advocate quotes section 69 of the EAPWDR and states that according to the physician's letter as well as the appellant's inability to cover the cost on her own, the appellant's circumstance would fall under section 69:

"...excepting that the Ministry made a choice not to cover items needed for hernia or abdominal binders. When such a request is made to avoid eminent (sic) danger to life, I would question the Minister's rational (sic) in denying such a request. Would the Ministry knowingly deny a device confirmed by two medical professionals as "an absolute medical necessity"? which would put the individual at "serious risk of harm". The physician has provided supplementary information which makes this case unique among other requests for this particular medical device; further the device is required to decrease harm and is the least expensive option for life-sustaining treatment."

The advocate quotes the appellant's physician's statement regarding the risks if the appellant were to have surgery, "...surgery would be extremely difficult and potentially fatal. When the appellant has had surgeries in the past, she suffered from infections, slow healing, and hemorrhage. It is therefore imperative to avoid surgery at all costs."

The panel finds that the appellant's statements in her Notice of Appeal and the advocate's submission relate to the necessity of the requested items as well as the appellant's economic situation. Therefore, in accordance with section 22(4)(b) of the *Employment and Assistance Act*, the panel admits these submissions as argument that is in support of the information and records that were before the ministry at reconsideration.

At the hearing, the advocate stated that the appellant's large hernia was caused by previous surgery and there is only a thin layer of skin on top holding the organs in place. If the skin breaks, the muscles and organs could come out and this would be life-threatening. The appellant had a challenging experience in the past with surgery; she had to be revived twice on the table, and was slow healing and high risk due to her medical condition of obesity. Therefore, surgery is the absolute last option for her.

The advocate stated that the appellant is unable to cover the cost of the abdominal bands on her own, and they question the ministry's rationale to deny the item when the appellant has a life-threatening need substantiated by both her doctor and her surgeon. The prescription for two abdominal bands indicates that it is necessary for the appellant to wear one all the time, even when it needs to be washed. The advocate added that the cost is small compared to the risks of hospital surgery and extensive after care. The appellant's need is urgent as she lives in a building where she is not monitored 24 hours per day and there is a high risk of incarceration which could cause bleeding and become kinked in the intestines with a risk of becoming septic.

The appellant added that the top layer of skin is the only thing holding her hernia in, and sometimes it comes out in her belly button where the skin is paper thin. It breaks open every now and then and she has to go in to have it cleaned around it. The top of it is getting thinner and could hemorrhage if she doesn't have the band to wear. Surgery is too risky for her because they lost her twice during a previous surgery.

In reply to questions from the panel, the advocate stated that the bands are not covered by MSP, and they have tried to connect with other resources but have not found any way to pay for the item. The appellant stated that the band costs \$50-60, two are required, and it would need to be fitted.

The panel makes the following findings of fact:

1. The appellant has a large umbilical/incisional hernia that is complicated by morbid obesity and at imminent risk of becoming incarcerated without treatment;
2. Surgery is not a viable option for the appellant due to the risk of severe complications and potential death;
3. The appellant requires two abdominal bands to treat her condition at an approximate cost of \$50-60 each; and
4. she has no available resources to purchase the item.

**PART F – Reasons for Panel Decision**

The issue on this appeal is the reasonableness of the Ministry's reconsideration decision of November 28, 2013, denying the appellant's request for abdominal binders as health supplements under the EAPWDR because the ministry found that these items do not meet the legislated criteria for health supplements under Schedule C and that the appellant's circumstances did not substantiate a direct and imminent life-threatening need for the item pursuant to section 69.

The relevant provisions of the EAPWDR are as follows:

**Schedule C – Health Supplements****General Health Supplements**

2. (1) The following are the health supplements that may be paid for by the minister if provided to a family unit that is eligible under section 62 [general health supplements] of this regulation:
  - (a) medical or surgical supplies that are, at the minister's discretion, either disposable or reusable, if the minister is satisfied that all of the following requirements are met:
    - (i) the supplies are required for one of the following purposes:
      - (A) wound care;
      - (B) ongoing bowel care required due to loss of muscle function;
      - (C) catheterization;
      - (D) incontinence;
      - (E) skin parasite care;
      - (F) limb circulation care;
    - (ii) the supplies are
      - (A) prescribed by a medical practitioner or nurse practitioner,
      - (B) the least expensive supplies appropriate for the purpose, and
      - (C) necessary to avoid an imminent and substantial danger to health;
    - (iii) there are no resources available to the family unit to pay the cost of or obtain the supplies.

**Medical equipment and devices**

3.10(11) The following items are not health supplements for the purposes of section 3 of this schedule:

- (a) a prosthetic and related supplies;
- (b) a plaster or fiberglass cast;
- (c) a hernia support;
- (d) an abdominal support;
- (e) a walking boot for a fracture;
- (f) an item primarily for recreation or sports.

Section 69 of the EAPWDR regarding health supplements for persons facing a direct and imminent life threatening health need:

69. The minister may provide to a family unit any health supplement set out in section 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, if the minister is satisfied that

- (a) the person faces a direct and imminent life threatening need and there are no resources available to the person's family unit with which to meet that need,
- (b) the health supplement is necessary to meet that need,
- (c) the person's family unit is receiving premium assistance under the Medicare Protection Act, and
- (d) the requirements specified in the following provisions of Schedule C, as applicable are met:
  - (i) paragraph (a) or (f) of section 2(1);
  - (ii) sections 3 to 3.11, other than paragraph (a) of section 3(1).

The advocate's position on behalf of the appellant is that they understand that equipment for hernias and abdominal support are not eligible under the legislation but the appellant has unique circumstances in that her hernia is life-threatening and there is a high risk of serious harm if she has surgery; surgery would be potentially fatal. The advocate argued that the letters from the appellant's physician and surgeon establish that the appellant's condition is life-threatening and that she has an imminent need for the item. As well, the appellant has no available resources to purchase the item due to her limited income.

The ministry's position is that abdominal bands are not an eligible item under the legislation because "a hernia support" and "abdominal support" are specifically excluded items under subsections 3.10(11)(c) and 3.10(11)(d) of the EAPWDR, Schedule C. Further, under section 2(1) of this Schedule, abdominal bands are not required for one of the purposes listed in subsection 2(1)(a)(i), i.e., wound care, catheterization, etc., nor were the supplies found to be necessary to avoid an imminent and substantial danger to health as required by subsection 2(1)(a)(ii)(C). The ministry did not question whether the appellant had resources to pay for the item; therefore, the availability of resources is not at issue in this appeal.

The ministry also held that the criteria in section 69 of the EAPWDR were not met in that the appellant had not established a direct and imminent life-threatening health need or that an abdominal binder is necessary to meet such a need despite the ministry acknowledging that the appellant's need for the binder was urgent and that a life-threatening health need may occur if the hernia became incarcerated. At the hearing the ministry stated that there was not enough information as of November 28th to establish that the appellant had a life-threatening need for the item, but ultimately, even where the need is life-threatening, and there are no resources available to pay for the item, it still has to be an eligible health supplement or meet the criteria for eligible medical or surgical supplies under the legislation.

The panel finds that the ministry's determination that there was not a direct and imminent life-threatening health need, or that the abdominal binder was not required to meet the need or not necessary to avoid an imminent and substantial danger to health was not reasonable based on the evidence. The appellant's physician confirmed that the item is an "absolute medical necessity" and her physician and her surgeon stated that she must wear the band at all times. The physician added that the hernia is at risk of becoming incarcerated which could necessitate surgery with consequences of serious complications and potential death. The oral testimony of the appellant and her advocate further support that there is an imminent life-threatening risk of the hernia becoming incarcerated due to the thinness of the skin around it and because it had already broken open on occasion. Therefore, the panel finds the ministry unreasonably determined that the appellant's

request for the abdominal binders did not fulfill the "direct and imminent" health need criterion in section 69 and that the binders are not necessary to avoid "substantial danger to health" as required under section 2(1).

However, as the ministry explained at the hearing, the requested item must still fit into the health supplement criteria set out in section 3.10 of Schedule C or the medical equipment and devices criteria in section 2(1). Because "a hernia support" and "abdominal support" are specifically excluded items under subsections 3.10(11)(c) and 3.10(11)(d) of the EAPWDR, Schedule C, the panel finds that the ministry reasonably determined that the health supplement criteria are not met. Despite the advocate's argument that the appellant's case is unique due to the serious nature of her medical conditions, the ministry is still bound by what the legislation says, as is the panel in determining whether the ministry's interpretation was reasonable.

As well, under section 2(1) of the Schedule, abdominal bands are not required for one of the purposes listed in subsection 2(1)(a)(i), i.e., wound care, catheterization, etc. As the item must be for one of the listed purposes in accordance with the legislation, the panel finds that the ministry reasonably determined that this legislated requirement was not met.

Accordingly, the panel finds that the Ministry's denial of the appellant's request for abdominal binders is a reasonable application of the legislation in the circumstances of the appellant. The panel confirms the ministry's reconsideration decision.