

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (ministry) reconsideration decision dated November 6, 2013 which denied the appellant's request for a supplement to cover the cost of Phonak Lyric hearing aids. The ministry found that the following requirement of Schedule C of the *Employment and Assistance for Persons With Disabilities Regulation* (EAPWDR) was not met:

-the medical equipment or device is the least expensive appropriate medical equipment or device, pursuant to Section 3(1)(b)(iii).

The ministry also found that the requirements of Section 69 of the *Employment and Assistance for Persons With Disabilities Regulation* (EAPWDR) were not met.

PART D – Relevant Legislation

Employment and Persons with Disabilities Regulation (EAPWDR), Sections 62 and 69, and Schedule C, Sections 3

PART E – Summary of Facts

The evidence before the ministry at the time of the reconsideration decision included:

- 1) Undated prescription in which the physician wrote that the appellant "is neurologically impaired and cannot manage external hearing aids- he requires internally placed hearing aids urgently due to medical reasons;"
- 2) Audiologic Evaluation dated June 12, 2013 in which the registered audiologist reported that on the left the appellant has mild sloping to moderately-severe sensorineural hearing loss above 1500 Hz, and on the right he has mild sloping to moderately-severe sensorineural hearing loss above 2000 Hz, with normal middle ear pressure and low static compliance. In the additional comments, the audiologist wrote "due to neurological condition resulting in extremely poor dexterity, he can't manage conventional hearing aids. Therefore, Phonic Lyric hearing aids are recommended;"
- 3) Letter dated August 20, 2013 from an occupational therapist (OT) to the ministry which states in part that the appellant has a history of polyneuropathy since the 1990's and the slowly progressive condition has affected his muscular and sensory function in all four limbs. The OT wrote that the appellant has 27.5 hours of home support every month to assist with ADL [activities of daily living] and IADL [instrumental activities of daily living] tasks. The appellant requires assistance with personal care, dressing and meal preparation and other home management tasks;
- 4) Audiologic Report dated August 21, 2013 in which the registered audiologist wrote that the appellant was seen for an audiologic evaluation on June 12, 2013 and he has been diagnosed by his family physician with a neurological impairment that results in extremely poor manual dexterity. The audiologist referred to the test results and concluded that the appellant has a hearing loss of sufficient severity to prevent him from hearing normal conversational speech clearly. The audiologist wrote that the appellant would benefit from bilateral hearing aids which would also likely alleviate the perception of the tinnitus. Because of his diagnosed neurological impairment and resulting impaired dexterity, the appellant is unable to manage conventional hearing aids that need to be inserted and removed daily. The solution to this challenge is the Phonak Lyric, a specialized deep-insertion extended-wear hearing aid that is inserted by the audiologist and remains in place for 3 months at a time. After 3 months, the aids are removed and new ones inserted. This is the only hearing aid available that would meet the appellant's needs. These hearing aids cost \$3,400 annually, which covers a one-year subscription after which time the subscription must be renewed, with an ongoing cost of \$3,400 ever year; and,
- 5) Request for Reconsideration dated October 25, 2013.

In his Notice of Appeal, the appellant stated that he disagrees with the ministry's decision because he is unable to comply medically with the ministry's regulation due to his disability.

At the hearing, the appellant stated that he has provided two medical letters, one from his doctor and one from an audiologist, that confirm he cannot use an external hearing aid because of his disability. The appellant stated that it is very frustrating for him to have to keep providing medical documents that the ministry already has. The ministry has acknowledged that his is very sick and that he lacks physical dexterity. The appellant stated that he has no control over his disability and what his hands can and cannot do. The appellant stated that an occupational therapist (OT) is not competent to give an assessment about hearing aids and there is nothing in section 3.11 of the legislation that requires this type of assessment by an OT or a physical therapist. The appellant stated that the audiologist,

as the specialist, confirmed his need for an internal hearing aid, not an external hearing aid. The appellant stated that the note from his doctor is brief because the doctor does not have much time to meet with each patient and charges a fee to write a letter, which gets costly. The appellant stated that, with his disability, he cannot insert an external hearing aid. The appellant stated that he has never had hearing aids. He has adapted a certain amount to his hearing impairment and he can manage to hear conversation in a quiet setting where he can see a person speaking, such as in the current meeting setting. However, in crowds or with the TV, where the voices are not distinct, he has difficulty.

The appellant stated that he uses a walker in his home and has fallen a few times when he is out of his wheelchair since he tends to spontaneously collapse, and "everything comes off." If the external hearing aids dropped out when he falls down and they got lost, he would have to go back to the ministry for another pair. A few days ago, he fell down in his bathroom between the toilet and the bathtub and broke some ribs but did not go to the hospital because there is nothing that doctors can do besides prescribe pain killers. He also fell about 4 days prior to the most recent occasion. The appellant stated that he once fell and his foot was badly cut and he had to take the bus to the hospital to get stitches. The appellant stated that his caregiver lives with him, but she is not a family member. They share the rent and food and she works during the day. Through a municipal program, he receives an amount every two weeks to pay for the caregiver to help him approximately 27 hours per month. The caregiver helps during the week to get dressed in the morning and helps him as well in the evening, and she also helps him on the weekends. The appellant stated that he does not call his caregiver during the day for help, but deals with things on his own. The appellant stated that he is at the point that he accepts his disability and he tries to maintain as much independence as possible.

The ministry relied on its reconsideration decision, which included evidence from a November 8, 2011 assessment by an OT that indicated that the appellant's caregiver is live-in. At the hearing, the ministry clarified that the most that the ministry pays for hearing aids is \$4,000 for the standard, behind-the-ear or the in-the-ear hearing aids. These hearing aids last for several years and the ministry only replaces the batteries.

PART F – Reasons for Panel Decision

The issue on the appeal is whether the ministry's reconsideration decision, which denied the appellant's request for a supplement to cover the cost of Phonak Lyric hearing aids because not all of the requirements of Section 3 of Schedule C and Section 69 of the *Employment and Assistance for Persons With Disabilities Regulation* (EAPWDR) were met, is reasonably supported by the evidence or a reasonable application of the applicable enactment in the circumstances of the appellant.

Pursuant to Section 62 of the EAPWDR, the applicant must be a recipient of disability assistance, or be a dependent of a person in receipt of disability assistance in a variety of scenarios. If that condition is met, Schedule C of the EAPWDR specifies additional criteria that must be met in order to qualify for a health supplement for various items. In this case, the ministry has not disputed that the requirement of Section 62 has been met in that the appellant has been approved as a recipient of disability assistance.

Section 3(1) of Schedule C of the EAPWDR provides:

Medical equipment and devices

- 3 (1) Subject to subsections (2) to (5) of this section, the medical equipment and devices described in sections 3.1 to 3.12 of this Schedule are the health supplements that may be provided by the minister if
- (a) the supplements are provided to a family unit that is eligible under section 62 [*general health supplements*] of this regulation, and
 - (b) all of the following requirements are met:
 - (i) the family unit has received the pre-authorization of the minister for the medical equipment or device requested;
 - (ii) there are no resources available to the family unit to pay the cost of or obtain the medical equipment or device;
 - (iii) the medical equipment or device is the least expensive appropriate medical equipment or device. . . .

Section 69 of the EAPWDR provides:

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).

Section 3 of Schedule C

The ministry's position is that the appellant is eligible to receive health supplements under Section 62 of the EAPWDR, but the appellant's request for a supplement to cover the cost of Phonak Lyric hearing aids does not meet the requirement set out in Section 3(1)(b)(iii) of Schedule C of the

EAPWDR as the information provided does not establish that the hearing aids requested are the least expensive appropriate medical device or equipment to meet his needs. The ministry argued that although the audiologist reported that the appellant is unable to manage conventional hearing aids that need to be inserted and removed daily, an assessment by an OT is not provided to describe the impacts to the appellant's physical functioning from the diagnosed neurological condition. The ministry pointed to the letter dated August 20, 2013 where the OT reported that the appellant has 27.5 hours of home support every month to assist with his DLA and IADL and that the appellant requires assistance with personal care, dressing and meal preparation and other home management tasks. The ministry argued that given the information that the appellant receives assistance with personal care and dressing from a live-in caregiver, it is reasonable to expect that a caregiver would be able to assist with the insertion and removal of either standard behind-the-ear hearing aids or in-the-ear hearing aids which normally cost \$4,000 and last for a number of years, and that insertion of the Phonak Lyric hearing aids should not be necessary.

The appellant's position is that both his doctor and the audiologist, as a specialist, have provided opinions that he needs internal hearing aids, and not the external version, due to his disability. The appellant argued that an OT is not competent to give an assessment about hearing aids and there is nothing in section 3.11 of the legislation that requires this type of assessment by an OT or a physical therapist. The appellant argued that the ministry has acknowledged that he is very sick and that he lacks the physical dexterity to insert and remove hearing aids daily. The appellant argued that he has met all of the requirements set out in the legislation.

Panel decision

The requirement in Section 3(1)(b)(iii) of Schedule C of the EAPWDR is that the requested Phonak Lyric hearing aids are the least expensive appropriate medical equipment or device and the panel finds that an assessment of the different types of equipment appropriate to the appellant's medical condition and the associated cost is relevant and necessary to this analysis. The ministry does not dispute that the requirements of Section 3.11 of Schedule C of the EAPWDR have been met and that the Phonak Lyric hearing aids have been prescribed and an audiologist has performed an assessment that confirms the need for the Phonak Lyric hearing aids. However, Section 3 of Schedule C also requires that the ministry is satisfied that the Phonak Lyric hearing aids are the least expensive appropriate device, or hearing instrument. The appellant acknowledged that he has 27.5 hours of home support every month to assist with his DLA and IADL and that he receives assistance with personal care, dressing and meal preparation and other home management tasks. The appellant stated that his live-in caregiver assists him in the mornings and evenings and on weekends. The appellant's physician wrote that the appellant "is neurologically impaired and cannot manage external hearing aids- he requires internally placed hearing aids urgently due to medical reasons;" however, no further information was provided from the physician regarding the appellant's ability to manage external hearing aids with the daily assistance that he receives from his caregiver. Likewise, the audiologist wrote in his evaluation dated June 12, 2013 that "due to neurological condition resulting in extremely poor dexterity, he can't manage conventional hearing aids" and "therefore, Phonic Lyric hearing aids are recommended;" but, again, there is no further information from the audiologist regarding the appropriateness of conventional hearing aids if the appellant has the assistance of his caregiver and whether she could insert and remove them for the appellant daily.

The appellant stated at the hearing that he has a tendency to fall when using his walker in his home and that the external hearing aids would likely fall off and possible get lost; however, there was no further assessment from a specialist, such as an OT, to evaluate whether the conventional hearing

aids are appropriate given all of the appellant's physical challenges. While the audiologist wrote in his report of August 21, 2013 that the Phonic lyric hearing aids are the only hearing aid available that would meet the appellant's needs, the panel finds that the ministry reasonably determined that there is not sufficient information available to assess whether the conventional hearing aids would be appropriate to meet the appellant's needs with the assistance he receives from a live-in caregiver.

The audiologist wrote that the solution to the appellant's challenges with dexterity is the Phonak Lyric, as a specialized deep-insertion extended-wear hearing aid that is inserted by the audiologist and remains in place for 3 months at a time. After 3 months, the aids are removed and new ones inserted and these hearing aids cost \$3,400 annually. The ministry pointed out that the conventional hearing aids, on the other hand, have a one-time cost of \$4,000 for the standard, behind-the-ear or the in-the-ear hearing aids. Considering these costs, the conventional hearing aids are the least expensive of the two types of hearing instruments, and the panel finds that the ministry reasonably concluded that further information is required to determine whether they may also be "appropriate" for the appellant in his particular circumstances. Therefore, the panel finds that the ministry's conclusion that the of Phonak Lyric hearing aids are not shown to be the least expensive appropriate medical equipment or device, pursuant to Section 3 (1)(b)(iii) of Schedule C of the EAPWDR, was reasonable.

Section 69

With respect to Section 69 of the EAPWDR, the ministry's position is that this section is intended to provide a remedy for those persons who are facing a direct and imminent life-threatening need for these supplements and information has not been submitted to establish that the appellant faces a life-threatening health need for the Phonak Lyric hearing aids. The ministry further argued that the remedy under Section 69 only applies if all the applicable requirements in Sections 3 to 3.12 of Schedule C are met, and the ministry has determined that the request does not meet all the requirements of Section 3 of Schedule C of the EAPWDR.

The appellant did not advance a position regarding a life threatening need for the Phonak Lyric hearing aids.

Panel decision

The panel finds that the ministry reasonably determined that there is not sufficient information to establish that the appellant faces a direct and imminent life-threatening health need for the Phonak Lyric hearing aids, pursuant to Section 69(a). Although the appellant's physician wrote that the appellant requires internally placed hearing aids "urgently due to medical reasons," there was no further elaboration of the urgency and the appellant stated that he has, to a certain extent, adapted to his hearing impairment and can manage to hear conversation in controlled environments. The panel finds that the ministry reasonably determined that the requirement of Section 69(d) is also not met as the Phonak Lyric hearing aids do not meet all the requirements of Section 3 of Schedule C, as detailed above. Therefore, the panel finds that the ministry's decision, which concluded that all of the criteria in Section 69 of the EAPWDR are not met, was reasonable.

Conclusion

In conclusion, the panel finds that the ministry's decision to deny the request for Phonak Lyric hearing aids, as not meeting all of the legislated criteria of Sections 3(1) of Schedule C and Section 69 of the EAPWDR, was a reasonable application of the applicable enactment in the appellant's circumstances and confirms the decision.