APPEA

PART C – Decision under Appeal

The decision under appeal is the ministry's reconsideration decision dated June 4, 2014 which held that the appellant is not eligible for a buyout of a continuous positive airway pressure (CPAP) machine, mask and filters as a health supplement as the criteria pursuant to section 69 or section 3.9(2)(c) of Schedule C, of the Employment and Assistance for Persons with Disabilities Regulation (EAPWDR) were not met.

The ministry determined that all necessary legislative requirements had been met by the appellant with the exception of the criteria set out in Schedule C, section 3.9(2)(c). This legislation requires that the ministry must be satisfied that the item is medically essential for the treatment of moderate to severe sleep apnea. The ministry determined that the appellant's sleep apnea falls within the mild range with an apnea/hypopnea index (AHI) of 10.1, and for this reason she is ineligible to receive the requested benefit.

The criterion of section 69 was also not met because the CPAP machine, mask and filters are not required to meet a direct and imminent life-threatening health need.

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 (EAPWDR), Schedule C.

APPEAL

PART E – Summary of Facts

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

- An Overnight Polysomnography and Multiple Sleep Latency Report dated July 1, 2008 which indicated that the appellant has obstructive sleep apnea and periodic limb movements and has fragmented non-refreshing sleep as a result.
- A Respiratory Services Requisition dated July 2, 2013 by the appellant's physician for Obstructive Sleep Apnea (OSA) screening and treatment.
- A letter from the appellant's physician dated August 27, 2013 which indicated that she has proven sleep apnea and requires a CPAP machine.
- A Medical Equipment Request and Justification dated October 24, 2013.
- An Apnea Link Report dated November 3, 2013.
- A Therapy Data Summary of 30 days usage with a Remstar Auto device dated December 2, 2013.
- A quote from a respiratory care center dated December 2, 2013 for a CPAP machine at $2200, a full face mask at $350 and 12 filters@ $4.50 each = $54. Total cost of all items is $2604.
- A purchase request on behalf of the appellant by the respiratory care center dated December 2, 2013.
- A letter from the appellant's physician dated May 16, 2014 which indicated that the appellant has mild OAS and has found that a CPAP has made a difference to her sleep quality. "She also feels better during the day. She has noted that with CPAP she has fewer sleep interruptions (apnoea spells), less muscle stiffness, burning sensation."
- The appellant's Request for Reconsideration dated June 2, 2014 with a 2-page letter written by the appellant.

In her letter the appellant writes that;

- Her diagnoses are Chronic Fatigue Syndrome and mild OSA with a Respiratory Disturbance Index (RDI) of 10.1.
- She experienced 132 micro arousals and 24 awakenings during her overnight Polysomnography test. 62 were respiratory, 31 due to leg movements and 29 were spontaneous.
- She had 3 apneas during the test which meant that she stopped breathing for an extended period of time, 3 times during the test.
- She also had 71 hypopneas during the test which meant that her blood oxygen saturation level fell significantly 71 times during the night because she was only breathing half her usual intake.
- She also had mild periodic limb movements and respiratory event related leg movements.
- The description of how this feels is; being jerked awake all night long, having dreams of being too tired to move, some nights her legs have painful jolts from the calves to the toes that last several hours or all night long, awakened by any little noise, she clenches her jaw and grinds her teeth nightly, sore lower back, stiffness accompanied by a burn sensation, if she has tossed and turned a lot she will have displaced her upper cervical spine which often results in migraine headaches and she requires 5-6 hours to manage the pain in the morning before she can leave her house.
- She has had 2 unsuccessful attempts with the CPAP due to sound and touch however, this is her 3rd attempt and she is at the point where she finds it not so intrusive.

- Using CPAP has made a difference to both her quality of sleep and waking. She has experienced a dramatic drop in incidence of her interrupted sleep pattern as well as a drop in fibro burn.
- She attributes her positive results to the A-Flex machine.

Prior to the start of the hearing, the appellant faxed a 45 page document that consisted of information from international research done on Chronic Fatigue Syndrome and Myalgia Encephalomyelitis (CFSME) that she hoped the panel and the ministry would have time to briefly review in order to better understand her medical conditions.

At the hearing, the appellant explained that her actual diagnosis was CFSME and that no two doctors agree on its definition and treatments. The appellant indicated that Chronic Fatigue Syndrome runs in her family. She stated that Sleep Apnea is part of or secondary to CFSME and together the symptoms are "exponentially multiplied". She has a hyper-sensitivity to stimuli, profound exhaustion and she gets 2-3 hours of sleep a night without disruption. The appellant has trialed the CPAP machine since last August and has recently had to return it, she believes that she has been denied the opportunity to have it work. Although she finds it intrusive, it is unlike others she has trialed that just interrupted her sleep. With this particular machine, the Respironics Flow-Gen, she has had about 4 effective nights and awoke the following mornings feeling rested. In response to a question by the panel, the appellant stated that in the mornings after not using the CPAP machine, she feels like she has a slur in her throat and a brick on her chest.

The panel finds that the new information provided by the appellant just prior to the hearing was for information purposes only and therefore not admissible as evidence pursuant to section 22(4) of the Employment and Assistance Act.

Findings of Fact

The appellant is a Person with Disabilities and the family unit is eligible to receive health supplements set out under the EAPWD Regulation, Section 62 and Schedule C.

The item has been prescribed by a medical practitioner.

The appellant's AHI is 10.1 events per hour.

PART F – Reasons for Panel Decision

The issue in this appeal is whether the ministry's determination that the appellant is not eligible to receive a health supplement for a buyout of a continuous positive airway pressure (CPAP) machine, mask and filters was a reasonable application of the legislation or reasonably supported by the evidence.

Specifically, the ministry determined that all necessary legislative requirements had been met by the appellant with the exception of the criteria set out in Schedule C, section 3.9(2)(c). This legislation requires that the ministry must be satisfied that the item is medically essential for the treatment of moderate to severe sleep apnea. The ministry determined that the appellant's sleep apnea falls within the mild range with an apnea/hypopnea index (AHI) of 10.1, and for this reason she is ineligible to receive the requested benefit.

The criterion of section 69 was also not met because the CPAP machine, mask and filters are not required to meet a direct and imminent life-threatening health need.

Relevant Legislation

The following sections of the EAPWDR and 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.

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 has recently had to return the Respironics Flow-Gen CPAP machine denying her the opportunity to have it work. Using this CPAP machine has made a difference to both her quality of sleep and waking. She has experienced a dramatic drop in incidence of her interrupted sleep pattern as well as a drop in fibro burn. With this particular machine, the appellant has had about 4 effective nights and awoke the following mornings feeling rested.

The ministry's position is as follows:

1. the minister is not satisfied that the CPAP machine is medically essential for the treatment of moderate to severe sleep apnea as set under subsection 3.9(2)(c), as the report from the sleep laboratory sent to the appellant's physician indicated that the appellant has an AHI of 10.1 which is consistent with mild sleep apnea;
2. the criterion of section 69 was not met because the information provided does not establish that the appellant is facing a direct and imminent life-threatening health need or that a CPAP machine is necessary to meet a direct and imminent life-threatening health need; and
3. the information provided to the appellant's physician and the sleep laboratory characterizes the appellant's condition as mild obstructive sleep apnea and therefore the request does not meet the requirements specified in sections 3 to 3.12 of Schedule C.

The panel finds that while the appellant's physician indicated in his letter dated August 27, 2013 that the appellant has proven sleep apnea and requires CPAP for this condition, in his letter dated May 16, 2014, the physician wrote that the appellant has mild OSA and has found that the CPAP has made a difference to her sleep quality. "She also feels better during the day. She has noted that with the CPAP she has fewer sleep interruptions (apnoea spells), less muscle stiffness, burning sensation." The panel finds that after using the CPAP machine for approximately 11 months, the appellant admitted to have about 4 mornings that she had awoken feeling rested; however, she did not mention that without the machine she has had muscle stiffness or a burning sensation only that

she has a slur in her throat and a weight on her chest. The panel finds that given the appellant's testimony that Sleep Apnea is part of or secondary to CFSME, and that she has mild OSA with a Respiratory Disturbance Index of 10.1, the ministry has reasonably determined that pursuant to the above noted legislation, the appellant is not eligible for a buyout of the CPAP machine, mask and filters as it is not required to treat moderate to severe sleep apnea as is required under section 3.9(2)(c) of Schedule C.

Additionally, the panel finds that although the appellant was required to return the CPAP machine after having used it for 11 months and admitted at the hearing that she had only had limited success with its use, no additional medical information was presented indicating that the requested item was required to meet a direct and imminent life threatening health need. Therefore, the panel finds that the CPAP machine, mask and filters were reasonably determined by the ministry as not required to meet a life-threatening health need and that therefore the ministry reasonably determined that this criterion in addition to the need to meet the criterion of 3.9(2)(c) make the appellant ineligible under section 69.

The panel finds that the ministry's decision that the appellant was not eligible for a buyout of a CPAP machine, mask and filters was a reasonable application of the applicable enactment in the circumstances of the appellant and therefore confirms the ministry's decision.