

PART C – Decision under Appeal

The appellant appeals the reconsideration decision of the Ministry of Social Development and Social Innovation (Ministry) dated September 25, 2013, which denied her request for medical supplies, in particular a specific type of swim diaper for incontinence, on the basis that her request did not meet the criteria set out in the *Employment and Assistance for Persons with Disabilities Regulation* (EAPWDR) Schedule C, section 2(1)(a)(ii)(B) and (C). The Ministry determined that the requested swim diaper is a specialized product and was not the least expensive appropriate medical supply for the purpose (as required by section 2(1)(a)(ii)(B) of Schedule C) and that information had not been provided to establish that the swim diaper is necessary to avoid an imminent and substantial danger to health as required by section 2(1)(a)(ii)(C) of Schedule C of the EAPWDR.

PART D – Relevant Legislation

Employment and Assistance for Persons with Disabilities Regulation (EAPWDR) section 62 and Schedule C – General Health Supplements, section 2(1)(a).

PART E – Summary of Facts

With the consent of the parties the appeal proceeded as a written hearing, in accordance with section 22(3)(b) of the *Employment and Assistance Act*.

The information before the Ministry at reconsideration consisted of the following:

- A note from the appellant's family doctor dated July 5, 2013, in which the doctor writes, "The above suffers from axonal neuropathy, osteoarthritis, and several other significant medical problems. Part of her essential therapy includes swimming. Unfortunately, due to urinary incontinence she requires a [specific brand of] swim diaper, 3XL size. This is an essential part of her treatment plan." Attached with the doctor's note is a one-page information sheet from the manufacturer about the requested swim diaper, stating that "this reusable swim brief ... is designed for adults dealing with incontinence ... It is intended for bowel containment; however, it will protect a certain amount against urinary leakage...";
- A copy of the Ministry's Health Assistance Branch Medical Supply Decision Summary dated July 19, 2013 denying the requested swim diaper; and
- The appellant's written submission on reconsideration dated September 12, 2013, in which she wrote "due to my chronic health problem and under the advice of my doctor (looked at attached medical note) it is essential to my therapy that the item I am requesting is to be worn in order to perform this essential physical activity." Attached to the submission is a note from the appellant's family doctor dated August 16, 2013 in which the doctor has written, "The above patient suffers from recurrent stool incontinence. This is a chronic problem with no cure."

With her notice of appeal dated October 8, 2013, the appellant provided the following documents:

- 1-page written submission dated October 7, 2013 prepared by an advocate for the appellant, to which was attached a copy of the July 5, 2013 note from the appellant's family doctor (referenced above);
- A copy of a consultation request prepared by the appellant's family doctor on July 5, 2013 (one page) regarding a neurology consult for the appellant – the appellant's family doctor has stated the reason for the consultation is, "Please see this lady who suffers from axonal neuropathy. She also suffers from reflex sympathetic dystrophy ..."; and
- 3 pages of information downloaded from the Internet describing the conditions of acute motor axonal neuropathy (Wikipedia) and osteoarthritis (The Arthritis Society).

In its supplementary written submission for this appeal dated November 5, 2013, the Ministry refers to the appellant's submission with her notice of appeal, but does not indicate whether it objects to the admission of this additional information. This panel admits the written submission dated October 7, 2013, as well as the attached copy of the July 5, 2013 consultation request and the information from the Internet, as written testimony in support of the information and records that were before the minister when the decision being appealed was made under subs. 22(4)(b) of the *Employment and Assistance Act*.

The appellant is a designated person with disabilities in receipt of disability assistance. The appellant receives supplies from the Ministry to manage her incontinence on a day-to-day basis.

PART F – Reasons for Panel Decision

The issue on this appeal is whether the Ministry's decision to deny the appellant's request for the medical supply of a swim diaper on the basis that the requested swim diaper did not meet the legislative criteria as it was not the least expensive appropriate medical supply for the purpose (as required by section 2(1)(a)(ii)(B) of Schedule C of the EAPWDR) and that information has not been provided to establish that the swim diaper is necessary to avoid an imminent and substantial danger to health (as required by section 2(1)(a)(ii)(C) of Schedule C of the EAPWDR) was reasonable based on the evidence of a reasonable application of the legislation in the appellant's circumstances.

Legislation - EAPWDR

62. General health supplements

(1) Subject to subsections (1.1) and (1.2), the minister may provide any health supplement set out in section 2 [*general health supplements*] ... 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,

...

Schedule C – Health Supplements

2. General health supplements

(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. ...

B. ongoing bowel care required due to loss of muscle function;

C. ...;

D. incontinence;

...;

(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.

The appellant is a designated person with disabilities in receipt of disability assistance and she meets the requirement set out in section 62(1)(a) of the EAPWDR.

In the written submission of the appellant's advocate, the advocate says that swimming is essential for the appellant's therapy – it is not an extra-curricular activity for her and it is as much one of the appellant's day-to-day activities "as getting groceries." The advocate says that as "swimming is a part of her day-to-day life, the [swim] diaper is required for day-to-day functioning." The advocate says further that the requested swim diaper "is necessary to avoid an imminent and substantial danger to health" referencing the appellant's family physician's note of July 5, 2013 that he has "clearly articulated" that swimming is "an essential therapy for" the appellant and an "essential part of her treatment plan for axonal neuropathy, osteoarthritis and several other significant medical

problems." The advocate says on the appellant's behalf that the appellant's medical problems are severe, referring to the information about these conditions from the internet sites, "and if left untreated and ... allowed to progress without swimming as therapy, they pose a substantial danger to health."

In the reconsideration decision, the Ministry notes the appellant's submissions that due to her chronic health problems and under the advice of her doctor, it is essential to the appellant's therapy that the swim diaper she is requesting is to be worn in order to perform the essential physical activity of swimming. In its reconsideration decision, the Ministry said that it is the Ministry's intention "to provide the least expensive appropriate medical supplies to assist recipients with managing their medical needs on an ongoing basis" and notes that the Ministry is providing the appellant with "sufficient supplies" to manage her incontinence on a day-to-day basis in order to maintain her hygiene. The Ministry said that the requested swim diaper was not required to manage the appellant's incontinence on a day-to-day basis to maintain her hygiene, but is being requested as a specialty item to enable the appellant to go swimming, recommended by the appellant's family doctor as part of her treatment plan. The Ministry found that while the appellant may benefit from swimming, "information is not provided to establish that the item requested is necessary to avoid an imminent and substantial danger to health."

The Ministry reiterated its position in the supplemental submissions on appeal, stressing that the information does not establish that swimming is a daily activity for the appellant, that swimming is a daily living activity as defined by the legislation (referring to section 2(1) of the EAPWDR which defines "daily living activities" for the purposes of the EAPWDA), or that a swim diaper is required directly for the management of the effects of incontinence on the appellant and to avoid an imminent and substantial danger to the appellant's health. The Ministry submits that the information provided by the appellant about the requested swim diaper indicates that it will protect a certain amount against urinary leakage and, "it is apparent that the swim diaper is not used directly to maintain the hygiene of the appellant." The Ministry listed supplies provided for the management of incontinence and pointed out that they are used to keep the perineal area, seating and bedding clean, dry and sanitary, thus reducing the risk of infection and skin breakdown for the user. "Therefore, it cannot be determined that a swim diaper is required to manage the effects of incontinence on the appellant or to avoid an imminent and substantial danger to the appellant's health." In its supplemental submission, the Ministry also refers to the appellant's submission that as swimming is an essential therapy for her the swim diaper is required to avoid the imminent and substantial danger to her health that would result if she couldn't swim. The Ministry submits that although it acknowledges that swimming is an essential component of the appellant's treatment plan, "the information provided does not establish that the swim diaper is directly required to manage the effects of incontinence on the appellant or to avoid an imminent and substantial danger to the appellant's health."

Panel Decision

Under subs. 2(1)(a) of Schedule C of the *EAPWDR*, the minister may pay for health supplements, including medical 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**: the supplies are required for incontinence (as set out in subs. 2(1)(a)(i)(D)), the supplies are prescribed by a medical practitioner, the least expensive supplies appropriate for the purpose, and necessary to avoid an imminent and substantial danger to health (as set out in subs. 2(1)(a)(ii)(A),(B) and (C)), and there

are no resources available to the family unit to pay the cost of or obtain the supplies (subs. 2(1)(a)(iii)). The panel stresses that the legislation requires that the minister must be satisfied that **all** of the requirements of subs. 2(1)(a)(i) through (iii) of Schedule C of the EAPWDR must be met before the requested medical supplies will be provided.

The appellant suffers from incontinence – the Ministry is satisfied that she meets the requirement set out in subs. 2(1)(a)(i)(D). The appellant's medical practitioner has prescribed the requested swim diaper so that she can engage in swimming as part of her physical therapy – the Ministry is satisfied the request meets the requirement of subs. 2(1)(a)(ii)(A).

However, the panel notes that there is little information before the Ministry or before this panel regarding the requirement articulated in subs. 2(1)(a)(ii)(B), that is, that the requested swim diaper is "the least expensive supply appropriate for the purpose." The focus of the appellant's submission in this regard is that the requested swim diaper is required for the appellant's therapeutic swimming, thereby "appropriate" for the purpose of facilitating swimming – there is no evidence regarding the cost of the requested swim diaper. The Ministry's corresponding submission (as set out in the reconsideration decision and the supplemental submission) is that the Ministry provides the necessary medical supplies to the appellant to address her incontinence and provide for her day-to-day hygiene, but that therapeutic swimming and the requested swim diaper is not part of the appellant's day-to-day hygiene and is thus not part of the supplies provided. Based on the information set out in the submissions (that is, that the appellant requests this particular swim diaper for therapeutic swimming, but does not provide information about the item's cost) and in the reconsideration decision (that the appellant receives supplies to address her incontinence and provide for her day-to-day hygiene, but that therapeutic swimming is not part of this), the panel finds that the Ministry's determination that the appellant did not provide sufficient information to establish the requirement set out in subs. 2(1)(a)(ii)(B) of Schedule C of the EAPWDR is reasonable.

The appellant's advocate submits that the appellant's swimming is essential therapy to address her severe impairments of axonal neuropathy and osteoarthritis – that without the requested swim diaper to enable her to swim, it will result in imminent and substantial danger to the appellant's health. The Ministry acknowledges that the appellant swims as part of her ongoing therapy to treat her impairments, but says that the appellant has not provided information to establish that the swim diaper is necessary to avoid an imminent and substantial danger to health, which is the requirement set out in subs. 2(1)(a)(ii)(C).

The panel finds that the information set out in the physician's letter of July 5, 2013 indicates that part of the appellant's "essential" therapy includes swimming, but the physician does not indicate an "imminent" or "substantial" danger to the appellant's health without this part of her therapy, or without the swim diaper. The advocate says on the appellant's behalf that the appellant's medical problems are severe, referring to the information about these conditions from the internet sites, "and if left untreated and ... allowed to progress without swimming as therapy, they pose a substantial danger to health." The panel places little weight on the information from the internet sites, which is not specific to the appellant. The panel finds the appellant's submission does not establish that she requires the requested swim diaper to avoid an imminent and substantial danger to her health – there is no specific information provided to establish what will happen to the appellant if she is unable to swim, or whether she is able to swim using another type of supply. Accordingly, the panel finds that the Ministry's determination that the appellant has not met the requirement set out in subs. 2(1)(a)(ii)(C)

of Schedule C of the EAPWDR is reasonable based on the evidence.

Therefore, the panel confirms the Ministry's decision to deny the appellant's request for the medical supply of the requested swim diaper as all of the requirements of subs. 2(1)(a)(i) through (iii) of Schedule C of the EAPWDR were not met.