APPEAL #

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (ministry) reconsideration decision dated November 18, 2013, which denied the appellant's request for a supplement to cover the cost of a mandibular advancement device (MAD) for sleep apnea. The ministry found that the item requested is not included as an eligible item in Schedule C of the *Employment and Assistance for Persons with Disabilities Regulation* (EAPWDR) and the appellant is not eligible for a supplement pursuant to Section 69 of the EAPWDR.

PART D – Relevant Legislation

Employment and Assistance for Persons with Disabilities Regulation (EAPWDR), Sections 62, 63 and 69 and Schedule C, Sections 2, 2.1, 2.2, 3, 3.1 to 3.12, 4, 4.1, 5, 6, 7, 8, 9

Schedule of Fee Allowances- Dentist

APPEAL #

PART E – Summary of Facts

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

1) Letter dated May 4, 2009 from the ministry to the appellant approving his request for a VPAP ADAP, CPAP mask with headgear and a humidifier for a total cost of $7,700;
2) Letter dated January 21, 2010 from the ministry to the appellant approving his request for a mask and headgear at a total cost of $350;
3) Article entitled "Combined oral appliance and positive airway pressure therapy for obstructive sleep apnea: pilot study", published online on November 10, 2010 and concluding in part that a combination therapy of a mandibular advancement device (MAD) and nasal CPAP is effective in normalizing respiratory disturbances of sleep apnea in selected obstructive sleep apnea ("OSA") patients who are intolerant to CPAP;
4) Article "Stages of Sleep Apnea" from Health Link BC last revised August 19, 2011;
5) Letter dated February 26, 2012 from the ministry to the appellant approving his request for a full face mask with headgear, tubing and filters for a total cost of $455;
6) Letter dated June 24, 2013 from the dentist who completed the Medical Equipment Request stating in part that the appellant was referred to the sleep apnea dental clinic to be evaluated for an oral appliance. The treatment being prescribed is a MAD called the "Klearway". The appellant has been using VPAP but is not getting complete relief with this treatment. Oral appliances are a primary treatment for obstructive sleep apnea (OSA) patients who are unable or unwilling to tolerate nasal CPAP. The appliance allows the patient to breathe normally at night without the cessation of breathing by gently holding the jaw forward, keeping the airway from occluding. The oral appliance must be fitted and supervised by a dentist or orthodontist who has been trained in the treatment of this disorder. The fee is $2,400;
7) Medical Equipment Request and Justification dated June 27, 2013 (original MERJ) in which the dentist describes the appellant's medical condition as "complex sleep apnea unresponsive to CPAP and BiPAP." The type of medical equipment recommended is "combination therapy of MAD (medical device) and positive airway pressure." The specifications of the medical equipment required to meet the appellant's needs is "MAD which maintains the lower jaw forward during sleep to improve the efficacy of VPAP, reduce leak and improve compliance."
8) Letter dated June 27, 2013 from a registered respiratory therapist stating in part that appellant has been using an adaptive servo-ventillator (ASV) since 2009. He has been fully compliant with his therapy and it has resulted in effectively managing his mixed sleep apnea. Recently, the appellant has been having problems with oral venting that was compromising the effectiveness of the ASV. Despite trials using a full face mask and chin straps, the oral venting persisted. He has been advised to seek alternative modalities to manage his oral venting and use in conjunction with his ASV;
9) Statistics from a sleep study conducted April through July 2013;
10) Letter dated July 9, 2013 from the appellant's family physician stating in part that the appellant has been diagnosed with obstructive sleep apnea and he needs an appliance called "Klearway". He has been using VPAP but still needs this medical device;
11) Medical Equipment Request and Justification dated July 12, 2013 (second MERJ) in which a physician with the Sleep Disorders Program describes the appellant's medical condition as "...severe complex sleep apnea. Persistent oral leak despite full face mask. Needs oral appliance to deal with this problem." The type of medical equipment recommended is "oral appliance therapy to be used in conjunction with positive airway pressure therapy."
12) Letter dated October 17, 2013 prepared by the appellant's advocate in which a physician with the Sleep Disorders Program agreed to statements that:

- The custom-made MAD is the oral appliance accessory that is required to operate a CPAP device for the appellant in conjunction with a full face mask because he is experiencing a persistent oral leak, and,
- The use of the custom-made MAD with the CPAP is medically essential for the treatment of the appellant's severe OSA;

13) Letter dated October 21, 2013 prepared by the appellant's advocate in which the registered respiratory therapist agreed to statements that:
- he has performed an assessment that confirms the medical need for the custom-made MAD to operate with the CPAP device in conjunction with a full face mask because the appellant is experiencing a persistent oral leak despite using full face mask,
- the MAD is the least expensive appropriate device available to treat the appellant's severe OSA,
- the MAD with the CPAP is medically essential for the treatment of the appellant's severe OSA, and
- the MAD must be made by a dentist;

14) Request for Reconsideration dated October 17, 2013 and Reasons prepared by an advocate on behalf of the appellant.

Prior to the hearing, the appellant provided additional documents as follows;

1) Written submission by an advocate on behalf of the appellant;
2) Letter dated December 3, 2013 prepared by the appellant's advocate in which the appellant's family physician agreed to statements that:
   - in addition to severe sleep apnea and asthma, the appellant suffers from coronary artery spasm requiring the use of nitroglycerin spray;
   - the MAD is the only CPAP accessory capable of ensuring that appellant's CPAP and full face mask relieve his severe sleep apnea by positioning his jaw forward in such a way that his mouth can remain closed and his airways kept open thereby customizing pressure and preventing leakage;
   - because the appellant continues to experience a persistent oral leak despite using a full face mask with his CPAP, the custom-made MAD is a medically necessary CPAP accessory that is essential to avoid an imminent and substantial danger to health resulting from severe sleep apnea.
3) Letter dated December 10, 2013 prepared by the appellant's advocate in which the physician with the Sleep Disorders Program agreed to statements that:
   - the MAD is the only CPAP accessory capable of ensuring the appellant's CPAP and full face mask relieve his severe sleep apnea by (a) positioning the appellant's jaw forward in such a way that his mouth can remain closed, and (b) keeping his airways open and preventing leakage;
   - because the appellant continues to experience a persistent oral leak despite using a full face mask with his CPAP, the custom-made MAD is a medically necessary CPAP accessory that is essential to avoid an imminent and substantial danger to health resulting from severe sleep apnea; and,
   - The physician added a handwritten note: "because of his OSA and the associated danger to his health, this accessory device is essential to ensure CPAP efficacy."

In his Notice of Appeal, the appellant expressed his disagreement with the ministry's reconsideration decision. The appellant wrote that, based on the facts of his case, the ministry was unreasonable to

deny the MAD for sleep apnea.

In the Request for Reconsideration, the advocate wrote that the MAD is an 'accessory' that is required to operate a positive airway pressure device and, therefore, can be covered by the ministry pursuant to Section 3.9(1)(a)(ii) and (2) of Schedule C of the EAPWDR. The advocate wrote that, on the second MERJ, the medical practitioner confirmed that the appellant has been diagnosed with severe, complex sleep apnea and that, with the use of the CPAP ventilator as it now operates, he experiences a persistent oral leak despite using a full face mask. The appellant needs the MAD to deal with this problem and the item is to be used in conjunction with his CPAP. The advocate referred to the information set out in the letters dated October 17, October 21 and June 24, 2013.

At the hearing, the appellant's advocate reviewed her written submission. In response to questions, she stated that the appellant agrees that all of the sections of Schedule C that are listed by the ministry in the reconsideration decision, other than Section 3.9, do not apply. The advocate stated the appellant's position that the appeal relates only to Section 3.9(1) and (2) of Schedule C of the EAPWDR. The advocate stated that a 'nasal' CPAP is not distinguishable from the equipment that the appellant currently uses, including the full face mask. She also clarified that the VPAP is sophisticated form of CPAP so that the terms have been used interchangeably in the materials. The advocate stated that the lack of sleep caused by the appellant being woken up is putting additional stress on his body and he has now become a heart patient. In response to a question, the advocate stated that information about the shape of the appellant's jaw was raised previously as the letters dated December 3 and December 10, 2013 since both refer to the need for a re-positioning of the appellant's jaw. The advocate stated that the appellant's mouth needs to be closed in order to operate the face mask properly because "the nose and the throat are connected."

At the hearing, the appellant showed the panel a MAD, which was an appliance made of plastic and metal bands that attaches to both the upper and lower teeth and hinges at the back. The appellant also demonstrated his VPAP machine, which included an electric machine with a hose attached as well as a face mask that covered both his nose and mouth, and headgear with straps that positioned the face mask on his head. The appellant stated that his airway has progressively relaxed as he ages and that it no longer stays open when he sleeps at night. When his airway closes, the pressure builds up in the VPAP machine and it forces his airway open. The appellant stated that when this pressure builds up, the air vents out the top of the mask, where there are some venting holes or slats, and also leaks out of the side of the mask. The appellant stated that when the pressure on the VPAP increases, it forces his mouth open and his tongue gets dry and he bites his tongue because he does not feel it in his mouth. The appellant stated that there are three stages of sleep, with stage 3 being the deep, restful sleep. When his airway closes and the pressure builds up in the VPAP machine and the air vents out of his mask, he is woken up before reaching stage 3 sleep. He usually only reaches stage 2 and he, therefore, does not get properly rested.

The appellant stated that when the sleep study was conducted that resulted in the Statistics report provided, the pressure in the VPAP went up to 17. The appellant is not sure how high the pressure goes on the VPAP. For the study, there was software connected to his VPAP and a record made of his usage and the pressure. For the 90 nights of the study, the appellant agreed that there were 45 nights that he did not use the VPAP machine. The appellant stated that water is used in the VPAP and it had to be reduced because the moisture caused him to get pneumonia during the study and he could not use the machine when he was coughing. The appellant stated that the stress on his body has resulted in problems with his heart, for which he now requires medication.

The appellant stated that it is the unusual shape of his jaw which does not allow a seal with the mask. He changes his masks every year because they wear out. The appellant stated that in order to get the MAD, the dentist needs to measure his mouth and teeth and fit one for him. Even though the dentist fits it, the MAD is not a dental appliance because the department that makes it is separate from the dentistry department.

The ministry did not object to the admissibility of the letters or the presentation of a MAD and the demonstration of the appellant's VPAP. The ministry also did not raise an objection to the additional oral evidence. The panel reviewed the additional letters and the physical evidence of the MAD and VPAP and admitted the documentary evidence that included further detail of the use of the MAD, and the physical evidence to allow the appellant to show the fitting of the equipment as had been previously described, and being in support of the information and records before the ministry on reconsideration, pursuant to section 22(4) of the *Employment and Assistance Act*. The panel did not admit references in the additional letters or the oral testimony to the appellant's heart condition, which condition was not part of the information or the record before the ministry at reconsideration. The panel considered the appellant's submission as argument.

The ministry relied on its reconsideration decision which included evidence that the appellant is in receipt of disability assistance and is eligible to receive health supplements provided under Section 62 and Schedule C of the EAPWDR. The appellant submitted a request for a MAD on June 27, 2013. The request included a letter dated June 24, 2013 from the dentist who completed the original MERJ, a letter from a respiratory therapist dated June 27, 2013 and the second MERJ dated July 12, 2013 signed by a physician. At the hearing, the ministry clarified that a face mask is considered an accessory to the CPAP as it is an item that is essential to connect the CPAP to the person. The MAD, on the other hand, is used in conjunction with the face mask and is not required to operate a CPAP.

APPEAL #

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 a mandibular advancement device (MAD) for sleep apnea because the item requested is not included as an eligible item in Schedule C of the *Employment and Assistance for Persons with Disabilities Regulation* (EAPWDR) and the appellant is not eligible for a supplement pursuant to Section 69 of the EAPWDR, 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 found that the requirement of Section 62 has been met in that the appellant has been approved as a recipient of disability assistance. As a person who is eligible for health supplements under Section 62 of the EAPWDR, the appellant may also be provided any health supplement set out in Section 4 [*dental supplements*] of Schedule C, pursuant to Section 63 of the EAPWDR.

At issue is whether the requested item is an eligible item under Schedule C of the EAPWDR, including the following sections:

Definitions

1 In this Schedule:

"basic dental service" means a dental service that

(a) if provided by a dentist,

(i) is set out in the Schedule of Fee Allowances — Dentist that is effective April 1, 2010 and is on file with the office of the deputy minister,

(ii) is provided at the rate set out for the service in that Schedule, . . .

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.

(a.1) the following medical or surgical supplies that are, at the minister's discretion, either disposable or reusable, if the minister is satisfied that all the requirements described in paragraph (a) (ii) and (iii) are met in relation to the supplies:

(i) lancets;

(ii) needles and syringes;

(iii) ventilator supplies required for the essential operation or sterilization of a ventilator;

(iv) tracheostomy supplies;

(a.2) consumable medical supplies, if the minister is satisfied that all of the following requirements are met:

(i) the supplies are required to thicken food;

(ii) all the requirements described in paragraph (a) (ii) and (iii) are met in relation to the supplies; . . .

Further, Section 2(1.1) of Schedule C, provides that "medical or surgical supplies" do not include nutritional supplements, food, vitamins, minerals or prescription medications.

Section 2(1)(c) provides that the following items are health supplements if the other criteria of the section are met: a service for acupuncture, chiropractic, massage therapy, naturopathy, non-surgical podiatry, physical therapy.

Section 2(1)(f) of Schedule C provides that the following items are health supplements if the other criteria of the section are met: the least expensive appropriate mode of transportation.

Section **2.1** of Schedule C provides that the following are the optical supplements that may be provided under Section 62.1 of the EAPWDR: basic eyewear and repairs, pre-authorized eyewear and repairs.

Section **2.2** of Schedule C provides that the minister may pay a health supplement under Section 67.2 of the EAPWDR for an eye examination if the other criteria of the section are met.

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.

(2) For medical equipment or devices referred to in sections 3.1 to 3.8, in addition to the requirements in those sections and subsection (1) of this section, the family unit must provide to the minister one or both of the following, as requested by the minister:

(a) a prescription of a medical practitioner or nurse practitioner for the medical equipment or device;

(b) an assessment by an occupational therapist or physical therapist confirming the medical need for the medical

equipment or device. ...

Section **3.1** provides that the following items are health supplements for the purposes of section 3 of the Schedule, if the other criteria of the section are met: a cane, a crutch, a walker, an accessory to a cane, a crutch or a walker.

Section **3.2** provides that the following items are health supplements for the purposes of section 3 if the other criteria of the section are met: a wheelchair, an upgraded component of a wheelchair, an accessory attached to a wheelchair.

Section **3.3** provides that the following items are health supplements for the purposes of section 3 of the Schedule, if the other criteria of the section are met: a wheelchair seating system, an accessory to a wheelchair seating system.

Section **3.4** provides that the following items are health supplements for the purposes of section 3 of the Schedule, if the other criteria of the section are met: a scooter, an upgraded component of a scooter, an accessory attached to a scooter.

Section **3.5** provides that the following items are health supplements for the purposes of section 3 of the Schedule, if the other criteria of the section are met: a grab bar in a bathroom, a bath or shower seat, a bath transfer bench with hand held shower, a tub slide, a bath lift, a bed pan or urinal, a raised toilet seat, a toilet safety frame, a floor-to-ceiling pole in a bathroom, a portable commode chair, a standing frame for a person for whom a wheelchair is medically essential, a positioning chair for a person for whom a wheelchair is medically essential, a transfer aid for a person for whom the transfer aid is medically essential.

Section **3.6** provides that the following items are health supplements for the purposes of section 3 of the Schedule, if the other criteria of the section are met: a hospital bed, an upgraded component of a hospital bed, an accessory attached to a hospital bed, and a positioning item on a hospital bed.

Section **3.7** provides that the following item is a health supplement for the purposes of section 3 of the Schedule, if the other criteria of the section are met: a pressure relief mattress.

Section **3.8** provides that the following item is a health supplement for the purposes of section 3 of the Schedule, if the other criteria of the section are met: a floor or ceiling lift device.

Medical equipment and devices — breathing devices

3.9 (1) Subject to subsection (4) of this section, the following items are health supplements for the purposes of section 3 of this Schedule:

(a) if all of the requirements set out in subsection (2) of this section are met,

(i) a positive airway pressure device,

(ii) an accessory that is required to operate a positive airway pressure device, or

(iii) a supply that is required to operate a positive airway pressure device . . .

(2) The following are the requirements in relation to an item referred to in subsection (1) (a) of this section:

(a) the item is prescribed by a medical practitioner or nurse practitioner;

(b) a respiratory therapist has performed an assessment that confirms the medical need for the item;

(c) the minister is satisfied that the item is medically essential for the treatment of moderate to severe sleep apnea.

(3) The period of time referred to in section 3 (3) (b) of this Schedule with respect to replacement of an item described in subsection (1) of this section is as follows:

(a) in the case of an item referred to in subsection (1) (a) (i), 5 years from the date on which the minister provided the item being replaced;

(b) in the case of an item referred to in subsection (1) (a) (ii) or (iii), one year from the date on which the

minister provided the item being replaced;

(c) in the case of an apnea monitor, suction unit, percussor, nebulizer or medical humidifier, 5 years from the date on which the minister provided the item being replaced;

(d) in the case of an inhaler accessory device, one year from the date on which the minister provided the device being replaced;

(e) in the case of an accessory or supply for an item referred to in paragraph (c) or (d), one year from the date on which the minister provided the device being replaced.

(4) A ventilator is not a health supplement for the purposes of section 3 of this Schedule.

Section **3.10** provides that the following items are an orthosis which is a health supplement for the purposes of section 3 of the Schedule, if the other criteria of the section are met: a custom-made or off-the-shelf foot orthotic, custom-made footwear, a permanent modification to footwear, off-the-shelf footwear, off-the-shelf orthopaedic footwear, an ankle brace, an ankle-foot orthosis, a knee-ankle-foot orthosis, a knee brace, a hip brace, an upper extremity brace, a cranial helmet, a torso or spine brace, a foot abduction orthosis, and a toe orthosis.

Section **3.11** provides that the following item is a health supplement for the purposes of section 3 of the Schedule, if the other criteria of the section are met: a hearing instrument.

Section **3.12** provides that the following item is a health supplement for the purposes of section 3 of the Schedule, if the other criteria of the section are met: a continuous glucose monitoring meter and a talking glucose meter.

Section **4** of the Schedule provides that the health supplement that may be paid under section 63 [*dental supplements*] are "basic dental services", if the other criteria of the section are met.

Section **4.1** provides that the health supplement may be paid under section 63.1 for crown and bridgework, if the other criteria of the section are met.

Section **5** of Schedule C provides that the health supplement that may be paid for under Section 64 of the EAPWDR are emergency dental services.

Section **6** of the Schedule provides that the amount of a diet supplement that may be provided under section 66 [*diet supplements*] is set out for various conditions, if the other criteria of the section are met.

Section **7** of the Schedule provides as follows:

7 The amount of a nutritional supplement that may be provided under section 67 *[nutritional supplement]* of this regulation is the sum of the amounts for those of the following items specified as required in the request under section 67 (1) (c):

(a) for additional nutritional items that are part of a caloric supplementation to a regular dietary intake, up to $165 each month;

(b) Repealed. [B.C. Reg. 68/2010, s. 3 (b).]

(c) for vitamins and minerals, up to $40 each month.

Section **8** of the Schedule provides that the amount of a natal supplement that may be provided under section 68 [*natal supplements*] is set out, if the other criteria of the section are met.

Section **9** of the Schedule provides that the minister may provide infant formula under section 67.1 of the EAPWDR if the other criteria of the section are met.

As well, Section 69 of the EAPWDR sets out:

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 3.9 of Schedule C of the EAPWDR

Ministry's position

The ministry's position is that the appellant is eligible to receive health supplements under Section 62 of the EAPWDR, as a recipient of disability assistance, but that the requested item is not one of the supplements listed in Section 3.9 of Schedule C. The ministry argued that the MAD is not integral to the operation of a positive airway pressure device, that it is not an 'accessory' that is required to operate a positive airway device. At the hearing, the ministry argued that a face mask is considered an accessory to the CPAP as it is an item that is essential to connect the CPAP to the person's face, while the MAD is described as being used "in conjunction with" the face mask in the appellant's circumstances and is not required to operate a CPAP. The ministry also argued that the MAD is not a 'supply' that is required to operate a positive airway pressure device. At reconsideration, the ministry did not make a determination regarding the eligibility requirements set out in Section 3.9(2)(c) or Section 3.9(3).

Appellant's position

The appellant argued, through his advocate, that the requested item meets all of the criteria in Section 3.9 as being an "accessory" that is required to operate a positive airway pressure device and that it is medically essential for the treatment of moderate to severe sleep apnea. The advocate agreed that the MAD is not a 'supply' and also that the provisions of Section 3.9(3) do not apply as the MAD is not a replacement of an item set out in Section 3.9(1). The advocate argued that a doctor, dentist and respirologist made it clear at application that the MAD is an accessory to be used with the CPAP to improve its efficacy by reducing leak and improving compliance, by maintaining the appellant's lower jaw forward during sleep. The advocate argued that the dentist set out in the original MERJ that the medical equipment requested is "combination therapy of mandibular advancement device (medical device) and positive airway pressure." The advocate pointed to the letter dated June 24, 2013 from the dentist who completed the MERJ stating that the appellant is not getting complete relief from his VPAP and studies have shown that when the CPAP is used in conjunction with the oral appliance, the pressure decreases and the patient tolerates it more. The advocate also pointed to the second MERJ requesting "oral appliance therapy to be used in conjunction with positive airway pressure therapy" and the letter dated June 27, 2013 from the respiratory therapist that the appellant has been having problems with oral venting that was compromising the effectiveness of the VPAP despite using a full face mask with chin straps.

The advocate pointed to the information provided at reconsideration, including a letter dated October 17, 2013 signed by the physician with the Sleep Disorders Program and argued that it confirms that the use of the MAD with the CPAP is medically essential for the treatment of the appellant's severe OSA and that the appliance is required to operate the CPAP in conjunction with a full face mask because he is experiencing a persistent oral leak. The advocate pointed to the letter signed by the respiratory therapist and argued that his assessment confirms the medical need specifically for the MAD to operate with the appellant's CPAP device in conjunction with a full face mask because he is experiencing a persistent oral leak despite using a full face mask. The advocate pointed to the additional information provided prior to the hearing, and argued that the MAD is the only CPAP accessory capable of enabling the appellant's CPAP and full face mask to relieve his severe OSA by positioning the jaw forward so his mouth can remain closed, and keeping his airways open thereby customizing pressure and preventing leakage. The advocate argued that the additional information also confirms that because the appellant continues to experience a persistent oral leak despite using a full face mask with his CPAP, the custom-made MAD is a medically necessary CPAP accessory.

Panel decision

In considering whether the item requested by the appellant, the custom-made MAD, falls within the item listed in Section 3.9 of Schedule C of the EAPWDR, namely "an accessory that is required to operate a positive airway pressure device," it was necessary to weigh the considerable evidence provided by four medical professionals as well as that of the appellant and his advocate, since there were some inconsistencies. For example, the letter from the dentist dated June 24, 2013 in support of the appellant's request described oral appliances as "primary treatment for OSA" for those who are "unable or unwilling to tolerate nasal CPAP", that the MAD itself has been proven effective in treating OSA, while the advocate-prepared letters refer to the MAD throughout as an 'accessory' to be used with a CPAP. The panel concluded that more weight would be placed on the evidence provided in the medical practitioner's own words as being more reliable than one-word responses to lengthy compound questions, which made it difficult for the panel to determine whether the medical practitioner was specifically agreeing to the legislative language in the statements.

"Accessory"

The panel first considered whether the MAD can reasonably be brought within the definition of an "accessory," as argued by the appellant. As there is no definition provided in the EAPWDR, the panel considered the ordinary meaning of the noun as informed by the Merriam-Webster dictionary to be 'something added to something else to make it more useful, attractive, or effective.' While the word "accessory" is used in the statements set out in the additional letters provided by the advocate, the panel finds that the use of the legislative term to categorize an item, in a document prepared by the appellant's advocate, is not determinative, as this would effectively usurp the ministry's role. The ministry must be satisfied, based on all the evidence, that the requested item can reasonably be brought within the definition of the item listed in the legislation.

As well, the word "accessory" is not previously used by the medical professionals when describing the MAD in their own words. For example, in the letter dated June 24, 2013 from the dentist, oral appliances are referred to as "primary treatment for OSA" for those who are unable or unwilling to tolerate nasal CPAP and, in the letter dated June 27, 2013 from the respiratory therapist, the appellant was advised to seek "alternative modalities." In the MERJ dated July 12, 2013, the physician describes the equipment recommended as "oral appliance therapy" which is to be used "in conjunction with positive airway pressure therapy," which could mean either that the distinct therapies are to be used at the same time or in combination. In the online article (November 2010) provided by

the appellant, the MAD is described by the researchers as an "alternative therapy" for treating OSA, and their pilot study is a review of the results to gage the feasibility of using the MDA at the same time as the nasal CPAP. The medical professions describe the MAD in terms of its primary function as a stand-alone treatment for OSA, which was recently investigated for possible use at the same time as the nasal CPAP.

The appellant and his advocate argued that the MAD will be used by the appellant at the same time as the VPAP and the dentist set out in the original MERJ that the MAD will serve to "improve the efficacy of VPAP." The ministry agreed at the hearing that the MAD had been proposed for use by the appellant 'in conjunction with' the face mask; however, the ministry maintained that the definition cannot be viewed in isolation as it must be an "accessory" for the positive airway pressure device that, in particular, is required to operate a positive airway pressure device. The panel finds that while the MAD could reasonably be brought within the ordinary meaning of the word "accessory," as being an item added to the appellant's VPAP system to make it more effective, as argued by the appellant, the ministry also reasonably concluded that the section further restricts the type of accessory to one that is "required to operate a positive airway pressure device."

"Required to operate a positive airway pressure device"
It is not disputed that the appellant's request for a VPAP, a mask with headgear and a humidifier for a total cost of $7,700, was approved by the ministry or about May 4, 2009, and that the appellant has been using the VPAP with a mask and headgear since that time. The VPAP is a type of positive airway pressure device, which is essentially a treatment that uses air pressure to keep the airways open during sleep, and the ministry clarified that a mask is considered an accessory to the positive pressure device because it is integral to the operation of any positive airway pressure device. The appellant stated that his mask needs to be replaced about every year because it wears out, but this VPAP system has been operating for him for the past several years. In his June 27, 2013 letter, the respiratory therapist wrote that this therapy has been "effectively managing" the appellant's OSA but that the appellant recently began having problems with 'oral venting' that was "compromising the effectiveness" of his system.

It is also not disputed that the appellant has continued to use his VPAP system, with a sleep study being conducted over the period April through July 2013 which monitored the appellant's usage, and the appellant stated that he did not use the VPAP for 45 of the 90 days because he contracted pneumonia and could not use the machine when he was coughing. The appellant's family physician confirmed, in his letter dated July 9, 2013, that the appellant has been using his VPAP. In explaining the recent issue with his VPAP, the appellant stated his airway has progressively relaxed as he ages and that it no longer stays open when he sleeps at night, causing the pressure to build up in the VPAP; the unusual shape of his jaw does not allow a proper seal with the mask, so that the resulting escape of air from the mask through the vents and at the side of the mask wakes him. The appellant stated that since he has not been able to reach 'stage 3' sleep, he is not rested and this tiredness has caused stress to his body.

The panel finds that the evidence demonstrates that the appellant has been operating his VPAP, as a positive airway pressure device, for over 4 years and that he continues to use the VPAP in combination with a mask and headgear. The recent issue with his VPAP system is one that is consistently described by the medical professionals as "oral venting" or "oral leak" and that the MAD is proposed to "improve the efficacy of VPAP", "reduce leak" and "improve compliance", as set out in the original MERJ, or "ensure CPAP efficacy" for the appellant, as set out in the physician's

handwritten note in the letter dated December 10, 2013. The reason for the recent development of an "oral leak" is not clear as the appellant referred to an improper seal with his full face mask which may indicate a problem with that mask, since the panel finds that there was no suggestion by the medical professionals that the shape of the appellant's jaw has changed since 2009 or that his condition of OSA has gotten worse over the years.

The panel finds that the evidence does not suggest that the MAD is required to operate any positive airway device, such as a mask that connects the machine to the person. Rather, the evidence shows that use of the MAD is proposed as a method to optimize the effectiveness of the VPAP for the appellant by addressing the recent issue of an "oral leak" from his mask and/or mouth. The panel finds that the ministry reasonably determined that the MAD is not "an accessory that is required to operate a positive airway pressure device" as it is not integral to the operation of a positive airway pressure device and, therefore, is not a health supplement under the provisions of Section 3.9(1)(a)(ii) of Schedule C of the EAPWDR.

"Medically essential for the treatment of moderate to severe sleep apnea"
The ministry did not make a determination at reconsideration regarding the eligibility requirements set out in Section 3.9(2)(c) of Schedule C. As Section 3.9(2) of Schedule C states that the requirements set out therein are in relation to "an item referred to in subsection (1)(a)," the panel finds that, given the ministry's conclusion that the item is not referred to in 3.9(1)(a), and the panel's finding that this conclusion was reasonable, it was reasonable for the ministry to decline to make a determination regarding the requirements in Section 3.9(2) of Schedule C.

Schedule of Fee Allowances- Dentist
Ministry's position
The ministry has determined that the appellant is a recipient of disability assistance and is, therefore, eligible to receive health supplements set out in Schedule C of the EAPWDR. The ministry's position is that the requested item is not "basic dental service" set out in Section 4 of Schedule C of the EAPWDR, as a MAD is not included in the ministry's Schedule of Fee Allowances- Dentist. The ministry pointed out that standard guards for bruxism are included in the Schedule and are provided at the rate of $244.35 each.

Appellant's position
The appellant agreed that the MAD is not a dental appliance.

Panel decision
The ministry determined that the appellant is a recipient of disability assistance and eligible to receive health supplements set out in Schedule C, pursuant to Section 62 of the EAPWDR ("general health supplements"). Section 63 of the EAPWDR stipulates that dental supplements may be provided to a family unit who is eligible for health supplements under Section 62 as a recipient of disability assistance, and the appellant is, therefore, eligible for dental supplements. Section 4 of Schedule C of the EAPWDR specifies that the health supplements to be paid for under Section 63 are "basic dental services." Section 1 of Schedule C further defines "basic dental service" to mean a dental service that, if provided by a dentist, is set out in the Schedule of Fee Allowances – Dentist. Upon review of the Schedule of Fee Allowances- Dentist, the panel finds that the ministry reasonably concluded that the MAD is not included in the list of services under this Schedule.

Medical Supply

Ministry's position

The ministry's position is that the appellant is eligible to receive health supplements under Section 62 of the EAPWDR but that the requested item is not an eligible item as a disposable or reusable medical or surgical supply under Section 2(1)(a) of Schedule C of the EAPWDR and the item does not meet all of the criteria. The ministry argued that there is no information provided that the item requested is necessary for any of the purposes set out in (A) through (F) of Section 2(1)(a) of Schedule C. The ministry also argued that information from a medical practitioner is not provided to confirm that the item requested is necessary to avoid an imminent and substantial danger to health as set out in Section 2(1)(ii)(C) of Schedule C.

Appellant's position

The appellant agreed that the MAD is not a medical supply.

Panel decision

The panel finds that the ministry reasonably concluded that the MAD is not an eligible item as a disposable or reusable medical or surgical supply required for one of the purposes listed in Section 2(1)(a)(i) of Schedule C. The panel finds that the ministry's decision, which concluded that the MAD does not meet all of the legislative criteria as set out in Section 2(1)(a) of Schedule C of the EAPWDR, was reasonable.

Medical equipment

Ministry's position

The ministry's position is that the appellant is eligible to receive health supplements under Section 62 of the EAPWDR but the MAD is not an eligible item as medical equipment specifically set out in Sections 3 and 3.1 through 3.12 of Schedule C of the EAPWDR.

Appellant's position

The appellant agreed that the requested item is not specifically listed as an item in Sections 3.1 through 3.12 of Schedule C, with the exception of Section 3.9 (as set out above).

Panel decision

The panel finds that the ministry reasonably determined that the requested MAD is not specifically set out in Section 3.1 through 3.12 of Schedule C of the EAPWDR as it is not: a cane, a crutch or a walker, or an accessory to a cane, a crutch or a walker; a wheelchair, an upgraded component of a wheelchair, an accessory attached to a wheelchair; a wheelchair seating system, an accessory to a wheelchair seating system; a scooter, an upgraded component of a scooter, an accessory attached to a scooter; a grab bar in a bathroom, a bath or shower seat, a bath transfer bench, a tub slide, a bath lift, a bed pan or urinal, a raised toilet seat, a toilet safety frame, a floor-to-ceiling pole in a bathroom, a portable commode chair, a standing frame or a positioning chair, or a transfer aid; a hospital bed, an upgraded component of a hospital bed, an accessory attached to a hospital bed, or a positioning item on a hospital bed; a pressure relief mattress; a floor or ceiling lift device; a custom-made of off-the-shelf foot orthotic, custom-made footwear, a permanent modification to footwear, off-the-shelf footwear, off-the-shelf orthopedic footwear, an ankle brace, an ankle-foot orthosis, a knee-ankle-foot orthosis, a knee brace, a hip brace, an upper extremity brace, a cranial helmet, a torso or spine brace, a foot abduction orthoses, or a toe orthosis; a hearing instrument or a non-conventional glucose meter. The panel finds that the ministry reasonably concluded that the MAD does not meet the requirements of Sections 3.1 to 3.12 of Schedule C of the EAPWDR.

Therapy and other supplements

Ministry's position

The ministry's position is that the appellant's request for a supplement to cover the cost of a MAD does not meet the criteria of the other sections of Schedule C of the EAPWDR, including sections 2(1)(c), 2.1, 2.2, 4, 4.1, 5, 6, 7, 8 and 9, since a MAD is not any of the items covered, namely: a service for acupuncture, chiropractic, massage therapy, naturopathy, non-surgical podiatry, and physical therapy; optical supplements; eye examination supplements; a dental supplement; a crown and bridgework supplement; emergency dental supplements; diet supplements; monthly nutritional supplements; natal supplements; or infant formula.

Appellant's position

The appellant agreed that the requested item does not fall within any of these other sections of Schedule C of the EAPWDR.

Panel decision

The panel finds that the ministry's decision, which concluded that the MAD is not an item listed in the other sections of Schedule C of the EAPWDR, was reasonable.

Section 69- Direct and imminent life threatening health need

Ministry's position

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 who are not otherwise eligible to receive them. The ministry argued that the appellant does not require a remedy under Section 69 as he is eligible to receive health supplements set out under Schedule C, Sections 2 and 3. The ministry argued that the information submitted does not establish that the appellant faces a direct and imminent life-threatening health need for the MAD. The ministry further argued that information has not been provided to demonstrate that the requirements of Section 69(d) are met as a MAD is not set out under Schedule C, Section 2(1)(a) [*medical supplies*] or Section 2(1)(f) [*medical transportation*] or in Sections 3 to 3.12.

Appellant's position

The appellant acknowledges that he is eligible to receive health supplements sets out in Schedule C and that he does not need to apply for the MAD under Section 69.

Panel decision

The panel finds that the ministry reasonably concluded that the appellant is eligible, as a recipient of disability assistance, for health supplements under Section 62 of the EAPWDR, whereas Section 69 applies to provide a health supplement to a person in the family unit who is otherwise not eligible for the health supplement under the EAPWDR. The panel also finds that the ministry reasonably determined that the requirements of Section 69(d) are not met as the MAD does not meet the criteria under Schedule C, Section 2(1)(a) as a medical supply and is not listed under Section 2(1)(f) as a mode of medical transportation, or under Sections 3 to 3.12, as detailed above. Therefore, the panel finds that the ministry's decision, which concluded that Section 69 of the EAPWDR does not apply to the appellant's circumstances, was reasonable.

APPEAL #

Conclusion

In conclusion, the panel finds that the ministry's decision to deny the request for a supplement to cover the cost of a MAD as not meeting the legislated criteria of Schedule C, Sections 3, 3.1 to 3.12, or Section 2(1)(a) or (c), 2.1, 2.2, 4, 4.1, 5, 6, 7, 8, and 9 or Section 69 of the EAPWDR, was a reasonable application of the applicable enactment in the circumstances of the appellant and, therefore, confirms the decision.