

## PART C – Decision under Appeal

The decision under appeal is the June 5, 2014 decision of the Ministry of Social Development and Social Innovation (the “ministry”) wherein the ministry denied the appellant’s request for medical equipment or a medical device – namely a scooter. In particular, the ministry found that the appellant had not satisfied four statutory criteria necessary to be granted the scooter:

- that the scooter is the least expensive appropriate medical equipment or device as required by section 3(1)(b)(iii) of Schedule C of the Employment and Assistance for Persons with Disabilities Regulation (“EAPWDR”);
- that the medical need for the scooter is confirmed by an assessment by an occupational therapist (“OT”) or physical therapist in accordance with section 3(2)(b) of Schedule C of the EAPWDR;
- that an OT or physical therapist confirms it is unlikely that the appellant will have a medical need for a wheelchair during the 5 years following the assessment, as required by section 3.4(3)(a) of Schedule C of the EAPWDR; and
- that the minister is satisfied that the scooter is medically essential to achieve or maintain basic mobility in accordance with section 3.4(3)(c) of Schedule C of the EAPWDR.

## PART D – Relevant Legislation

EAPWDR sections 2 and 62; and Schedule C sections 3(1)(b)(iii), 3(2)(b), 3.4(3)(a) and 3.4(3)(c).

## PART E – Summary of Facts

The information and records that were before the ministry at the time of reconsideration included the following:

- a Medical Equipment Request and Justification form completed by the appellant's physician on December 10, 2013 (the "MERJ");
- an assessment completed by the appellant's OT, dated April 24, 2013;
- a supplier's quote for a Pride Celebrity DX Sport 4 wheeled scooter, dated April 24, 2013;
- outpatient reports dated May 30, 2012 and December 10, 2013;
- a medical imaging report dated February 20, 2014; and
- an advocate-prepared form, dated May 7, 2014, on which the appellant's physician indicated his responses to a number of questions. The physician signed this document on May 27, 2014.

At the appeal hearing, the appellant submitted a letter from his physician dated July 16, 2014. The letter indicated that:

- the appellant lives in a rural area approximately 2 km from the nearest bus stop;
- he is severely disabled in his ability to ambulate due to arthritis, degeneration and pain in his right knee;
- he is not able to travel by wheelchair or walker to the bus stop from his home;
- he requires the use of a motorized electric scooter to help him mobilize in the community; and
- he is otherwise safe to perform daily living activities ("DLA") including banking, shopping and attending appointments.

The appellant is a recipient of disability assistance under the age of 65, and is therefore eligible for medical equipment and devices under section 62(1)(a) of the EAPWDR, as long as the necessary criteria specific to each item are satisfied.

In the MERJ, the physician described the medical condition of the appellant as "complex revision of right knee arthroplasty, unable to ambulate adequately (pain/stiffness)." In response to the question "What type of medical equipment is recommended" the physician wrote "power scooter (electric)."

In his assessment of April 24, 2013 the OT reported that:

- the appellant had a total knee replacement in 2008 with 8 subsequent interventions;
- the appellant demonstrated walking more than 75 feet and standing for 10 minutes;
- he is able to tend to his DLA at home with the use of a cane, and he receives assistance from his son for DLA outside the home such as attending medical appointments and prescription refills.
- the appellant's goal is to use the scooter to maintain his independence to access DLA outside the home, "with consideration to anticipated physical changes related to his current disability."

The May 30, 2012 outpatient report includes a medical opinion that "[T]here is no surgery that can

reliably bring the patella back. Patellectomy tends to leave significant weakness and does not usually resolve the symptoms. [The appellant] has asked about a brace today, but we do not feel this will assist the patella in tracking normally...Unfortunately, there is not a lot more we can offer [the appellant] other than simple analgesia and ongoing support with walking aids. He will have to think about the brace to try and load the medial side which may make him walk more normally, but I do not think this will make a difference to his discomfort.”

The outpatient report of December 10, 2013 includes a medical opinion that “[The appellant]...is suffering persistent right knee pain...re-surfacing [surgery] was described as having a 50/50 chance of helping his symptomology...It was also discussed that bracing would likely be ineffective to treat this patella maltracking.”

In the medical imaging report of February 20, 2014, it was reported that:

- the appellant has a mild to moderate wedge compression deformity of the T12 vertebral body, accompanied by endplate osteophytes. The vertebrae are of normal height and alignment with well-maintained disc spaces;
- no bone or joint abnormality was identified in the right hip, but surgical clips were noted in the right inguinal region; and
- the alignment of the components of the prosthesis in the right knee appears normal. Lucency is noted around the stem of the femoral and tibial components.

In the advocate-prepared form, the appellant’s physician indicated his opinion that:

- in his estimation the appellant can walk 1 to 2 blocks in approximately 5 minutes using a cane;
- he does not think the appellant is safe accessing the community without the use of a motorized scooter (“very poor ambulation”);
- the appellant requires a motorized scooter to achieve basic mobility;
- the appellant would not be able to use a four wheeled walker (“he should not be ambulating on the right knee”) or a manual wheelchair (“very difficult over longer distances”) to achieve basic mobility.

In his oral testimony, the appellant stated that:

- since the OT assessment was done, the appellant’s son’s circumstances have changed and he is no longer consistently available to help with the appellant’s DLA;
- the problems with his right knee have caused complications in his right hip, which is getting worse;
- he doesn’t need the scooter to manage DLA within his home, but he does need it for DLA outside the home.

In response to questions from the panel, the appellant responded that:

- HandyDART was not sufficiently punctual to ensure that he could get to appointments on time, particularly if he has multiple appointments in one day. He also said that he’d heard Handydart leaves people waiting, which would cause the appellant pain and discomfort.
- he had tried a manual wheelchair but it caused pain in his lower back, and his strength was insufficient to allow him to use the wheelchair for more than a short period of time.

In response to a question from the panel as to whether there was anywhere in the appeal record where the OT had confirmed that he was unlikely to require a wheelchair within 5 years, the appellant

responded that his physician has confirmed that he cannot use a wheelchair or walker.

*Admissibility of Additional Information*

The panel assessed the physician's letter of July 16, 2014 as providing more detail with respect to the opinions expressed by the physician in the advocate-prepared form that had been before the ministry at reconsideration. The ministry stated it did not object to submission of the document. The panel accepted the physician's letter as written testimony in support, in accordance with section 22(4) of the *Employment and Assistance Act*.

The ministry relied on its appeal record and submitted no additional information.

## PART F – Reasons for Panel Decision

The issue on appeal is the reasonableness of the ministry's decision to deny the appellant's request for medical equipment or a device in the form of a scooter on the basis that the appellant had not demonstrated that the following statutory criteria were satisfied:

- that the scooter is the least expensive appropriate medical equipment or device as required by section 3(1)(b)(iii) of Schedule C of the Employment and Assistance for Persons with Disabilities Regulation ("EAPWDR");
- that the medical need for the scooter is confirmed by an assessment by an occupational therapist ("OT") or physical therapist in accordance with section 3(2)(b) of Schedule C of the EAPWDR;
- that an OT or physical therapist confirms it is unlikely that the appellant will have a medical need for a wheelchair during the 5 years following the assessment, as required by section 3.4(3)(a) of Schedule C of the EAPWDR; and
- that the minister is satisfied that the scooter is medically essential to achieve or maintain basic mobility in accordance with section 3.4(3)(c) of Schedule C of the EAPWDR.

The relevant legislation is as follows:

### EAPWDR

#### Daily living activities

2 (1) For the purposes of the Act and this regulation, "**daily living activities**" ,

(a) in relation to a person who has a severe physical impairment or a severe mental impairment, means the following activities:

- (i) prepare own meals;
- (ii) manage personal finances;
- (iii) shop for personal needs;
- (iv) use public or personal transportation facilities;
- (v) perform housework to maintain the person's place of residence in acceptable sanitary condition;
- (vi) move about indoors and outdoors;
- (vii) perform personal hygiene and self care;
- (viii) manage personal medication, and

(b) in relation to a person who has a severe mental impairment, includes the following activities:

- (i) make decisions about personal activities, care or finances;
- (ii) relate to, communicate or interact with others effectively.

**General health supplements**

62 (1) Subject to subsections (1.1) and (1.2), the minister may provide any health supplement set out in section 2 [*general health supplements*] or 3 [*medical equipment and devices*] of Schedule C to or for a family unit if the health supplement is provided to or for a person in the family unit who is

(a) a recipient of disability assistance,...

**Schedule C****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.

3 (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.

...

**Medical equipment and devices – scooters**

3.4 (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:

(a) an assessment by an occupational 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;

(c) the minister is satisfied that the item is medically essential to achieve or maintain basic mobility.

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The appellant's position is that the evidence demonstrates that all the legislative criteria have been satisfied. He said that the opinions of his physician and the OT demonstrate the medical need for the scooter, and that the scooter is medically essential to achieve or maintain basic mobility. He argued that a manual wheelchair and the HandyDART service are not appropriate in his circumstances, and that he cannot manage DLA outside the home without a power scooter. He assured the panel that the scooter is the least expensive appropriate device, and that the ministry and appellant would get the full benefits of the expenditure. The appellant stated that his physician's statements show that he cannot use a wheelchair or walker, so it is not likely that he will have a medical need for a wheelchair within 5 years. Finally, the appellant argued that he is not familiar with the application process and the legislative criteria, that he's been learning as he goes, that the application and appeal processes have taken a long time, and that it would not be reasonable to make him start back at square one of the process.

The ministry's position is that the OT's assessment does not demonstrate the medical need for the scooter, and doesn't confirm that a manual wheelchair in conjunction with bus/HandyDART service couldn't be a less expensive option for the appellant. The ministry also argued that the OT did not confirm it is unlikely that the appellant will have a medical need for a wheelchair in the next 5 years, and that the ministry is strictly bound by the statutory criteria so it can't overlook this missing information. Finally, the ministry stated that the evidence of the appellant's functional skills doesn't support a conclusion that the scooter is medically essential to achieve or maintain basic mobility. The ministry said that it considers the meaning of "medically essential" to be "indispensable, absolutely necessary or cannot be done without."

### **Panel Decision**

#### **Section 3(1)(b)(iii) – Least Expensive**

The OT assessment did not indicate whether the appellant had been trialed on a manual wheelchair, and did not address the issue as to whether the appellant could use a combination of manual wheelchair and bus/HandyDART. The appellant has stated that he cannot use a wheelchair because of back pain, that the bus stop is too far away for him to access by wheelchair, and that it would be painful for him to have to wait for a HandyDART that he said is "not punctual". The physician has stated that use of a wheelchair would be "very difficult over longer distances" and that "it is unreasonable to assume" that the appellant can use a wheelchair or walker to travel the 2 km to the closest bus stop. Since the HandyDART provides door-to-door service, and since the OT wrote that the appellant can walk more than 75 feet using a cane and the physician indicated in the advocate-prepared form his estimate that the appellant can walk 1 to 2 blocks in approximately 5 minutes using his cane, the evidence doesn't explain why the appellant cannot use a combination of cane or wheelchair, and HandyDART to perform his DLA out of the home. The appellant's observations with respect to the discomfort of waiting for a late HandyDART, and the difficulty of managing multiple appointments on the same day aren't sufficient to establish that the scooter is the least expensive

appropriate medical equipment or device.

Based on this analysis, the panel finds that the ministry reasonably concluded that this legislated criterion had not been satisfied.

#### Section 3(2)(b) – Medical Need

The appellant's oral testimony and the OT's assessment both confirm that the appellant independently manages his DLA at home. They confirm the purpose for the scooter would be to permit independent access to the community to perform DLA such as shopping and banking outside the home. The plain meaning of the word "need" in the statutory provision – particularly when read in context - connotes that the scooter must be necessary. As discussed above in the analysis of section 3(1)(b)(iii), the evidence does not demonstrate that the use of a wheelchair and HandyDART would not be appropriate. Therefore, it does not establish that the scooter is "necessary" and that the HandyDART/wheelchair/cane option would not suffice to provide access to the community for DLA. The panel finds that the ministry reasonably concluded that the OT's assessment does not confirm the medical need for the scooter.

#### Section 3.4(3)(a) – Need for a Wheelchair Within 5 Years

This provision clearly requires the OT to confirm that it is unlikely that the appellant will have a medical need for a wheelchair during the 5 years following the assessment. In this section a wheelchair could be either manual or motorized. The OT simply did not address this provision in his assessment. The appellant has argued that when considered in conjunction with the physician's evidence that he cannot use a wheelchair over long distances and his own testimony about his back pain and lack of strength to use a wheelchair, this legislated criterion is satisfied. However, given the explicit requirement in the legislation for the OT to address this issue, and in the circumstances where the OT did not address the use of a wheelchair at all – either manual or motorized - the panel finds that the ministry reasonably concluded that this criterion has not been satisfied.

#### Section 3.4(3)(c) – Medically Essential for Basic Mobility

Section 3.4(3)(c) gives the ministry discretion as to whether it is "satisfied" that the scooter is "medically essential" to achieve or maintain basic mobility. The panel notes that the physician indicated in the advocate-prepared form that in his opinion the appellant requires a motorized scooter to achieve basic mobility. The ministry cannot simply adopt the physician's conclusion on this point as its own without analysis as to do so would constitute an improper fettering of the ministry's discretion. The ministry must assess the physician's opinion on this point in the context of the evidence and the legislation.

The plain meaning of the word "essential" is that a thing is "of the essence" or necessary, and can't reasonably be done without. In the panel's view, the term "basic mobility" means the degree of mobility required to perform DLA as prescribed in section 2 of the EAPWDR. As discussed above, the evidence does not demonstrate that a manual wheelchair/HandyDART combination would not satisfy the appellant's needs for managing DLA outside the home. Accordingly, the panel finds that the ministry reasonably concluded that the scooter is not medically essential to achieve basic mobility.



Conclusion

The panel understands the appellant's frustration with the fastidious attention to detail that is required to satisfy the legislated criteria. However, the ministry is strictly bound to follow the legislative requirements, and for the reasons provided above the panel concludes that the ministry's decision is a reasonable application of the legislation in the appellant's circumstances. Accordingly, the panel confirms the ministry's decision.