

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (ministry) reconsideration decision dated January 14, 2014 which denied the appellant's request for a supplement to cover the cost of a scooter. The ministry found that the following requirements of Schedule C of the *Employment and Assistance for Persons With Disabilities Regulation* (EAPWDR) were not met:

- the assessment by an occupational therapist does not confirm a medical need for the scooter, pursuant to Section 3(2)(b); and,
- the ministry is not satisfied that the scooter is medically essential to achieve or maintain basic mobility, pursuant to Section 3.4(3)(c).

PART D – Relevant Legislation

*Employment and Persons with Disabilities Regulation* (EAPWDR), Section 62 and Schedule C, Sections 3 and 3.4

## PART E – Summary of Facts

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

- 1) Quote from a health product company dated July 12, 2013 for a Shop rider scooter in the total amount of \$3,500;
- 2) Medical Equipment Request and Justification dated July 22, 2013 which states in part that the appellant's medical condition is that he has chronic degenerative disc disease (lumbar spine osteoarthritis) with refractory sciatica/ leg weakness and the medical equipment recommended is a motorized scooter;
- 3) Letter dated July 29, 2013 from an occupational therapist (OT) to the ministry which states in part that:
  - The appellant has chronic degenerative back pain, depression, osteoporosis and dyslexia, and had a L5-S1 discectomy in 2000.
  - The appellant has significant back pain and trouble with all mobility outside of his home. He has frequent falls both inside his home and outdoors.
  - The appellant looks after his son 50% of the time and is unable to participate in many care giving activities, including accompanying him on activities outside the house.
  - The appellant also struggles with grocery shopping and accessing other community facilities.
  - The appellant is independent with transfers and is able to walk short distances inside his home.
  - For outdoor mobility, his weakness tolerance is around 400 meters. After 200 meters, the appellant had slowed gait and increased limping and back flexion, had to take fast-acting pain medication and lie down.
  - The appellant has tried a wheeled walker but reports it aggravated his back pain.
  - The appellant has functional range of movement and strength in both arms.
  - For lower extremity function, the appellant has functional range but muscle weakness in both legs. His left side has greater weakness and his legs often give out on him. He reports he has fallen over 20 times in the past 3 months. He reports the sensation of pins and needles in both legs.
  - The appellant reports that he has significant pain on a daily basis. His pain increases when he spends more time on his feet. He states that after grocery shopping he spends the rest of the day lying down due to pain.
  - It is recommended that the appellant use a scooter to assist with outdoor mobility and improve his safety. He would also be able to use it on the HandyDART bus and wheelchair taxi;
- 4) Supplemental Medical Opinion from the OT dated November 22, 2013 which states that the appellant's impairments make it very difficult for him to move about both indoors and outdoors. He gets very tired easily and often feels fatigued and sore. The OT agrees that an electric scooter is medically essential for the appellant to achieve or maintain basic mobility, with a handwritten comment added: "a scooter is necessary for basic mobility outside his home."
- 5) Supplemental Medical Opinion from a physician dated December 30, 2013 which includes the same comments as that of the OT's opinion and the physician agrees that the electric scooter is medically essential for the appellant to achieve or maintain basic mobility with a handwritten comment added: "has severe lumbar disc osteoarthritis/ degenerative disease- can only ambulate 5 minutes before having to stop and rest. Scooter would greatly facilitate ambulation for longer trips/ outings and improve quality of life."
- 6) Letter faxed January 8, 2014 in which the appellant's son wrote that a scooter would help the

appellant because he would be able to be his coach for cross-country running, he would be able to go out more and go for walks; and,

7) Request for Reconsideration dated November 22, 2013.

In his Notice of Appeal, the appellant expressed his disagreement with the ministry's reconsideration decision. The appellant wrote that he believes he has met the criteria for a scooter because he has the support of his OT and his family physician.

At the hearing, the appellant and his advocate stated that:

- He has provided a prescription from his family physician which was not included as part of the ministry's materials.
- An assessment has also been provided from his OT which confirms his medical need for the scooter. The OT sets out that the appellant has significant back pain and trouble with all mobility outside of his home, including accompanying his son outdoors and going grocery shopping or to other places in the community.
- He has a friend who he calls to do his grocery shopping for him. Some stores provide a scooter for the customers and he can do his shopping with the use of a scooter. For doctor appointments, he will either take a cab or drive his own vehicle.
- The OT reported that the appellant has significant pain on a daily basis. He has muscle weakness and frequent falls.
- The appellant's physician and his OT have signed additional letters expressing a professional opinion that the scooter is medically essential for the appellant to achieve basic mobility.
- The ministry suggested that remedial measures such as pain medications can be used, but this is a subjective assumption and the ministry is not in a position to prescribe medications and it is not reflective of the requirements in the legislation.
- He has to go for regular tests to determine the amount of drugs in his system and, if there are any other drugs, he will not be given his narcotics. His family physician is under strict guidelines and must restrict the amount of pain medication prescribed so that the appellant can only take the medication twice daily. His physician is even encouraged to reduce the dosage of the medication rather than increase it, as has been suggested by the ministry,
- The appellant's functional mobility is very limited. His walking tolerance is around 400 meters but after 200 meters his gait is slowed, he has increased limping and back flexion. He has to take fast-acting pain medication and to lie down.
- While public transit may assist the appellant with outdoor mobility, he can only walk a short distance. He could possibly use public transit to get to a store, for example, but he "cannot take the bus into the store."
- He tried a wheeled walker for a period of 4 to 5 months and it aggravated his back pain. The angle of the walker requires him to bend forward too much which stresses his thoracic and lumbar spine.
- Although the ministry suggested that the appellant use a cane to steady himself, it is reasonable to assume that this option will also aggravate the appellant's back pain.
- He had surgery on discs at L5-S1 and he now has problems with other discs down his back as his condition is getting worse.
- His physician is getting "fed up" with filling out forms and will just answer the one question put to him rather than providing further information to explain.
- The advocate has observed that the appellant is visibly in significant pain after travelling to the advocate's office for his interviews.

The ministry relied on its reconsideration decision. At the hearing, the ministry clarified that the appellant was required to provide both a prescription from a medical or nurse practitioner and an assessment confirming the medical need for the scooter, pursuant to Section 3(2) of Schedule C of the EAPWDR, likely because a scooter is a more costly item. The ministry is satisfied that the prescription has been provided by the appellant's physician. The OT did not review the options of a manual wheelchair or a cane to assist with the appellant's mobility, and the ministry is not satisfied that the appellant cannot use public transit.

## PART F – Reasons for Panel Decision

The issue on the appeal is whether the ministry's decision, which denied the appellant's request for a supplement to cover the cost of a scooter because:

- the assessment by an OT does not confirm a medical need for the scooter; and,
- the ministry is not satisfied that the scooter is medically essential to achieve or maintain basic mobility,

as required by Schedule C of the *Employment and Assistance for Persons With Disabilities Regulation* (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 *Employment and Assistance for Persons with Disabilities Regulation* (EAPWDR), the applicant must be a recipient of disability assistance, or be a dependant 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.

At issue is whether the appellant's request for a scooter meets the requirements under Schedule C of the EAPWDR, including:

### **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 or section 3.12, 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. ...

### **Medical equipment and devices – scooters**

- 3.4 (1) In this section, "scooter" does not include a scooter with 2 wheels.
- (2) Subject to subsection (5) of this section, the following items are health supplements for the purposes of section 3 of this Schedule if all of the requirements set out in subsection (3) of this section are met:
- (a) a scooter;
  - (b) an upgraded component of a scooter;
  - (c) an accessory attached to a scooter.
- (3) The following are the requirements in relation to an item referred to in subsection (2) of this section:

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- (a) an assessment by an occupational therapist or a physical therapist has confirmed that it is unlikely that the person for whom the scooter has been prescribed will have a medical need for a wheelchair during the 5 years following the assessment;
  - (b) the total cost of the scooter and any accessories attached to the scooter does not exceed \$3 500 or, if subsection (3.1) applies, \$4 500;
  - (c) the minister is satisfied that the item is medically essential to achieve or maintain basic mobility. ...

### *Medical Need*

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 a scooter does not meet all of the applicable criteria of Schedule C of the EAPWDR. Firstly, the ministry argued that the requirements in Section 3(2)(b) have not been met as, while a prescription has been provided by the appellant's physician, the assessment by the OT does not confirm the medical need for the scooter. The ministry argued that the assessment by the OT indicated that pain is the limiting factor affecting the appellant's mobility issues and remedial measures are available in the form of analgesics to ameliorate pain and allow for better functionality. The ministry argued that the appellant is able to perform the majority of his activities of daily living and the difficulty arises with the need to perform instrumental activities of daily living such as grocery shopping and accompanying his son on school and sports activities. The ministry argued that there is no indication that the appellant is unable to use public transportation and the appellant currently uses no assistive devices, not even a cane, to steady himself and reduce the amount of falls he reports. The ministry argued that the OT did not assess the use of equipment other than a scooter, such as a cane, a 4-wheeled walker with pain medications, or a manual wheelchair, to meet the appellant's needs.

The advocate argued that the ministry acknowledged that a prescription had been provided by a medical practitioner and this meets the requirement of the section for "one or both" of either the prescription or the assessment, as set out in Section 3(2) of Schedule C. The advocate argued in the alternative that the requirements of the section have been met by the information provided to the ministry by his OT and his family physician. The physician confirmed in the Supplemental Medical Opinion that the appellant has chronic degenerative disc disease and the scooter would greatly facilitate ambulation and the OT reported that the appellant has significant back pain and trouble with all mobility outside of his home. The advocate argued that the OT indicated that the appellant has significant pain on a daily basis and frequent falls both inside his home and outdoors. The advocate argued that the OT is of the opinion that the appellant needs a scooter to maintain his independence with accessing basic daily needs such as obtaining groceries, accessing other community facilities and accompanying his son on activities outside the house.

### *Panel decision*

The ministry clarified that the appellant was required to provide both a prescription from a medical or nurse practitioner and an assessment by an OT confirming the medical need for the scooter, pursuant to Section 3(2) of Schedule C of the EAPWDR. The ministry is satisfied that the prescription has been provided by the appellant's physician but takes the position that the assessment by the OT does not confirm the medical need for the medical equipment. The panel finds that, while the assessment by the OT identifies impacts from the appellant's medical conditions that dictate a medical need for equipment or a device to assist with mobility, the assessment does not confirm the medical need for a motorized scooter in particular.

The appellant's medical conditions are identified by the OT as including "chronic degenerative back pain" with "significant back pain" and, consequently, the appellant has "trouble with all mobility outside of his home" and "frequent falls both inside his home and outdoors." The OT also reported that the appellant has functional range of movement and strength in both of his arms, functional range but muscle weakness in both legs and his legs "often give out on him." The OT indicated that the appellant reports significant pain on a daily basis and that his pain increases when he spends more time on his feet; after grocery shopping, for example, he spends the rest of the day lying down due to pain. There is no indication by either the physician or the OT that the appellant currently uses an assistive device or equipment to aid either his indoor or his outdoor mobility.

For outdoor mobility, the appellant stated that he either drives his own vehicle or takes a cab but acknowledged that he could possibly take public transit if he had a solution to assist his indoor mobility upon reaching his destination. The OT indicated in the assessment that the appellant tried a wheeled walker "but reports it aggravated his back pain." The appellant stated at the hearing that he tried the walker for 4 or 5 months and the angle of the walker required him to bend forward too much which stressed his thoracic and lumbar spine and aggravated his pain. While the OT indicated that the appellant's pain increases when he spends more time on his feet, the OT did not provide an assessment of the appellant's maximum walking tolerance with the walker and whether the walker improved his safety. The OT did not provide an assessment of the appellant's ability to use a cane and, although the advocate argued that it is reasonable to assume that the appellant's pain would also be aggravated by this option since the appellant would remain on his feet, Section 3(2) of Schedule C specifically requires that the OT confirm the medical need for the scooter in particular, which reasonably requires a comparison with other types of medical equipment or devices.

The OT did not provide an assessment of the appellant's ability to use a manual wheelchair, especially important given the advantage for the appellant to remain seated and in light of the reported strength in both of the appellant's arms. The panel finds that the assessment by the OT does not fully consider other types of equipment or devices available to address the appellant's restrictions to functioning in order to show that the scooter addresses particular restrictions that cannot be met by other equipment or devices. Therefore, the panel finds that the ministry's determination that the assessment by the OT has not confirmed the medical need for the scooter, pursuant to Section 3(2)(b) of Schedule C of the EAPWDR, was reasonable.

*Medically essential to achieve or maintain basic mobility*

The ministry's position is that the requirements in Section 3.4(3)(c) have not been met as the ministry is not satisfied that the scooter is medically essential for the appellant to achieve or maintain basic mobility. The ministry argued that at the present time the appellant is able to walk independently and the OT has not assessed the possibility of the appellant using a 4-wheeled walker or a cane in combination with medication to ameliorate pain, a manual wheelchair, and public transportation to achieve or maintain the appellant's basic mobility.

The appellant argued that the requirements of the section have been met by the information provided to the ministry by his OT and physician by specifically confirming in the Supplemental Medical Opinion letters that an electric scooter is medically essential for the appellant to achieve or maintain basic mobility. The advocate argued that the appellant's functional mobility is very limited, that he struggles with grocery shopping and accessing other community facilities since his outdoor walking tolerance is 400 meters. The advocate argued that the OT reported that use of the walker aggravated the appellant's pain since his pain increases when he spends more time on his feet, and

it is reasonable to assume that use of a cane would also increase his pain. The advocate argued that increased pain medication is not feasible in the appellant's circumstances and this suggestion by the ministry that he use medication to ameliorate his pain and take public transit is subjective and not reflective of the legislation. The advocate argued that the evidence demonstrates that a scooter is required for the appellant to achieve his basic mobility.

#### *Panel decision*

The panel finds that the evidence shows that the appellant has a need for equipment to assist in performing his grocery shopping and accessing other community facilities, as well as participating in care giving activities for his son, including accompanying his son on activities outside the house, due to significant back pain, muscle weakness in both legs, and frequent falls both indoors and outdoors as a result of his legs giving out on him. The appellant's son wrote in his letter that a scooter would help the appellant because he would be able to be his coach for cross-country running, he would be able to go out more and go for walks. In the Supplemental Medical Opinion dated December 30, 2013, the appellant's physician wrote that the appellant has severe lumbar disc osteoarthritis/ degenerative disease, that he can only ambulate 5 minutes before having to stop and rest, and a scooter "... would greatly facilitate ambulation for longer trips/ outings and improve quality of life." However, in terms of identifying a scooter as medically essential to achieve or maintain basic mobility, the panel finds that an assessment of a variety of types of equipment is relevant and necessary to this analysis, in order to specify the equipment features that address the appellant's particular restrictions and provides for "basic" mobility along the range of various levels of mobility (with 'no mobility' at one extreme and 'perfect mobility' at the other).

The appellant stated that he drives his personal vehicle or takes a cab and that he could possibly take public transit if he has a solution to assist with his mobility upon reaching his destination. As set out above, there is no indication by the OT or the appellant's physician that the appellant presently uses any medical equipment or devices. There is no discussion of the potential use of a cane and, while the OT indicated that the appellant found the use of a walker aggravated his pain, the OT did not elaborate to provide the appellant's maximum tolerance with a walker and whether the walker addressed the safety issues by alleviating falls. There is also no discussion of the potential use of a manual wheelchair and, as set out above, this despite the advantage for the appellant to remain seated. Although the advocate argued that the appellant's OT and physician specifically confirmed in the Supplemental Medical Opinion letters that an electric scooter is medically essential for the appellant to achieve or maintain basic mobility, the panel finds that the ministry is required to weigh and assess all of the evidence to be satisfied with this conclusion and the ministry reasonably determined that there is insufficient supporting information provided by the medical professionals. The panel finds that the ministry's determination that the evidence does not establish that the motorized scooter is medically essential to achieve or maintain basic mobility, pursuant to Section 3.4(3)(c) of Schedule C of the EAPWDR, was reasonable.

#### *Conclusion*

In conclusion, the panel finds that the ministry's decision to deny the request for a scooter as not meeting the legislated criteria of Schedule C, Sections 3(2)(b) and 3.4(3)(c) of the EAPWDR, was reasonably supported by the evidence and confirms the decision.