

PART C – Decision under Appeal

The decision under appeal is the reconsideration decision of the Ministry of Social Development and Social Innovation (the ministry) dated 13 March 2014 that found that the appellant was not eligible for funding for a CPAP machine and mask under section 69 of the Employment and Assistance for Persons with Disabilities Regulation. The ministry determined that the appellant was not eligible under paragraph (d)(ii) of section 69 and section 3(1)(b)(ii) of Schedule C of the Regulation because his request did not meet the criterion that there are no resources available to the family unit to pay the cost of or obtain the medical equipment or device. The ministry also determined that the appellant was not eligible under subsection 69(a) of the Regulation as there is no evidence of a direct and life-threatening need for a CPAP machine, humidifier and mask.

PART D – Relevant Legislation

Employment and Assistance for Persons with Disabilities Regulation (EAPWDR), section 69, and Schedule C, sections 3 and 3.9.

PART E – Summary of Facts

The ministry did not appear at the hearing. After confirming that the ministry was notified of the hearing, the hearing proceeded in accordance with section 86(b) of the Employment and Assistance Regulation.

The evidence before the ministry at reconsideration included the following:

- From the ministry's files, as set out in the reconsideration decision: the appellant is a medical services only (MSO) client of the ministry in his mid-70s.
- The following documentation faxed to the ministry on the appellant's behalf from a social worker at a hospital on 18 December 2013:
 - a) A Medical Equipment Request and Justification form dated 12 December 2013, completed by the appellant's physician. The appellant's medical conditions include amputation below right knee, hypertension, atrial fibrillation, TUPR, severe obstructive sleep apnea and osteoarthritis of left knee. The physician indicates that a CPAP machine is needed. A respiratory therapist also signed a Medical Equipment Request and Justification form of the same date, specifying need for a CPAP machine, humidifier and nasal mask, certifying that he assessed the medical needs of the appellant and the recommended medical equipment will satisfy his medical needs.
 - b) A Summary Report - Oximetry on an overnight pulse oximetry of the appellant done at a hospital 30/31 October 2013. The conclusion: "Severe sleep disordered breathing. A trial of auto CPAP is recommended and follow-up on clinical outcome on treatment."
 - c) Price quotes from a respiratory equipment provider dated 12 December 2013:
 1. CPAP monthly rental @ \$160 per month for two months, heated humidifier rental @ \$35 per month and WISP CPAP mask. Total = \$649.
 2. Ministry Philips Respironics System One CPAP, \$1795; Ministry Philips Respironics System One heated humidifier for CPAP, \$465; less CPAP monthly rental @ \$320 for 2 months and less heated humidifier rental @ \$70 for 2 months. Total = \$1870.
 3. Ministry Philips Respironics System One heated humidifier for CPAP, \$465; Ministry Philips Respironics System One CPAP, \$1795; WISP CPAP mask, \$259. Total = \$2519.
 - d) The appellant's bank statements for the periods ending mid-September, mid-October and mid-November 2013. The mid-November closing balance in the appellant's chequing account was \$5979.96. The closing balance in his savings account was \$110.42.
- The ministry's decision letter dated 06 February 2014, with accompanying detailed reasons, denying the appellant's request for a Wisp CPAP mask and 2 month trial rental of a standard CPAP machine.
- The appellant's Request for Reconsideration dated 25 February 2014, attached to which were:

a) A letter to the appellant from his physician dated 14 February 2014. The physician writes:
 “The CPAP machine is prescribed for you for management of clinically significant obstructive sleep apnea. During your inpatient stay at [name of the hospital] it was identified that you suffered from this condition. The effects of this condition included diminished mentation, which was adversely affecting your rehabilitation performance and outcome.

This was identified as a medical necessity as without improvement in your sleep disorder your amputee/prosthetic rehabilitation were significantly compromised.

With improvements in this condition your function and performance outcome improved significantly.”

b) The appellant's bank statement for the period ending mid-January 2014 and mid-February. The mid-February closing balance in the chequing account was \$2471.87, and in his savings account, \$110.48.

The appellant's Notice of Appeal is dated 24 March 2014. Under Reasons for Appeal the appellant writes:

“Based on the facts of my case it was unreasonable to deny purchase of a CPAP ventilator, humidifier & CPAP mask.”

After reconsideration and before the hearing, the appellant's advocate forwarded a submission dated 03 April 2014, with the following information:

- A letter to the appellant from his physician dated 24 March 2014. The physician writes:
 “I had previously provided you with a letter in support of your funding application for a CPAP ventilator, heated humidifier, and CPAP mask. Please be advised that you have been diagnosed with severe obstructive sleep apnea. I have identified that this equipment is medically necessary to meet direct and life-threatening health need caused by severe obstructive sleep apnea.”
- The appellant's bank statement for the period ending mid-March 2014. The closing balance in his chequing account was \$2006.07, and in his savings account, \$110.50.
- An email dated 24 March 2014 from the appellant's respiratory equipment provider to the appellant's advocate attaching the appellant's CPAP compliance data (not included in the appellant's submission). The e-mail states: “The usual process through the ministry is that they cover the costs of a 2 month rental and then request a 'buy out' quote afterwards. The 2 month rental payment is applied to the total purchase cost.”
- What purports to be the ministry's guidelines with respect to “NCPAP and BiPAP Breathing Devices.” These guidelines describe a 2-step process: the first is ministry funding of a 3-month trial in order to provide time for proper assessment of efficacy of treatment and compliance. If a purchase is requested after the 3-month trial, a post-CPAP/BiPAP oximetry is required with results that show that treatment with the device is effective. Also required are compliance data from the equipment and/or a letter from the prescribing physician demonstrating adequate and consistent compliance with therapy. The guidelines note that at the buyout step a quote is required indicating the buyout cost of the most basic equipment found to meet the client's

need, with a quote clearly showing any discounts included from the rental. The guidelines also state that any additional requirements, e.g. heated humidity, must have medical justification to demonstrate why this is medically essential in relation to the client's medical condition.

At the hearing, the appellant's advocate stated that she had downloaded the "NCPAP and BiPAP Breathing Devices" guideline described above from the ministry's website. The appellant stated that he had never before in his life been a recipient of ministry assistance and his advocate stated that the ministry was incorrect in indicating in the reconsideration decision that the appellant was eligible for MSO benefits.

The appellant stated that he was currently using a rental CPAP machine and humidifier. He began using it sometime in November 2013, shortly after his oximetry test, with his physician ordering him to start using one. As a result, his condition has significantly improved. In answer to a question, the appellant's advocate stated that a humidifier is an integral part of modern CPAP machines, with the humidifier being necessary to avoid damage to the sinuses.

The appellant stated that his bank balance was now about \$1500; his financial situation is getting worse because he is no longer able to work, as his driver's license has been suspended because of driving difficulties due to his right leg amputation.

The balance of the appellant's presentation went to argument (see Part F, Reasons for Panel Decision, below).

As the ministry did not attend the hearing, the panel is unable to verify whether these guidelines reflect ministry practice regarding a 2 step process for providing a CPAP machine or whether the trial period is 2 or 3 months. However, the panel accepts the information provided by the appellant as argument respecting the appellant's position for the ministry funding the purchase of a CPAP machine.

The panel finds the other information provided by the appellant on appeal to be in support of the information before the ministry at reconsideration. The physician's letter of 24 March 2014 elaborates on his earlier letter regarding the medical need for the CPAP machine, and the bank statements update the appellant's financial situation. The information that the appellant had begun renting a CPAP machine in November 2013 explains the physician's statement in his 14 February letter that "With improvements in this condition your function and performance outcome improved significantly." The panel therefore admits this information provided by the appellant under section 22(4) of the *Employment and Assistance Act*.

PART F – Reasons for Panel Decision

The issue in this appeal is whether the ministry decision that found that the appellant was not eligible for funding for a CPAP machine and mask under section 69 of the EAPWDR was reasonably supported by the evidence or was a reasonable application of the legislation in the circumstances of the appellant. More specifically, the issue is whether the ministry was reasonable in determining that

- the appellant was not eligible under paragraph (d)(ii) of section 69 and section 3(1)(b)(ii) of Schedule C of the EAPWDR because his request did not meet the criterion that there are no resources available to the family unit to pay the cost of or obtain the medical equipment or device, and
- the appellant was not eligible under section 69(a) of the Regulation as there is no evidence of a direct and life-threatening need for a CPAP machine, humidifier and mask.

The applicable legislation is from the EAPWDR:

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).

And from Schedule C of the EAPWDR:

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.

(2.1) For medical equipment or devices referred to in section 3.9 (1) (b) to (g), in addition to the requirements in that section 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 a respiratory therapist, occupational therapist or physical therapist confirming the medical need for the medical equipment or 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;
- f) if the minister is satisfied that the item is medically essential to moisturize air in order to allow a tracheostomy patient to breathe,
 - (i) a medical humidifier,
 - (ii) an accessory that is required to operate a medical humidifier, or
 - (iii) a supply that is required to operate a medical humidifier;

(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.

Issues respecting the reconsideration decision

Rent or Purchase?

The ministry's original decision of 06 February 2014 denied the appellant funding for a Wisp CPAP mask and a 2 month trial rental of a standard CPAP machine. However, one of the explanations given in the decision summary was that the appellant "has resources to purchase his own CPAP equipment." In his Request for Reconsideration the appellant compares the cost (\$2519) of the CPAP ventilator, heated humidifier and mask to his bank balance (\$2471.87) as argument for the ministry purchasing the complete CPAP package. In the reconsideration decision, the ministry upheld the original decision, comparing rental costs to the appellant's mid-February bank balance, but also concluded that the appellant's "request for funding to purchase or rent this equipment does not meet the eligibility criteria.." The appellant's position, as set out in his Notice of Appeal, is that it is unreasonable for the ministry to deny the purchase of a CPAP ventilator, humidifier and mask. As the reconsideration decision denies funding "to purchase or rent this equipment," the panel will make its determination on the "no resources available" criterion on both options.

Humidifier included?

The panel is unclear as to whether the reconsideration decision relating to the rental of a "standard CPAP machine" includes the rental of a heated humidifier. The position of the appellant is that a

modern CPAP unit includes a heated humidifier and that a humidifier is necessary to prevent damage to the sinuses. The reconsideration decision stated that the ministry "has determined that [the appellant] is not eligible for funding for a CPAP machine, rental, and mask..." Elsewhere in the decision, the humidifier accessory is mentioned in connection with the appellant's 18 December 2013 request and in relation to rental costs compared to the appellant's bank balance. The ministry guidelines provided by the appellant's advocate on appeal suggests that any additional requirements, e.g. heated humidifier, must have medical justification to demonstrate why this is medically essential in relation to the client's medical condition. The panel will not make a determination on whether the heated humidifier is considered part of a "standard CPAP machine." As will be seen below, whether a heated humidifier is included or not makes no material difference to the panel's decision.

The panel will consider each party's position respecting the issues under appeal.

No resources available

The position of the ministry is that information provided by the appellant demonstrates that he has sufficient funds to pay the rental costs of a CPAP machine at \$160 monthly, a humidifier at \$36 monthly and the purchase of a CPAP mask at \$259. The appellant's bank balances show that he has sufficient assets to meet his general health supplement costs through his own resources as he had the balance of \$2582.82 in mid-February 2014.

The appellant's position, as set out in the Request for Reconsideration, is that the appellant's latest bank statements indicate that he has only \$2471.87 in his bank account while the CPAP ventilator, heated humidifier and CPAP mask cost \$2519.00. At the hearing, the appellant testified that his bank balance fell to about \$1500 while the cost of the buy-out would be \$1870 after taking into account discounts after 2 months rental. In either case, as the cost of the CPAP package is greater than his available resources, the appellant submits he meets the "no resources available" criterion. He further argues that it is unreasonable to expect him to rent the equipment on a month-to-month basis, as his available funds would soon run out.

Panel findings

The evidence is that the appellant had, in mid-February at the time of reconsideration, approximately \$2582 in his bank accounts. (The amount cited in the appellant's Request for Reconsideration did not include approximately \$110 in his savings account.) As the panel's jurisdiction is to assess the reasonableness of the ministry's reconsideration decision, the panel considers the appropriate comparison to be the appellant's bank balance at the time the reconsideration decision was made, not the balance at some later time, as the appellant has argued in referring to his bank balance at the time of the hearing.

The panel notes that a CPAP mask is not an item that can be rented, while the basic machine and a humidifier has been rented by the appellant, at \$160/month for the former and \$35/month for the latter, for a total of \$195/month. Considering that the mask has already been purchased by the appellant, the panel finds that, given the appellant's bank balance at the time of reconsideration was \$2582, the ministry was reasonable in determining that there were sufficient resources available to the appellant to rent the equipment.

In terms of purchase, the panel notes that the quoted purchase cost of the total package – mask, CPAP machine and humidifier, not taking into account discounts available because of prior rental – is \$2519. This amount is less than the appellant's mid-February bank balance of \$2582, indicating that there were sufficient resources available at that time for the appellant to purchase the equipment. In the panel's view, a more appropriate comparison must take into account the appellant not advising the ministry that he had gone ahead and bought the mask and rented the CPAP equipment in November 2013. Considering sub-paragraph (i) of section 3(1)(b) of Schedule C of the EAPWDR, requiring the pre-authorization of the minister, (legislation not cited by the ministry presumably because it was not aware that the appellant was already using the equipment when the request was made) it would be unreasonable for the appellant to expect the ministry to cover costs that he has already made without pre-authorization. The quoted cost for the CPAP machine and humidifier, after discounts for 2 months rental paid by the appellant, is \$1870. As this amount is also within the appellant's bank balance at the time of reconsideration, the panel finds that the ministry was reasonable in determining that the "no resources available" criterion had not been met.

Direct and imminent life threatening need

In the reconsideration decision, the ministry did not have available to it the letter from the appellant's physician of 24 March 2014 and relied on the physician's letter of 14 February 2014. The ministry found that the information provided in this letter substantiates the medical need for a CPAP machine as required under paragraph (2)(c) of section 3.9 of Schedule C of the EAPWDR as confirming that the item is medically essential for the treatment of moderate to severe sleep apnea. However it is the position of the ministry that the information does not demonstrate that without a CPAP machine the appellant's life is at risk.

The appellant's position relies on the physician's statement in his letter of 24 March 2014: "I have identified that this equipment is medically necessary to meet direct and life-threatening health need caused by severe obstructive sleep apnea." At the hearing, the appellant's advocate also argued a person with severe sleep apnea, without CPAP treatment, was always at risk of fatal coronary arrest. The appellant submits that the new evidence from the physician demonstrates that this criterion is met.

Panel findings

The panel notes that the legislation requires that the minister is satisfied that the person faces a direct and imminent life threatening need. While the physician's letter of 24 March 2014 confirms that the appellant's severe obstructive sleep apnea gives rise to the direct and life-threatening need for the CPAP equipment, the panel notes that, given the opportunity, the physician has not addressed how this need is "imminent." More specifically, the physician was not explained how, without the CPAP equipment, the appellant is at immediate risk of death. Without such information, the panel finds that the ministry was reasonable in determining that the appellant's request did not meet the criterion set out in the first part of subsection 69 of the EAPWDR.

Conclusion

On the basis of the foregoing, the panel finds that the ministry's decision to deny the appellant's

request for funding for a CPAP machine and mask under section 69 of the EAPWDR was reasonably supported by the evidence. The panel therefore confirms the ministry's decision.