APPEAL #

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the "ministry") reconsideration decision of January 8, 2014, which denied the appellant's request for funding for an oxygen concentrator and accessories. The ministry determined that it was not authorized to provide an oxygen concentrator and accessories because they are not eligible items under Schedule C of the Employment and Assistance for Persons with Disabilities Regulation.

PART D – Relevant Legislation

Employment and Assistance for persons with Disabilities Regulation (EAPWDR), Sections 62 and 69.
Employment and Assistance for persons with Disabilities Regulation, Schedule C.

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PART E – Summary of Facts

The evidence before the ministry at reconsideration consisted of the following:

- A 2 page Medical Equipment Request and Justification form dated October 15, 2013 and signed by a family nurse practitioner, which described the appellant's medical condition as very severe Central Sleep Apnea (CSA) and recommended specific medical equipment, - a Nocturnal Oxygen Concentrator. The 2nd page indicated the following specifications of medical equipment required to meet the appellant's needs - an oxygen concentrator and nasal prongs and is signed by a respiratory therapist on October 16, 2013.

- A Sleep Apnea & Oxygen Therapy Referral form for the appellant dated September 25, 2013 by the family nurse practitioner.

- A letter dated September 16, 2013 from the respiratory therapist which requests authorization for the purchase of the following:

  Visionaire stationary concentrator - $2000.
  Nasal prongs X 3 @ $4 - $12.
  25 foot extension tubing X3 @ $5 - $15.
  Swivel Connector X3 @ $4 - $12.
  Total $ 2039.

- A summary of a CPAP overnight polysomnogram from May 31, 2013 in which the physician reported that the ASV device does not appear to be effective for this patient and conversely she has excellent response to supplemental nocturnal oxygen therapy which is strongly recommended.

- A 5 page, Laboratory - Treatment Polysomnography Report dated May 31, 2013.

- The appellant's Request for Reconsideration dated December 20, 2013 indicated that; although she has been diagnosed with Obstructive Sleep Apnea (OSA) and has completed 4 separate, overnight, in hospital sleep lab studies, her condition was not helped sufficiently by any of the machines (CPAP, BIPAP and VPAP), to be considered successful. The treatment that made the difference during the studies was the Nocturnal Oxygen Supplement, which is recommended by her physician and the respiratory therapists. Without this specific treatment, the appellant stated that her health is compromised.

In the Notice of Appeal, the appellant stated that the studies clearly show that normal treatment for OSA does not work in her case and that the supplemental nocturnal oxygen did treat her sleep disorder. The appellant reported that she has serious headaches, fog in her brain due to the amount of oxygen and that she can't remember things, has no energy and always feels tired. The appellant added that it is clear in the report what is needed and that it costs less than the CPAP, BIPAP or VPAP machines.

Oral Testimony

The appellant testified that she was a student and suffers from brain fog because of her obstructive sleep apnea. After at least 4 laboratory studies, using a CPAP for a trial period and over 2 years of using different masks and machines, her condition was not resolved until oxygen was added. The only machine that successfully treated her medical condition was the Visionaire stationary concentrator. This machine differs from the CPAP, BIPAP or VPAP machines by filtering the air in the room, before it delivers oxygen to the lungs. The appellant understood that the Visionaire stationary concentrator and accessories are not listed under Schedule "C", however, hoped that with consideration for her special circumstances, the ministry could provide the equipment. In response to a question, the appellant indicated that she could have requested that her physician provide more medical information.

The ministry stood by its reconsideration decision.

New Information

The panel finds that the new information provided by the appellant in her Notice of Appeal and her testimony are further description of the appellant's medical situation and its impact and is therefore in support of the information and records that were before the ministry at the time of reconsideration. The panel therefore admits the new information as evidence pursuant to section 22(4) of the Employment and Assistance Act.

Findings of Fact

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.

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PART F – Reasons for Panel Decision

The issue in this appeal is whether the ministry reasonably determined that the appellant is ineligible for funding for an oxygen concentrator and accessories as a health supplement, as the criteria pursuant to sections 62 to 69 and Schedule C, of the Employment and Assistance for Persons with Disabilities Regulation were not met.

Relevant Legislation

Section 69 of the EAPWDR and the relevant sections of Schedule C apply to this appeal:

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.

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;
(b) if the minister is satisfied that the item is medically essential to monitor breathing,
(i) an apnea monitor,
(ii) an accessory that is required to operate an apnea monitor, or
(iii) a supply that is required to operate an apnea monitor;
(c) if the minister is satisfied that the item is medically essential for clearing respiratory airways,
(i) a suction unit,
(ii) an accessory that is required to operate a suction unit, or
(iii) a supply that is required to operate a suction unit;
(d) if the minister is satisfied that the item is medically essential for clearing respiratory airways,
(i) a percussor,
(ii) an accessory that is required to operate a percussor, or
(iii) a supply that is required to operate a percussor;
(e) if the minister is satisfied that the item is medically essential to avoid an imminent and substantial danger to health,
(i) a nebulizer,
(ii) an accessory that is required to operate a nebulizer, or
(iii) a supply that is required to operate a nebulizer;
(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;
(g) if the minister is satisfied that the item is medically essential to deliver medication,
(i) an inhaler accessory device,
(ii) an accessory that is required to operate an inhaler accessory device, or
(iii) a supply that is required to operate an inhaler accessory 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.

General health supplements – medical supplies

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.

Sections 2.1, 2.2, 4, 4.1,5, 6, 7, 8 and 9 set out additional 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 including optical and dental, that are not relevant to the request.

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).

The appellant's position is that she suffers from very severe Central Sleep Apnea and medical studies clearly have shown that normal treatment for Obstructive Sleep Apnea does not work. In her case, the supplemental nocturnal oxygen therapy did effectively treat her sleep disorder. The appellant reported that she has serious headaches, fog in her brain due to the amount of oxygen and that she can't remember things, has no energy and always feels tired. The appellant argues that it is clear in the medical reports that she needs the Visionaire stationary concentrator to treat her sleep apnea and that it costs less than the CPAP, BIPAP or VPAP machines.

The ministry's position is as follows:

1. the criteria of section 3, 3.1 to 3.12 were not met because the oxygen concentrator and

accessories are not listed under medical equipment and devices to include: a cane, walker, wheelchair, scooter, a grab bar, a floor or ceiling lift device, a positive airway pressure device, a custom-made orthotic and/or a hearing aid or non-conventional glucose meter;

2. the criterion of section 3.9 was not met because the oxygen concentrator and accessories are not considered; a positive airway pressure device, an apnea monitor, a suction unit, a percussor, a nebulizer, a medical humidifier, an inhaler accessory device and/or a ventilator.
3. the criterion of section 2(1)(a) was not met because the oxygen concentrator and accessories are not listed under disposable or reusable medical or surgical supplies required for any of the purposes set out in section 2(1)(a)(i); wound care, ongoing bowel care, catheterization, incontinence, skin parasite care and/or limb circulation care;
4. the criteria of section 2(1)(c) and 2(2) were not met because the oxygen concentrator and accessories are not required as therapy provided to include: acupuncture, chiropractic service, massage therapy, naturopathy, non-surgical podiatry and/or physiotherapy therapy;
5. the criteria of sections 2.1, 2.2, 4, 4.1,5, 6, 7, 8 and 9 were not met because the oxygen concentrator and accessories are not listed under the remaining health supplement legislation; and
6. the criterion of section 69 was not met because the oxygen concentrator and accessories are not required to meet a life-threatening health need.

The panel finds that the ministry has reasonably determined that pursuant to the above noted legislation, the oxygen concentrator and accessories are not listed; under medical or surgical supplies, under medical equipment and devices, or as a therapy or under the remaining health supplements set out in Schedule C. Additionally, the panel finds the oxygen concentrator and accessories were reasonably determined by the ministry as not required to meet a life-threatening health need as required under section 69 which is limited to sections 2(1)(a) to (f) [general health supplements] and section 3 [medical equipment and devices]. This legislation provides a remedy for those who are facing a direct and imminent life-threatening health need for these supplements and who are not otherwise eligible to receive them which is not the appellant's situation. The panel notes that the ministry has no discretion to approve funding for the requested items.

The panel acknowledges that the appellant's physician and respiratory therapists have strongly recommended the oxygen concentrator and accessories as being effective as a therapy for her Central Sleep Apnea. While a positive airway pressure device which does not work for the appellant according to medical evidence is listed among breathing devices in section 3.9, an oxygen concentrator as recommended by the health practitioner is not included in this list and may therefore not be approved by the ministry. Although the panel finds that the appellant has a need for the oxygen concentrator and accessories, the legislation is very specific that these items are not health supplements for the purposes of section 3 of Schedule C of the EAPWDR.

The panel finds that the ministry's reconsideration decision that the appellant was not eligible for funding for the oxygen concentrator and accessories was a reasonable application of the applicable enactment in the circumstances of the appellant and therefore confirms the ministry's decision.