APPEAL #

PART C – Decision under Appeal

This is an appeal of the reconsideration decision of the Ministry of Social Development and Social Innovation ("ministry") dated December 31, 2014, in which the ministry denied the appellant's request for funding for an oxygen concentrator on the basis that the request did not meet the criteria set out in the *Employment and Assistance for Persons with Disabilities Regulation* ("EAPWDR"). The ministry determined that the appellant's request for funds for an oxygen concentrator did not meet the legislative criteria for the following reasons:

- The requested oxygen concentrator is not one of the devices listed under subs. 3.9(1) of Schedule C;
- The requested oxygen concentrator is not required to treat sleep apnea, as required under subs. 3.9(2) of Schedule C;
- The requested oxygen concentrator does not meet the criteria as medical supply set out in subs. 2(1)(a) of Schedule C;
- The requested oxygen concentrator is not medical equipment under section 3 of Schedule C;
- The requested oxygen concentrator is not an item set out in any of the other sections of Schedule C; and
- The appellant is not eligible for an oxygen concentrator under s. 69 of the EAPWDR as an oxygen concentrator is not medical supplies, medical transportation or medical equipment and the appellant is otherwise eligible under s. 62 of the EAPWDR for health supplements.

PART D – Relevant Legislation

Employment and Assistance for Persons with Disabilities Regulation (EAPWDR) sections 62 and 69 and Schedule C – Health Supplements.

APPEAL #

PART E – Summary of Facts

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

- A prescription note from the appellant's family physician dated November 4, 2014 in which he writes that the appellant has nocturnal hypoxemia and that she no longer qualifies for home oxygen "even though she meets the recognized criteria for nocturnal oxygen by medical standards" and refers to the report of the sleep specialist. The appellant's family doctor writes in this note "please fund as this is a life threatening medical condition";
- A copy of a report from a sleep clinic to the appellant's family physician dated September 10, 2014 indicating the appellant was seen for follow-up evaluation for psycho-physiological insomnia and nocturnal hypoxemia. The specialist indicates that he was "prescribing nocturnal oxygen @ 1 lpm. We will refer [the appellant] to [home oxygen program of the Ministry of Health] to see if she meets their criteria for coverage";
- A print out of oximetry test report dated October 4, 2014 from the local hospital respiratory department;
- A copy of a ministry service request form (used for crisis supplement requests) completed by the appellant in which she indicates that she is requesting an "oxygen machine," she indicates that it is an unexpected item of need and the reason it is unexpected is "so I can breathe at night - with oxygen machine I can" and in response to the question about what community resources she has explored "everywhere I don't qualify";
- A copy of an estimate for pre-authorization from a respiratory home care company dated October 31, 2014, indicating that the cost for the purchase of a stationary oxygen concentrator is $2200.00 ($200.00/month to rent) and the yearly maintenance fee (if purchased) is $500.00 and includes all plastics, 24 hour emergency call out and 2 respiratory assessments per year;
- A copy of a faxed home oxygen subsidy qualification outpatient form with faxed stamp date of November 3, 2014, with a check mark in the box beside "qualifies for home oxygen subsidy funding" and a check beside the words "nocturnal oxygen";
- A copy of a ministry form "request for non-local medical transportation assistance" (although this title has been crossed out) completed by the appellant on November 12, 2014 indicating that she is requesting an oxygen machine; and
- The December 16, 2014 submissions of the appellant's advocate.

In the advocate's submissions on reconsideration and at the hearing, the advocate advised that the appellant has been diagnosed with mitochondrial cytopathy and is dealing with nocturnal hypoxemia, as well as heart problems and other medical conditions. The advocate and the appellant said that the appellant is over her limit of 16 puffs per day on her puffer and she has had to go to the hospital several times in the past month to receive oxygen so that she can breathe and to cope with the effects of her breathing difficulties. At the hearing, the advocate advised that the appellant has been to the hospital about 19 times in the past month because of breathing problems. The appellant keeps her living areas very cold as she finds it very difficult to breathe if it is warm. The appellant told the panel that she is suffering from anxiety about her medical condition and is very worried about herself and her children if something should happen to her. The appellant said that she had received oxygen from the Ministry of Health home based oxygen program for about 2 weeks, but the Ministry of Health took away the oxygen machine based on medical information that was out of date and she is not able to get oxygen from the Ministry of Health. At the hearing, the appellant and her advocate said that the appellant's doctor had tried to determine why the Ministry of Health had refused her oxygen under the home based oxygen program, but that the Ministry of Health had based its decision on older medical

information from 5 years ago when her health was better and that the Ministry of Health would not change its mind.

Prior to the hearing, the appellant provided a one-page letter dated January 8, 2015 from her family physician in which he indicates the letter was written to further explain why the appellant requires nocturnal oxygen. In this letter, the family physician confirms that the appellant has mitochondria cytopathy that affects the power generating components of every cell in her body and she has widespread symptoms. The physician listed all of the medications that the appellant takes and writes that the combination of medications that she takes may influence her respiratory effort during the evening. In his letter, the family doctor confirms that the appellant does not suffer from significant obstructive sleep apnea and she can manage her nocturnal hypoxemia by low-flow oxygen, as recommended by the sleep specialist. The physician writes "the failure to treat this nocturnal hypoxemia can result in imminent life-threatening events such as cardiac dysrhythmias … her mitochondrial disorder is a life-threatening disorder due to its progressive nature, but at this time the imminent threat to her life is the development of a cardiac dysrhythmia that could cause sudden death or cause embolic events triggering a cerebral vascular accident."

The ministry did not object to the admission of the January 8, 2015 letter from the appellant's physician, but noted that information about the appellant's cardiac dysrhythmias was not before the ministry at reconsideration, although the ministry agreed that the information about the appellant's nocturnal hypoxemia and that her physician believes that she need oxygen to prevent an imminent danger to her health was before the ministry.

The panel admits the letter of January 8, 2015 under section 22(4)(b) of the *Employment and Assistance Act* as written testimony in support of the information and records before the ministry when the decision under appeal was made. In the letter, the appellant's physician clarifies the information he provided in the prescription note of November 4, 2014, as well as the information provided by the sleep specialist regarding the appellant's medical condition and her need for nocturnal oxygen.

The ministry confirms that the appellant is a designated person with disabilities in receipt of disability assistance and meets the criteria under section 62 of the EAPWDR. The ministry noted in the reconsideration decision and at the hearing that the appellant had not provided any information about why the Ministry of Health had refused to supply her oxygen under the home based oxygen program.

APPEAL #

PART F – Reasons for Panel Decision

The issue on this appeal is whether the ministry's decision to deny the appellant's request for funding for an oxygen concentrator was reasonable based on the evidence or a reasonable application of the legislation in the appellant's circumstances.

Legislation

The following are the relevant provisions of the legislation (the EAPWDR) applicable to the appellant's request for funding for an oxygen concentrator.

62. General health supplements

(1) Subject to subsections (1.1) and (1.2), the minister may provide any health supplement set out in section 2 [*general health supplements*] …. 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,

…

69. Health supplement for persons facing direct and imminent life threatening health need

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) of (f) of section (2)(a);
    (ii) sections 3 to 3.11, other than paragraph (a) of section 3(1).

Schedule C – Health Supplements

2. General health supplements

(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: wound care; ongoing bowel care required due to loss of muscle function; catheterization; incontinence; skin parasite care; limb circulation care;]
    (ii) the supplies are [prescribed by a medical practitioner or nurse practitioner, the least expensive supplies appropriate for the purpose, and 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.

Subsection 2(1)(a.1) of Schedule C of the EAPWDR provides that the following medical or surgical supplies (lancets, needles and syringes, ventilator supplies or tracheostomy 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. Subsection 2(1)(a.2) sets out the requirements for supplements that are consumable medical supplies (supplies required to thicken food). Subsection 2(1)(c) sets out the requirements for medical supplements that are therapy services (acupuncture, chiropractic, massage therapy, naturopathy, non-surgical podiatry, and physical therapy). The number of allowable visits and the amounts payable for visits are set out in subsections 2(2) and 2(2.1).

Provisions for health supplements that are for optical, eye examination, dental, crown and bridgework, denture, emergency dental, natal and infant formula, are set out in sections 2.1, 2.2, 4, 4.1, 5, 8 and 9 of Schedule C of the EAPWDR.

3. Medical equipment and devices

(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:

(iii) the family unit has received the pre-authorization of the minister for the medical equipment or device requested;

(iv) there are no resources available to the family unit to pay the cost of or obtain the medical equipment or device;

(v) the medical equipment or device is the least expensive appropriate medical equipment or device.

Subsection 3(2) applies to medical equipment or devices referred to in sections 3.1-3.8 and 3.12 of Schedule C, which does not apply to the appellant's request for funding for an oxygen concentrator. Subsection 3(2.1) applies to medical equipment or devices referred to in section 3.9(1)(b) to (g), but the requested oxygen concentrator does not fall in the listed devices. Subsection 3(2.1), which requires the provision to the minister, as requested, of one or both of a prescription from a medical or nurse practitioner for the equipment or device, or an assessment by a respiratory, occupational or physical therapist confirming the medical need for the equipment or device, does not apply to the appellant's request for an oxygen concentrator. Subsection 3(3) sets out the requirements for replacement of medical equipment previously provided by the minister under this section, subsection 3(4) sets out the requirements for the repair of medical equipment previously provided by the minister, and subsection 3(5) sets out the requirements for repairs of medical equipment not previously provided by the minister. These sections are not relevant to the appellant's request for funding for an oxygen concentrator.

3.9 Medical equipment and devices – positive airway pressure devices

(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 the requirements set out in subsection (2) of this section are met:

(i) a positive airway pressure device,

…;

(b) if the minister is satisfied that the item is medically essential to monitor breathing,

(i) an apnea monitor; ….

(c) If the minister is satisfied that the item is medically essential for clearing respiratory airways,

(i) A suction unit

(d) If the minister is satisfied that the item is medically essential for clearing respiratory airways,
    (i) 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 …
(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, …
(g) if the minister is satisfied that the item is medically essential to deliver medication,
    (i) 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.

Specific medical equipment and medical devices are listed in Schedule C of the EAPWDR as follows: canes, crutches and walkers (s. 3.1); wheelchairs (s. 3.2); wheelchair seating systems (s. 3.3); scooters (s. 3.4); bathing and toileting aids (s. 3.5); hospital bed (s. 3.6); pressure relief mattresses (s. 3.7); floor or ceiling lift devices (s. 3.8); orthoses (s. 3.10); hearing instruments (s. 3.11); and non-conventional glucose meters (s. 3.12). The appellant's requested oxygen concentrator does not fall under any of these listed medical equipment and devices.

Submissions

The appellant is a designated person with disabilities in receipt of disability assistance and she meets the requirement set out in section 62(1)(a) of the EAPWDR. The appellant suffers from mitochondrial cytopathy and nocturnal hypoxemia, as well as heart problems, and other medical conditions caused by her mitochondrial cytopathy. The appellant and her advocate clarified at the hearing that the appellant does not suffer from sleep apnea (as confirmed in her doctor's letter of January 8, 2015) and is not asking for any of the devices listed under section 3.9 of Schedule C.

In their submissions, the appellant and her advocate argued that the appellant requires the oxygen concentrator so that she has a sufficient level of oxygen in her blood at night and that without the oxygen concentrator, her health is severely compromised, and she faces an imminent and life-threatening need for the oxygen concentrator. The advocate and the appellant point to the information from the appellant's family physician set out in his prescription note of November 4, 2014 in which he confirmed that the appellant has nocturnal hypoxemia, that she no longer qualifies for home oxygen "even though she meets the recognized criteria for nocturnal oxygen by medical standards" and that "this is a life threatening medical condition."

The appellant and her advocate also point to the information provided in the January 8, 2015 letter from the appellant's family physician that the appellant's mitochondria cytopathy causes widespread symptoms, and that her nocturnal hypoxemia can be alleviated by low flow oxygen at night and that "the failure to treat this nocturnal hypoxemia can result in imminent life-threatening events such as cardiac dysrhythmias … that could cause sudden death or cause embolic events triggering a cerebral vascular accident." The appellant and her advocate argue that the appellant's physician has confirmed that she has an imminent and life threatening need for the requested oxygen concentrator

and her request for funding for the oxygen concentrator should be considered under s. 69 of the EAPWDR.

The ministry stood by its reconsideration decision and confirmed that the ministry does not provide oxygen or an oxygen concentrator – that it is the Ministry of Health through its home based oxygen program that provides oxygen to those persons with disabilities who meet the requirements for it. The ministry says that the appellant's request for an oxygen concentrator does not meet the criteria set out in the relevant sections of Schedule C of the EAPWDR under which the ministry provides health supplements to PWDs. The ministry notes that an oxygen concentrator is not a general health supplement under section 2 of Schedule C as it is not one of the listed disposable or reusable medical supplies, or medical or surgical supplies, or required to thicken food.

The ministry determined that the requested oxygen concentrator is not eligible under subsection 3.9 of Schedule C of the EAPWDR, as an oxygen concentrator is not one of the listed devices set out in subsection 3.9 (a positive airway pressure device, an apnea monitor, a suction unit, a percussor, a nebulizer, a medical humidifier, or an inhaler accessory device). The ministry noted that the requested oxygen concentrator was not eligible as medical equipment under section 3 of Schedule C of the EAPWDR as it is not in one of the categories of listed equipment, and an oxygen concentrator is not an eligible item under any of the other sections of Schedule C of the EAPWDR as a therapy, or remaining health supplements.

The ministry determined that the appellant's request for funding for an oxygen concentrator does not meet the criteria under section 69 of the EAPWDR – although the appellant's physician has confirmed that the appellant has an imminent and life threatening need for oxygen to alleviate her nocturnal hypoxemia and reduce the risk of cardiac issues, because the oxygen concentrator is not eligible under the specific sections of Schedule C of the EAPWDR (sections 2, and 3 and following), section 69 does not apply to the appellant's request. The ministry also confirmed that section 69 of the EAPWDR does not apply to those persons who have PWD designation and are otherwise eligible under section 62 of the EAPWDR, such as the appellant.

Panel Decision

The panel notes that the appellant and her advocate did not assert that the requested oxygen concentrator should be considered as medical supply under section 2 of Schedule C, or as medical equipment and devices under section 3(1) of Schedule C, or as one of the listed items in sections 3.1 through 3.12 of Schedule C. The appellant and her advocate argued that the ministry should fund her requested oxygen concentrator under section 69 of the EAPWDR, asserting that the appellant's physician confirms that she has an imminent and life-threatening need for oxygen at night due to her nocturnal hypoxemia.

Section 69 of the EAPWDR stipulates that 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 it 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 the person faces a direct and imminent life threatening need for the health supplement or medical supply. In order to qualify under section 69 of the EAPWDR, the requested item must be one of those listed in sections 2(1)(a) and (f) or 3 of Schedule C, and the person for who the item is requested must be not

otherwise eligible for it under the EAPWDR.

The appellant does not dispute that she is a designated PWD eligible for health supplements under the EAPWDR through section 62. Further, the appellant does not dispute that the requested oxygen concentrator is not listed as an eligible general health supplement or medical equipment and devices in the relevant sections of Schedule C. Accordingly, the panel finds that the ministry's determination that appellant's request for funding for an oxygen concentrator does not meet the requirement of section 69 of the EAPWDR is a reasonable application of the legislation in the appellant's circumstances where she meets the eligibility requirement of section 62 of the EAPWDR, and where the requested item (oxygen concentrator) is not an eligible item under sections 2(1)(a) and (f) and 3 of Schedule C of the EAPWDR.

Therefore, the panel confirms the ministry's decision to deny the appellant's request for an oxygen concentrator as the legislative requirements set out in section 69 and Schedule C of the EAPWDR were not met.