

PART C – Decision under Appeal

The decision under appeal is the August 26, 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 two statutory criteria necessary to be granted the scooter:

- that the medical need for the scooter is confirmed by an assessment by an occupational therapist (“OT”) or physical therapist (“PT”) in accordance with section 3(2)(b) of Schedule C of the Employment and Assistance for Persons with Disabilities Regulation (“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(2)(b) 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 quote for a Comet scooter in the amount of \$4,057.98 and a quote for a Pegasus scooter in the amount of \$3,595.48 (both dated April 14, 2014).
- Medical Equipment Request and Justification forms dated March 20, 2014 and August 19, 2014 (“MERJ #1” and “MERJ #2” respectively).
- OTs’ reports dated April 16, 2014 and July 31, 2014 (“OT Report #1” and “OT Report #2” respectively).
- A letter from the appellant’s advocate dated July 31, 2014.
- A Request for Reconsideration form dated August 23, 2014 including the appellant’s written reasons for requesting reconsideration.

Admissibility of New Information

Prior to the appeal hearing the appellant submitted the following documents to the offices of the Employment and Assistance Appeal Tribunal:

1. A Notice of Appeal, dated September 12, 2014, in which the appellant stated that “I cannot wear my leg from the time I get up in the morning until I go to bed because I may get blisters right now.”
2. A series of 19 photographs of streets and sidewalks in the appellant’s community, intended to demonstrate that “it is very difficult to take my wheelchair down town with a lot of sidewalks the way they are in [the community]”.
3. A quotation for a Cobra GT4 Heavy Duty Power Scooter in the amount of \$3,999.99, dated September 22, 2014.
4. A cover letter from the supplier of the Comet scooter, advising that “due to the percent grade of some of the roadways in [the appellant’s] community, the Comet scooter would be a more capable scooter” as it has a larger motor and larger batteries.
5. A letter from the appellant’s physician, dated October 6, 2014, stating in part that the appellant is having “amputation stump problems in the form of recurrent infections and skin breakdown. This can only be treated with significant non use or rest... Infections to the stump have in past resulted in hospitalization, and are extremely serious matters for her... Currently, she is having stump issues and is re-referred to orthopaedic care. In my opinion she would be well served by having a motorized scooter to limit the risk to her precarious stump, reduce her risk of falls, and maintain her independence and dignity.”
6. A letter, dated October 3, 2014, from the appellant’s OT stating in part that “Despite the fact that [the appellant] has a prosthesis and may graduate to using a cane this will not provide her with the necessary means to transport herself to her rehabilitation appointments, medical appointments, and to complete IADL’s such as grocery shopping. The community distances she must travel to get to rehabilitation, medical and community services is greater than 1km each way with significant hills that she is not expected to walk up and down using a prosthesis

and cane.

7. A letter, dated October 8, 2014 from the appellant's PT stating in part that "[The appellant] has been attending physiotherapy approximately once per week for gait retraining...[she] has had to have many prosthetic adjustments...continues to have frequent falls and is still using 2 crutches full time for all ambulation in and out of the house. We...anticipate that it will take several months of consistent work in therapy to achieve the goals of ambulating with a single point cane, eliminating risk of falls, and improving balance for community level activities."

In the panel's view, items 2, 4 and 6 provide corroborating information with respect to evidence that was before the reconsideration officer, and can be admitted as testimony in support in accordance with section 22(4) of the *Employment and Assistance Act* ("EAA"). Item number 3 was not before the ministry at the time of reconsideration and doesn't tend to support or corroborate information and records that were before the ministry, so is not admissible.

With respect to items 1, 5 and 7 – at the time of reconsideration the information before the ministry (from OT Report #1 and OT Report #2) indicated that the appellant was expected to be using a cane and prosthesis for basic mobility by October 2014. Items 1, 5 and 7 include new medical information which indicates that the appellant is having complications which will extend the period of time before she can use the cane and prosthesis for basic mobility. As this is not information that was before the ministry, and can't be said to corroborate the previous information, it is not admissible under the test in EAA section 22(4).

Evidence

The appellant underwent surgery to amputate her left leg above the knee in September 2013 as a result of complications of diabetes. The appellant's physician reported in MERJ #2 that the appellant also suffers from L5 sciatica and peripheral vascular disease. She currently uses a manual wheelchair for basic mobility and is taking physiotherapy to learn to use a prosthetic leg and cane. OT Report #1 anticipated that the appellant would need to attend physiotherapy sessions twice weekly for three to six months, and OT Report #2 anticipated that the appellant would "graduate to using a cane and prosthesis for basic mobility in the home and short distances in the community."

The hospital where the appellant receives physiotherapy is about 1 km from her home, up a steep 12% grade. Community services and shopping are also accessed by steep grades and distances of up to 10 km in the appellant's community. The OT expressed the view in OT Report #2 that once the appellant graduates to use of cane and prosthesis, "the manual wheelchair will become a backup chair only and power mobility will be the most beneficial method for community access."

HandyDART service is available in the appellant's community, but the OT wrote in OT Report #1 that "it is cost prohibitive for [the appellant] to fund frequent Handidart (*sic*) trips weekly and scheduling is not always possible. To ensure that [the appellant] continues to have a high quality of life since her amputation it is recommended she be provided with power mobility in the form of a scooter. She will be able to use it to get to all her appointments independently as well as resume participation in grocery shopping; something else she has not been able to do independently with her wheelchair due to inability to carry grocery bags and push her wheelchair along." In OT Report #2 the OT wrote that "Using a manual wheelchair for community distances and Handidart (*sic*) for transport reduces her independence with tasks such as grocery shopping which she can otherwise complete independently

if she has power mobility...a manual wheelchair and Handidart community transportation services in [the appellant's community] are not available for her on a daily basis without considerable and unrealistic scheduling and planning and cost...and, do not meet her needs for power mobility assistance when completing tasks that require carrying and object handling which is not able to do when using a cane or manual wheelchair without an attendant for assistance."

In her Request for Reconsideration the appellant wrote that "I like...to be very independent...and with the scooter I would have that chance, to get to appointments like the Doctor's, physio also to get my dogs out for a walk instead of someone else doing it for me."

In her Notice of Appeal the appellant wrote that she is "wheelchair bound in a house." She noted that while HandyDART is available "I have to plan ahead for all my Apps but what happens if something comes up all of a sudden app or need food can't call up handidart to come right away pick me up."

In her oral testimony the appellant stated that she has to attend physiotherapy sessions at the local hospital rather than in her home because the hospital gives her access to specialized equipment such as parallel bars. She said that the electric scooter will give her the independence to get up to the hospital on her own.

In response to a question from the ministry as to whether her physical condition is significantly different than it was at the time of the original request for the scooter, the appellant replied that she has not been attending physiotherapy twice a week as recommended. She only gets there once a week, or sometimes only once or twice per month.

In response to a question from the panel as to whether HandyDART is available to take her to physiotherapy, the appellant replied that:

- she would have to call HandyDART and it is inconvenient to have to schedule pickups.
- it costs \$2.50 per ride and sometimes she doesn't have the money to pay for it.
- she used the HandyDART once last Christmas, and the driver didn't help her into the house so she hasn't used the service since.

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 medical need for the scooter is confirmed by an assessment by an OT or PT in accordance with section 3(2)(b) of Schedule C of the EAPWDR;
- 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.

The appellant's position is that the evidence demonstrates that all the legislative criteria have been satisfied. She said that the opinions of her physician and the OT demonstrate the medical need for the scooter, and that the scooter is medically essential to achieve or maintain basic mobility. She argued that the manual wheelchair is not appropriate because of the steep grades in her community, that the HandyDART service is not appropriate in her circumstances as she cannot afford it, and it is difficult to schedule, especially on short notice. The appellant argued that she cannot manage DLA outside the home independently unless she has a power scooter. Finally, the appellant argued that

the application and appeal processes have taken a long time, and that it would not be reasonable to make her start back at the beginning of the process.

The ministry's position is that the OT reports do not confirm the medical need for the scooter. The ministry argued that the appellant can independently manage her activities of daily living ("ADL") and that her difficulty arises with instrumental activities of daily living ("IADL") such as grocery shopping and other chores in town which is up a steep hill. Finally, the ministry argued that since the appellant is expected to graduate to use of her prosthetic leg and a cane for basic mobility in the home and short distances in the community, and since the manual wheelchair is available as a backup assistive device, the scooter is not medically essential to achieve or maintain basic mobility.

Panel Decision

Section 3(2)(b) – Medical Need

The appellant's testimony and the OT reports confirm that the appellant independently manages her mobility at home. They confirm the purpose for the scooter would be to permit independent access to the community to perform daily living activities 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. In the panel's view, the medical need must be assessed in the context of "basic mobility".

The EAPWDA defines daily living activities ("DLA") in section 2(1). DLA incorporate the concept of ADL and IADL. The evidence indicates that the appellant is able to manage ADL inside the home, and that the request for the scooter is meant to address IADL outside the home – primarily the mobility component of getting to and from town on steep hills. In the panel's view, the term "basic mobility" does not mean that the appellant must be able to manage IADL or DLA independently of the use of public transportation. The HandyDART provides door to door service to take the appellant from her home into town. The evidence indicates that the appellant can manage short distances within the community with her wheelchair and eventually will be able to do so with her prosthesis and cane. Therefore, the evidence does not establish that the scooter is "necessary" or that the HandyDART/wheelchair/prosthesis/cane options would not suffice to provide access to the community for DLA. The panel finds that the ministry reasonably concluded that the OT reports do not confirm the medical need for the scooter.

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 OT reports seem to interpret the term "basic mobility" as meaning that the appellant should not have to bear the inconvenience and cost of using the HandyDART service. The ministry cannot simply adopt the OT'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 appellant's situation and the OT's opinion 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, in the panel's view the term "basic mobility" does not preclude the use of a HandyDART despite the fact that it is more inconvenient than having one's own electric scooter. The evidence does not demonstrate that the appellant's use of a manual wheelchair, prosthetic, cane and HandyDART 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 having to schedule the use of the HandyDART. 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.