

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the Ministry) reconsideration decision dated April 2, 2015 in which the Ministry denied the Appellant's request for an Obus Forme Back Rest Support ("back rest support") as a health supplement under the Employment and Assistance for Persons with Disabilities Regulation (EAPWDR) because the following sections of Schedule C were not met:

- Section 2(1)(a)(i): The Ministry found that the Appellant is not eligible for the back rest support as a medical supply because it is not required for one of the purposes set out in this section.
- Sections 3.1 to 3.12: The Ministry found that the Appellant is not eligible for the back rest support as medical equipment because it is not set out in these sections. In addition, the information provided does not establish that all other legislated requirements for each type of equipment have been met under these sections and section 3(1).
- Sections 2(1)(c), 2(2), and 2(2.1): The Ministry found that the back rest support does not meet the eligibility criteria as a therapy.
- Sections 2.1, 2.2, 4, 4.1, and 5 to 9: The Ministry found that the back rest support does not meet the criteria as one of the remaining health supplements under these sections.

In addition, the Ministry found the Appellant is not eligible for the back rest support under life-threatening health need in EAPWDR section 69.

PART D – Relevant Legislation

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

PART E – Summary of Facts

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

1. A Request for Reconsideration signed by the Appellant on March 25, 2015 in which he stated that due to constant lower back pain he cannot sit or watch TV without having to get up frequently. Both his medical doctor and his back doctor have suggested the Obus back support. He would like the Ministry to reconsider his request for only a back support without the seat part.
2. A letter from the Ministry to the Appellant dated February 3, 2015 in which the Ministry stated that it does not have the legal authority to provide the requested back rest support
3. Three quotations for medical equipment from medical supply retailers:
 - October 22, 2014: Obus back high back support \$99.99, Obus ultra back support \$129.99, and Obus contoured seat cushion \$69.99;
 - December 1, 2014: Obus Forme back support \$95.80, and Obus back seat \$74.89, total \$170.69; and
 - December 1, 2014: Obus Forme low back \$75.99 and Obus Forme seat \$59.99, total with tax is \$145.57.
4. Two prescriptions:
 - from an osteopathic physician dated September 9, 2014 for an Obus Forme back rest support; and
 - from a physician dated March 23, 2015, “back support cushion recommended”.

Appellant's additional submissions

Subsequent to the reconsideration decision the Appellant submitted the following documents:

1. A Notice of Appeal dated April 9, 2015 in which he reported that all of his doctors have come to the conclusion that a back rest support would greatly increase his standard of life without pain in his lower back.
2. A quotation from a pharmacy dated April 27, 2015 for an Obus Forme low back support, \$75.95.

The panel finds that the above information corroborates the information in the reconsideration record that included prescriptions from two physicians and three quotations for Obus back support products. The panel therefore admits the additional submissions under section 22(4)(b) of the *Employment and Assistance Act* (EAA) as evidence in support of the information and records that were before the Ministry at the time the decision being appealed was made.

Oral testimony

The Appellant had two advocates with him at the hearing. One of them is his case manager for whom a Release of Information was faxed to the tribunal office prior to the hearing. The other was the case manager's colleague and the Appellant gave his verbal consent for her to participate in the teleconference.

The Appellant stated that being without the back rest support not only affects him physically, but also affects his lifestyle psychologically and emotionally both in the community and at home. It affects his volunteer work at a community program when he cannot sit with clients for very long. He cannot get up without pain; he cannot sit or read for more than five minutes or watch TV for more than ten minutes without getting up; and he requires more prescription painkillers to manage his pain. All of his doctors have recommended the back rest support and say that the benefit would be to reduce his need for narcotics for lower back pain. The Appellant added that his pharmacist has brought the price down to \$75 and is willing to match any lower price for the item.

In response to questions from the Ministry and the panel regarding any evidence he has that addresses the Ministry's reasons for denial, the Appellant stated that he has repeated prescriptions for the Obus Forme item. He has multiple prescriptions from three different doctors because the pain also affects his mental health. He gets anxiety with the pain as well as other psychiatric symptoms, and he has to take more medications for these as well; his psychiatrist therefore supports his request for the back rest support.

In response to further questions, the Appellant stated that he was given orthotics three years ago due to back pain but his back doctor said the orthotic is no longer working because he has hip as well as back problems and he may need surgery if he doesn't get the back rest support.

The panel finds that the oral testimony corroborates the information in the reconsideration record that included prescriptions from physicians recommending the back rest support, and in the Request for Reconsideration where the Appellant described his pain and its effects on his functioning. The panel therefore admits the oral submissions under section 22(4)(b) of the EAA as evidence in support of the information and records that were before the Ministry when the decision being appealed was made.

Ministry's submission

The Ministry relied on its reconsideration decision and did not provide any additional evidence for the hearing. At the hearing, the Ministry made arguments for why the back rest support does not fit under specific items listed in the legislation. The panel will address the Ministry's arguments in the next section, Part F – Reasons for Panel Decision.

PART F – Reasons for Panel Decision

The issue in this appeal is whether the Ministry's reconsideration decision of April 2, 2015 denying the Appellant's request for an Obus Forme Back Rest Support because it is not an eligible item under Schedule C and section 69 of the EAPWDR, was reasonably supported by the evidence or was a reasonable application of the applicable enactment in the circumstances of the Appellant.

Legislation - EAPWDR

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*] 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

The Ministry acknowledged that the Appellant is eligible for health supplements pursuant to EAPWDR section 62 but found that the Appellant was not eligible for the requested items under the following sections of the EAPWDR:

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) or (f) of section (2) (1);
- (ii) sections 3 to 3.12, other than paragraph (a) of section 3 (1).

Schedule C - 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;

(c) subject to subsection (2), a service provided by a person described opposite that service in the following table, delivered in not more than 12 visits per calendar year,

(i) for which a prescribed by a medical practitioner or nurse practitioner has confirmed an acute need,

(ii) if the visits available under the Medical and Health Care Services Regulation, B.C. Reg. 426/97, for that calendar year have been provided and for which payment is not available under the *Medicare Protection Act*, and

(iii) for which there are no resources available to the family unit to cover the cost:

Item	Service	Provided by	Registered with
1	acupuncture	acupuncturist	College of Traditional Chinese Medicine under the <i>Health Professions Act</i>
2	chiropractic	chiropractor	College of Chiropractors of British Columbia under the <i>Health Professions Act</i> (B.C. Reg. 420/2008)
3	massage therapy	massage therapist	College of Massage Therapists of British Columbia under the <i>Health Professions Act</i>
4	naturopathy	naturopath	College of Naturopathic Physicians of British Columbia under the <i>Health Professions Act</i>
5	non-surgical podiatry	podiatrist	College of Podiatric Surgeons of British Columbia under the <i>Health Professions Act</i> (B.C. Reg. 169/2010)
6	physical therapy	physical therapist	College of Physical Therapists of British Columbia under the <i>Health Professions Act</i>

(2) No more than 12 visits per calendar year are payable by the minister under this section for any combination of physical therapy services, chiropractic services, massage therapy services, non-surgical podiatry services, naturopathy services and acupuncture services.

(2.1) If eligible under subsection (1) (c) and subject to subsection (2), the amount of a general health supplement under section 62 of this regulation for physical therapy services, chiropractic services, massage therapy services, non-surgical podiatry services, naturopathy services and acupuncture services is \$23 for each visit.

2.1 Optical supplements

2.2 Eye examination supplements

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:

(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.

3.1 Medical equipment and devices – canes, crutches and walkers

3.2 Medical equipment and devices – wheelchairs

3.3 Medical equipment and devices – wheelchair seating systems

3.4 Medical equipment and devices - scooters

3.5 Medical equipment and devices – bathing and toileting aids

3.6 Medical equipment and devices – hospital bed

3.7 Medical equipment and devices – pressure relief mattresses

3.8 Medical equipment and devices – floor or ceiling lift devices

3.9 Medical equipment and devices – positive airway pressure devices

3.10 Medical equipment and devices – orthoses

(1) In this section,
“orthosis” means;

(a) a custom-made or off-the-shelf foot orthotic;

(b) custom-made footwear;

(c) a permanent modification to footwear;

(d) off-the-shelf footwear required for the purpose set out in subsection (4.1) (a);

(e) off-the-shelf orthopaedic footwear;

(f) an ankle brace;

(g) an ankle-foot orthosis;

(h) a knee-ankle-foot orthosis;

- (i) a knee brace;
- (j) a hip brace;
- (k) an upper extremity brace;
- (l) a cranial helmet used for the purposes set out in subsection (7);
- (m) a torso or spine brace;
- (n) a foot abduction orthosis;
- (o) a toe orthosis.

(2) Subject to subsections (3) to (11) of this section, an orthosis is a health supplement for the purposes of section 3 of this Schedule if

- (a) the orthosis is prescribed by a medical practitioner or a nurse practitioner,
- (b) the minister is satisfied that the orthosis is medically essential to achieve or maintain basic functionality,
- (c) the minister is satisfied that the orthosis is required for one or more of the following purposes:
 - (i) to prevent surgery;
 - (ii) for post-surgical care;
 - (iii) to assist in physical healing from surgery, injury or disease;
 - (iv) to improve physical functioning that has been impaired by a neuro-musculo-skeletal condition, and
- (d) the orthosis is off-the-shelf unless:
 - (i) a medical practitioner or nurse practitioner confirms that a custom-made orthosis is medically required, and
 - (ii) the custom-made orthosis is fitted by an orthotist, pedorthist, occupational therapist, physical therapist or podiatrist.

(8) For an orthosis that is a torso or spine brace, in addition to the requirements in subsection (2) of this section, the brace must be intended to provide pelvic, lumbar, lumbar-sacral, thoracic-lumbar-sacral, cervical-thoracic-lumbar-sacral, or cervical spine support.

3.11 Medical equipment and devices - hearing instrument

3.12 Medical Equipment and devices – non-conventional glucose meters

4 Dental supplements

4.1 Crown and bridgework supplement

5 Emergency dental supplements

6 Diet supplements

7 Monthly nutritional supplement

8 Natal supplement

9 Infant Formula

The panel notes that the Ministry found that the Appellant meets the basic eligibility for health supplements under EAPWDR section 62 because he is a recipient of disability assistance. However, the Ministry found that the Appellant is not eligible for the back rest support under the following sections of the legislation:

EAPWDR Schedule C

Section 2(1)(a)(i): item not required for one of the purposes set out in this section.

Appellant's position

The Appellant argued that he requires the back rest support to alleviate his chronic and severe back pain, reduce his need for pain medication, improve both his physical and mental health, and avoid surgery. All of his doctors have prescribed the item for his medical conditions.

Ministry's position

In its reconsideration decision, the Ministry argued that the back rest support is not required for one of the purposes listed in section 2(1)(a)(i). At the hearing, in response to a question from the panel, the Ministry argued that the back rest support is also not a disposable or reusable medical or surgical supply as required under section 2(1)(a), and even though “disposable or reusable” aren’t defined in the legislation, there is no evidence that the back rest support is something that is replaced on a regular basis.

Panel decision

The panel finds that the Ministry reasonably determined that the back rest support is not required for one of the purposes specified in section 2(1)(a)(i) of Schedule C. The Appellant’s medical need for the back rest support, as prescribed by his physicians, is not covered under this section.

The purposes listed in section 2(1)(a)(i) include wound care, bowel care, catheterization, incontinence, skin parasite care, and limb circulation care. This section clearly requires the medical supply to be for one of these purposes; however, there is no evidence that the Appellant’s back pain resulted from a wound. The prescriptions of September 9, 2014 and March 23, 2015 are the only information in the record from the Appellant’s medical practitioners and neither these nor the Appellant’s testimony provide any information about the cause of his back pain.

Regarding the Ministry’s argument at the hearing that the back rest support is also not a “disposable or reusable” supply, the panel notes that this was not a finding or basis of denial in the reconsideration decision and is therefore not at issue in this appeal. The panel therefore finds that the Ministry reasonably concluded that the back rest support was not required for one of the purposes listed in EAPWDR Schedule C, section 2(1)(a)(i).

Sections 3.1 to 3.12: not an eligible item under these sections and the information provided does not establish that all other legislated requirements for each type of equipment have been met under these sections and section 3(1)

Appellant's position

At the hearing the Appellant reported chronic pain and argued that “an exception should be made for humanitarian reasons, to bypass the government criteria when the pain is so severe”. All of his doctors prescribed the back rest support and he wants to get help before he ends up at the hospital needing surgery.

Ministry's position

The Ministry argued that the Appellant is not eligible for the back rest support as medical equipment under these sections because the item is not set out in sections 3.1 to 3.12 of Schedule C and all of the other legislated requirements related to each listed item have not been met. At the hearing the Ministry stated that it is required to follow the legislation and while it has some discretion to look at the types of items covered to see if the back rest support could fit in anywhere, off the shelf items such as the Obus Forme are generally not eligible.

The Ministry further argued that the prescriptions from the Appellant's doctors state only that a “back rest support” and “back rest cushion” are recommended. The Ministry argued that “these are not strong notes as they provide no details regarding the specific function for the item or how it would be useful”. The Ministry stated that the prescriptions gave it no leeway to look at where the back rest support might fit into the legislation, but even if additional information was provided, all legislated criteria must still be met. The Ministry acknowledged that the Appellant is in pain and the back rest support would be useful to him but submitted that there is no legislative authority under which the Ministry can provide the requested item.

At the hearing, the Ministry stated that the back rest support probably fits under orthosis (section 3.10 of Schedule C) more than anywhere else; however, the information provided does not describe the back rest support as a “torso or spine brace”. Moreover, all of the other criteria for orthoses would need to be met; for example, the item would have to be for one of the purposes listed in sections 3.10(2) and 3.10(8) of Schedule C. The listed purposes include preventing surgery, and providing specific types of back support.

Panel decision

The panel finds that the Ministry reasonably determined that the back rest support is not set out in sections 3.1 to 3.12 of EAPWDR Schedule C, and therefore the legislative requirements for the items listed under these sections and section 3(1) [which applies to the medical equipment and devices listed in 31 to 3.12] have not been met. The panel's authority is limited to determining whether the Ministry's reconsideration decision was reasonably supported by the evidence or a reasonable application of the legislation. As such, neither the panel nor the Ministry has the authority to overturn the reconsideration decision for humanitarian reasons.

Sections 3.1 to 3.12 of Schedule C set out eligibility criteria for canes, crutches, walkers, wheelchairs, scooters and accessories; bathroom items including grab bars, a hospital bed, pressure relief mattress, floor or ceiling lift device, positive airway pressure device and accessories; orthoses and braces; and hearing instruments and glucose meters. The Appellant did not request any of those items and the panel finds that the ministry reasonably determined that the back rest support does not fall within the definition of any of the items in these sections.

Regarding an orthosis, the panel finds that the Ministry reasonably determined that the back rest support is not a “torso or spine brace” under section 3.10(1)(m) of Schedule C. As noted by the Ministry, the doctors’ prescriptions are for a “back rest support” and a “back rest cushion”, not a “brace”. Further, all of the price quotations including the additional one from the pharmacist are for a back rest support or cushion. There is also no Medical Equipment Justification form in the record which a physician would use to make a case for the requested item and specifically state its function and purpose. The panel finds that the Ministry reasonably determined that the back rest support is not an item listed under sections 3.1 to 3.10 of EAPWDR Schedule C and therefore does not meet the additional criteria for the listed items as set out in these sections and section 3(1) of Schedule C.

Sections 2(1)(c), 2(2), and 2(2.1): does not meet the eligibility criteria as a therapy

Appellant’s position

The Appellant argued that he requires the back rest support to alleviate his chronic and severe back pain, reduce his need for pain medication, improve both his physical and mental health, and avoid surgery. All of his doctors have prescribed the item for his medical conditions.

Ministry’s position

The Ministry argued that the back rest support does not meet the criteria as a therapy under these sections which set out that the Ministry may provide no more than 12 visits per calendar year at a rate of \$23 per visit for acupuncture, chiropractic, massage, naturopathy, podiatry, and physical therapy.

Panel decision

These sections govern visits to various types of therapists and there is no evidence that the Appellant requested any type of therapy. The prescriptions from his doctors do not recommended any type of therapy and there is no recommendation in the record for any of the therapy visits covered under these sections. The panel therefore finds that the Ministry reasonably determined the Appellant’s request for the back rest support does not meet the criteria for therapies under sections 2(1)(c), 2(2), and 2(2.1) of EAPWDR Schedule C.

Sections 2.1, 2.2, 4, 4.1, and 5 to 9: does not meet the criteria as one of the remaining health supplements

Appellant's position

The Appellant argued that he requires the back rest support to alleviate his chronic and severe back pain, reduce his need for pain medication, improve both his physical and mental health, and avoid surgery. All of his doctors have prescribed the item for his medical conditions.

Ministry's position

The Ministry argued that the requested back rest support is not a health supplement set out in any of the remaining sections of Schedule C. The back rest support is not an optical or eye examination supplement, nor is it a supplement for dental work or diet and nutrition including infant supplements as listed in these sections. In addition, the Ministry submitted that the information provided does not establish that the other criteria for the health supplements specified in these sections have been met.

Panel decision

These sections list health supplements that the Ministry may fund when the associated eligibility criteria for each supplement are met. The eligible supplements include optical and dental procedures; and diet, nutrition, natal, and infant formula requirements. The back rest support is clearly not any of these, and it follows that the Appellant's medical need for the item as stated by the Appellant and his doctors is therefore not a consideration for determining eligibility under these sections. Accordingly, the panel finds that the Ministry reasonably determined that the Appellant is not eligible for the back rest support under sections 2.1, 2.2, 4, 4.1, and 5 to 9 of EAPWDR Schedule C.

EAPWDR section 69

Section 69: not eligible under direct and imminent health need

Appellant's position

The Appellant argued that he requires the back rest support to alleviate his chronic pain, limit his use of narcotic pain medication, and prevent the need for surgery. All of his doctors recommended the back rest support and they support his request for the item in terms of both his physical and mental health.

Ministry's position

The Ministry found that the Appellant is not eligible to receive the back rest support as a health supplement for a person facing a direct and imminent life-threatening health need. The Ministry submitted that EAPWDR section 69 applies to the health supplements set out under Schedule C,

sections 2(1)(a) to (f) [general health supplements] and section 3 [medical equipment and devices] and is intended to provide a remedy for persons facing a direct and imminent life-threatening health need who are not otherwise eligible to receive these supplements. The Ministry argued that the requested back rest support is not a health supplement set out in sections 2 and 3 of Schedule C and the Appellant's request has not met all of the requirements specified in sections 2(1)(a) to (f) [general health supplements] and section 3 [medical equipment and devices].

The Ministry further argued that the information provided does not demonstrate that the Appellant faces a direct and imminent danger to his health if the back rest support was not made available to him, but even if this were established, the Appellant would not be eligible for the back rest support as it is not a health supplement set out in Schedule C, sections 2(1)(a) and (f). Further, the Appellant's request has not met all of the requirements specified in Schedule C, sections 2(1)(f) and sections 3.1 to 3.12.

Panel Decision

In order to be eligible for a health supplement under section 69, the person must be facing a direct and imminent life-threatening health need and not be eligible for health supplements under other sections of the EAPWDR. The Appellant is eligible to receive the health supplements set out under sections 2 and 3 of Schedule C because he meets the basic eligibility requirement for health supplements as a recipient of disability assistance under EAPWDR section 62(1)(a).

Regarding a direct and imminent life-threatening health need under EAPWDR section 69(a), the panel finds that the Ministry reasonably determined that the information provided does not establish this level of need for the back rest support. While the Appellant testified that the back rest support would assist him to reduce his pain medications and avoid surgery, there is no information in the record to confirm that the Appellant requires the back rest support to meet a direct and imminent life-threatening health need. The Appellant stated that he wants to get his back pain under control so that he won't need surgery (a future event). Further, the prescriptions from his doctors do not mention any imminent life-threatening health need for the back rest support.

The panel notes that even though the Appellant is eligible for health supplements under sections 2 and 3 of EAPWDR Schedule C, his request must still meet the specific eligibility requirements for a particular item or supplement. If the item he requested is not listed in the legislation as an eligible item, then the Ministry has no legal authority to provide a health supplement to cover the cost of the item.

The panel finds that the Ministry reasonably determined that a back rest support is not an eligible item under Schedule C, sections 2(1)(a) [medical supplies for a specific purpose as listed in the legislation] to 2(1)(f) [disposable or consumable medical supplies, therapies, and medical transportation], or section 3 which applies to the medical equipment and devices that are listed in sections 3.1 to 3.12 of the Schedule.

As noted earlier, the panel finds that the Ministry reasonably determined that the back rest support is not an eligible item under sections 3.1 to 3.12. Given that the back rest support is not eligible under sections 2(1), 3, or 3.1 to 3.12 of Schedule C, the panel finds that the Ministry reasonably determined that the Appellant is not eligible for the back rest support to meet a direct and imminent life-threatening health need under EAPWDR section 69.

Conclusion

The panel finds that the Ministry's denial of the Appellant's request for a health supplement for an Obus Forme Back Rest Support is reasonably supported by the evidence and is a reasonable application of the applicable enactment [EAPWDR Schedule C and section 69] in the circumstances of the Appellant. The panel confirms the Ministry's reconsideration decision.