APPEAL #

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the "ministry") reconsideration decision dated March 28, 2014 wherein the ministry denied the appellant's request for funding for medical purposes, specifically a peak flow meter and saline solution (the "Requested Items"). The appellant is a recipient of disability assistance, and the ministry determined that the appellant was not eligible for the Requested Items as any of the following:

1. a positive airway pressure device, accessory or supply, as provided in section 3.9 of Schedule C of the Employment and Assistance for Persons With Disabilities Regulation ("EAPWDR");
2. medical supplies, as provided in section 2(1)(a) of Schedule C of the EAPWDR;
3. medical equipment or devices, as provided in sections 3 to 3.11 of Schedule C;
4. a therapy service, as provided in sections 2(1)(c), 2(2) and 2(2.1) of Schedule C;
5. any health supplement under any other sections of Schedule C; or
6. a health supplement for a person facing a direct and imminent life threatening need under s. 69 of the EAPWDR.

PART D – Relevant Legislation

EAPWDR section 62 *[general health supplements];* section 69 *[health supplement for persons facing direct and imminent life threatening health need]*; and Schedule C.

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PART E – Summary of Facts

The information before the ministry at the time of reconsideration included the following:

- The appellant is designated as a person with disabilities (PWD) and is a recipient of disability assistance.
- The appellant's physician provided the appellant with a prescription (dated November 27, 2013) for a peak flow meter "to improve his care/management."

At appeal, the appellant's oral testimony included the following:

- He has severe sleep apnea and qualified for a Bi-Pap machine in 2009;
- The appellant also suffers from asthma which requires the inhaling of a number of medications. He has a Nebulizer to facilitate this.
- In November 2013 the appellant's physician provided a prescription for saline solution to keep his breathing equipment sterile. This prescription was not included in the appeal record.
- The ministry provided the appellant with funding for saline solution on a three month basis, ending mid-April 2014.
- A peak flow meter assists persons with severe asthma to record their peak expiratory flow and those readings allow the monitoring of the effectiveness of the medications.
- The appellant did not recall being asked by the ministry to submit an assessment by a respiratory therapist as part of the Medical Equipment Request form.

The appellant's advocate submitted a two-page document which substantially reiterated the above-noted oral evidence. When asked for its position on admissibility of this document the ministry stated that it took no position. As they provided additional detail regarding the history of this appeal, the panel accepted both the document and the appellant's oral testimony as being in support of the information and records that were before the ministry at the time of reconsideration, in accordance with section 22(4) of the *Employment and Assistance Act*.

The appellant, through his advocate, acknowledged that the assessment by a respiratory therapist is a requirement, but said it had been held up by a backlog of practitioners and by the ministry's inadvertent failure to include a copy of the Medical Equipment Request in the appellant's file. The ministry's representative stated that the ministry would assist in having an assessment done.

The ministry relied on its reconsideration decision.

PART F – Reasons for Panel Decision

The issue on appeal is whether the ministry's decision to deny the Requested Items is reasonably supported by the evidence or is a reasonable application of the applicable enactment in the circumstances of the appellant. In particular, was it reasonable for the ministry to determine that the appellant was not eligible for the Requested Items as any of the following:

1. a positive airway pressure device, accessory or supply, as provided in section 3.9 of Schedule C of the Employment and Assistance for Persons With Disabilities Regulation ("EAPWDR");
2. medical supplies, as provided in section 2(1)(a) of Schedule C of the EAPWDR;
3. medical equipment or devices, as provided in sections 3 to 3.11 of Schedule C;
4. a therapy service, as provided in sections 2(1)(c), 2(2) and 2(2.1) of Schedule C;
5. any health supplement under any other sections of Schedule C; or
6. a health supplement for a person facing a direct and imminent life threatening need under s. 69 of the EAPWDR.

The relevant legislative provisions are described as follows:

EAPWDR Schedule C

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; ...

Section 2(1.1) of Schedule C, provides that for the purposes of subsection 2(1)(a), "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, physiotherapy.

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(3) of Schedule C provides that "If the minister provided a benefit to or for a person under section 2(3) of Schedule C of the Disability Benefits Program Regulation, B.C. Reg. 79/97, the Income Assistance Regulation, B.C. Reg. 75/97 or the Youth Works Regulation, B.C. Reg. 77/97, as applicable, for the month during which the regulation was repealed, the minister may continue to provide that benefit to or for that person as a supplement under this regulation on the same terms and conditions as previously until the earlier of the following dates:

(a) the date the conditions on which the minister paid the benefit are no longer met;
(b) the date the person ceases to receive disability assistance.

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 3.11 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.

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.

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;

(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.

Section 3.10 provides that each of the following items is 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 foot orthotic, custom-made footwear, a permanent modification to 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.

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 aid.

Section 3.12 provides that a non-conventional glucose meter is a health supplement for the purposes of section 3 of the Schedule, it the other criteria of the section are met.

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 is 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.

EAPWDR

Under Section 69 of the EAPWDR, the minister may provide a general health supplement if it is provided to or for a person in the family unit who is otherwise not eligible for the health supplement under the 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).

* * *

1. Positive airway pressure device, accessory or supply (s. 3.9 of Schedule C)

The appellant acknowledged that the requirement for an assessment by a respiratory therapist was not yet satisfied. Otherwise, the appellant's position is that the other legislative criteria are satisfied for the Requested Items to be provided as a positive airway pressure device or an accessory or supply required to operate a positive airway pressure device.

The ministry's position, as set out in its reconsideration decision, is that the Requested Items are not a positive airway pressure device or an accessory or a supply that is required to operate a positive

airway pressure device. The ministry acknowledged that the Requested Items had been prescribed by a medical practitioner as required by section 3.9(2)(a) of Schedule C of the EAPWDR, but said that there was no assessment performed by a respiratory therapist to confirm the medical need for the Requested Items or that they were medically essential for the treatment of moderate to severe sleep apnea, as required by sections 3.9(2)(b) and (c) of Schedule C.

Panel Decision

In the panel's view, a peak flow meter and saline solution do not constitute a positive airway pressure device. There is also no professional medical evidence before the panel to show that the peak flow meter and saline solution are medically needed by the appellant, or that these Requested Items are medically essential for the treatment of moderate to severe sleep apnea, as required by sections 3.9(2)(b) and (c) respectively.

It may be that the Requested Items respectively constitute an accessory (the peak flow meter) and supply (saline solution) for the appellant's nebulizer or Bi-Pap machine (each of which is a health supplement under sections 3.9(1)(e) and 3.9(1)(a) respectively), but there is no supporting medical evidence before the panel to verify that the appellant has either a nebulizer or Bi-Pap machine, or that the Requested Items are an accessory or supply for either of those machines.

It may be that the assessment of the respiratory therapist which is currently being sought by the appellant will ultimately fill these gaps. However, the panel must make its decision based on the evidence currently before it. Accordingly, the panel finds that the ministry reasonably determined that the Requested Items do not constitute a positive airway pressure device, or an accessory/supply for a positive airway pressure device.

2. Medical supplies (s. 2(1)(a) of Schedule C)

The appellant advanced no argument with respect to this provision.

The ministry's position is that the Requested Items are not required for one of the purposes set out in section 2(1)(a)(i) of Schedule C, and that there is no evidence to establish that the Requested Items are necessary to avoid an imminent and substantial danger to health.

Panel decision

The evidence indicates that the Requested Items are not needed for one of the purposes prescribed by section 2(1)(a) of Schedule C. There is also no supporting evidence with respect to an imminent and substantial danger to the appellant's health.

The panel finds that the ministry reasonably determined that these legislated criteria were not satisfied.

3. Other medical equipment or devices (sections 3 to 3.11 of Schedule C)

The appellant advanced no argument with respect to these provisions.

The ministry's position is that the Requested Items are not health supplements that the ministry is authorized to provide under sections 3 to 3.11 of Schedule C of the EAPWDR. The ministry also contends that the evidence does not establish that the other legislated criteria set out in these sections for each of the health supplements have been met.

Panel Decision

The evidence before the panel indicates that the Requested Items do not constitute any of the health supplements authorized in sections 3 to 3.11 of Schedule C.

Accordingly, the panel finds that the ministry reasonably determined that the legislated criteria for these provisions had not been satisfied.

4. Therapy services (sections 2(1)(c), 2(2) and 2(2.1) of Schedule C)

The appellant advanced no argument with respect to these provisions.

The ministry's position is that the Requested Items are not any of the therapy services authorized in sections 2(1)(c), 2(2) or 2(2.1) of Schedule C.

Panel Decision

The evidence before the panel indicates that the Requested Items are not a form of therapy service as identified in sections 2(1)(c), 2(2) or 2(2.1).

Accordingly, the panel finds that the ministry reasonably determined that the legislated criteria for these provisions had not been satisfied.

5. Other remaining health supplements (Schedule C)

The appellant advanced no argument with respect to sections 2.1, 2.2, 4, 4.1, 5, 6, 7, 8 or 9 of Schedule C.

The ministry's position is that the Requested Items are not authorized by any of these remaining provisions of Schedule C.

Panel Decision

The evidence before the panel indicates that the Requested Items do not meet the legislated criteria for any of the above-noted provisions.

Accordingly, the panel finds that the ministry reasonably determined that the legislated criteria for these provisions have not been satisfied.

6.0 Direct and imminent life threatening need (Section 69, EAPWDR)

The appellant advanced no argument with respect to this provision.

The ministry's position is that the appellant is eligible to receive health supplements set out under Schedule C, sections 2(1)(a) to (f), and section 3 if the legislated criteria are satisfied. The ministry argued that the Requested Items are not health supplements set out in these sections and that the appellant's request does not satisfy all the requirements specified in section 69(d).

Panel Decision

The evidence before the panel indicates that the appellant is otherwise eligible for health supplements under sections 2 and 3 of Schedule C. Section 69 is meant to apply to family units that are *not* otherwise eligible. The evidence also indicates that the Requested Items are not a medical or surgical supply identified in section 2(1)(a), nor a mode of transportation identified in section 2(1)(f), and that the criteria for health supplements in sections 3 to 3.12 have not been satisfied.

Accordingly, the panel finds that the ministry reasonably determined that the Requested Items do not meet the legislated criteria to meet a direct and imminent life threatening need.

Conclusion

For the foregoing reasons, the panel concludes that ministry's decision is reasonably supported by the evidence.

The panel therefore confirms the ministry's decision.