APPEAL #

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the "ministry") reconsideration decision dated March 27, 2015 wherein the ministry denied the appellant's request for funding for a two-month trial of a Constant Positive Airway Pressure ("CPAP") machine along with mask and chin strap accessories (collectively the "Requested Items") on the grounds that:

- the appellant's medical condition is only mild sleep apnea, rather than being moderate to severe as required by s. 3.9(2)(c) of Schedule C of the Employment and Assistance for Persons with Disabilities Regulation ("EAPWDR"); and

- the CPAP machine was not necessary in order for the appellant to meet a direct and imminent life-threatening need and did not satisfy the applicable criteria of sections 3 to 3.12 of Schedule C as required by s. 69 of the EAPWDR.

PART D – Relevant Legislation

EAPWDR section 69 and Schedule C sections 3 and 3.9

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PART E – Summary of Facts

The information before the ministry at the time of reconsideration included the following:

- The appellant is designated as a person with disabilities and was receiving disability assistance prior to transitioning to Medical Services Only due to income exceeding the amount of disability assistance for which she was eligible.

- A Medical Equipment Request and Justification form (the "MERJ") signed by the appellant's family physician on September 23, 2014. On the MERJ the family physician diagnosed the appellant with obstructive sleep apnea ("OSA") seizure disorder, refractory epilepsy, and migraines, and recommended CPAP equipment for the appellant. The MERJ was also signed by a respiratory therapist on October 17, 2014, certifying that he had assessed the appellant and that a fixed pressure CPAP machine, heated humidifier, and CPAP mask for long-term use were required to meet the appellant's needs.

- A quote dated October 17, 2014 in the amount of $740.00 for a 2 month trial of the Requested Items. The quote also indicated the total cost of a CPAP machine is $2,000.00 and a mask $300.00.

- Results of a sleep study of the appellant dated September 10, 2014, indicating that the appellant has an AHI score of 7 (normal is less than 6), an RI of 10, and an Epworth score of 8/24. In an accompanying letter, a physician specializing in neurology and sleep medicine (the "Sleep Medicine Specialist") assessed the results of the sleep study and indicated that:
  - The appellant's Epworth score is consistent with mild daytime sleepiness.
  - Manual scoring gave her an overall AHI of 10.1 events per hour which is consistent with mild predominately OSA.
  - Impression of mild OSA with mild oxygen desaturation.
  - A CPAP trial should be considered if the appellant has significant non-refreshing sleep with excessive daytime fatigue.
  - Other alternative approved treatment options include dental appliance, a tongue retaining device, regular exercise with weight loss, positional therapy to avoid sleeping supine, and/or surgery.

- A hand-written note from the appellant's family physician dated November 6, 2014 strongly recommending that funding for CPAP equipment be "expedite[d] as soon as possible" to treat her OSA.

- A letter from a neurologist, dated March 6, 2015, stating that:
  - The appellant had been diagnosed with mild OSA and that since she has been using a CPAP for a short period of time they notice that "she is less tired during the day and feels more refreshed."
  - Since surgery in April 2014 the appellant's epileptic seizures now only occur during sleep.
  - **Any degree of poor sleep can worsen seizure control in an epileptic patient.** (emphasis included)
  - The appellant subjectively feels much more rested after using the CPAP, and improved sleep quality "could help contribute to better seizure control…Granted that [the appellant] does not have moderate to severe OSA, the degree to which the OSA is contributing to

her seizures is questionable."

- A letter from the family physician, dated March 9, 2015, stating that:
  - He has been treating the appellant for 2 ½ years and is aware that her untreated OSA contributes to worsening of her epileptic seizure control.
  - Her seizures tend to occur more frequently at night and it is critical that she have adequate oxygenation of her brain throughout the night.
  - If the appellant does not have treatment of her OSA with the Requested Items she will be "at risk of further seizure activity and deterioration of her cognitive functioning."

- The appellant's reconsideration submission dated March 21, 2015 in which she states that:
  - She has been diagnosed with moderate sleep apnea.
  - She has a very dangerous form of epilepsy.
  - Her seizures occur only during sleep and she can't wake up after a seizure.
  - She can have up to five seizures in a six hour period.
  - Anywhere from one to three of her seizures have been Grand Mal (full generalized) seizures, which "…ARE life threating, requiring immediate emergency medical care (911) and hospitalization." (emphasis included)
  - Since she has had access to a CPAP trial, the quality of life for her and her family has improved greatly.

Prior to the appeal hearing, the appellant submitted to the office of the Employment and Assistance Appeal Tribunal a letter from the family physician dated April 9, 2015 and a written statement from the appellant's advocate (her husband) dated April 22, 2015.

In his letter of April 9, 2015 the family physician wrote that:

"Without treatment of her sleep apnea, which may trigger aggravation of seizures, a life-threatening condition exists. I therefore strongly recommend that the Ministry fund the required CPAP equipment for the safety of this patient…If [the appellant] does not have treatment of obstructive sleep apnea with a CPAP machine with the appropriately fitted CPAP mask and chin strap, she will be at risk of further seizure activity and deterioration of her cognitive functioning, and potential death from hypoxemia…While using the CPAP equipment she has not suffered any seizures except for one afternoon March 27, 2015 when she took a nap and did not use the CPAP, then she had a seizure. Certainly it indicates that the CPAP is effective in keeping her from having seizures. And the opposite is also true that when she does not use the CPAP she is more prone to having seizure activity."

In her written statement of April 22, 2015 the advocate, writing on the appellant's behalf "as Husband and Advocate", stated that:

- Since being diagnosed with epilepsy five years ago the appellant's health has taken a drastic turn for the worst.
- In the case of a Grand Mal seizure, the appellant produces a large quantity of fluids which, if aspirated, will cause death.
- The family physician arranged to have a sleep apnea test done which was positive but not severe.
- The Grand Mal seizures are life-threatening and because of high medical expenses incurred previously the family is not financially able to provide a CPAP machine on its own.

In her oral testimony, the appellant (primarily through her advocate) stated that:

- Her OSA study scores show she has mild to moderate sleep apnea. If she had scored higher the decision to provide her with a CPAP would be a "no-brainer".
- Typically Grand Mal seizures may occur in clusters of three to five and are life-threatening.
- When she is using the CPAP the appellant doesn't have any seizures or if she does the events, if any, are much milder.
- Grand Mal seizures require a 911 call and hospitalization.
- One can't say that the CPAP will stop all seizures at night.
- The seizures affect the advocate/husband's quality of life as well as it affects his ability to provide child care, provide care to the appellant, and attend his job.
- The appellant has been provided with a trial CPAP by a corporate medical equipment supplier without waiting for ministry approval. The corporate supplier is so concerned with the risks posed to the appellant's health that it won't take the CPAP back until "the final decision by the ministry."
- A reduction in seizures will reduce the number of ambulance trips and hospitalizations required by the appellant, and will reduce the government's overall costs.
- The appellant is afraid to go to sleep every night. Her family is afraid that she will die.
- Seizures cause her muscles to tighten up severely. After a Grand Mal seizure it takes days to recuperate because it makes her body feel as though she's been in a car wreck.

In response to a question from the ministry, the appellant's advocate confirmed that he does not have medical coverage from his employer which will provide the Requested Items.

In response to questions from the panel, the appellant (through her advocate) stated that:

- It isn't possible to say that use of the CPAP machine will prevent all possible seizure activity.
- The appellant did have three severe seizures in February while using the CPAP.
- Physical trauma (such as a recent slip and fall on ice) and emotional trauma (such as the recent death of a neighbour) have triggered seizures whether or not the appellant was using the CPAP.
- On average the appellant has gone seven to nine weeks between seizures while on the CPAP. Before the CPAP she had seizures every one to two weeks.
- The appellant has not tried the alternative treatments suggested by the Sleep Medicine Physician, who has never met the appellant and had no knowledge of the appellant's other medical conditions. He provided generalized suggestions that are not applicable to the appellant.
- The appellant cannot use a dental appliance because she has bad teeth, she tolerates the CPAP well, she is underweight rather than obese, she already exercises to the extent that she is able, and she has to sleep on her back because of back and neck issues. Accordingly, the appellant's family physician has not followed up on the suggested alternate therapies.

Admissibility of Additional Information

The family physician's letter of April 9, 2015 tends to corroborate the submissions made by the appellant at reconsideration regarding the life-threatening nature of the appellant's seizures and the role the Requested Items play in reducing the number of seizures. The advocate's written statement

of April 22, 2015 tends to corroborate earlier information regarding the appellant's medical condition and the risks posed by her seizures. The ministry did not object to either document. The appellant's oral testimony also tended to corroborate previous information about the appellant's medical condition. Accordingly, the panel has accepted both documents and the appellant's oral testimony into evidence in accordance with section 22(4) of the *Employment and Assistance Act*.

The ministry relied on its reconsideration decision and provided no additional information.

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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 a two-month trial of the Requested Items on the bases that:

- she did not have moderate to severe sleep apnea as required by s. 3.9(2)(c) of Schedule C of the EAPWDR; and
- the CPAP machine was not necessary in order for the appellant to meet a direct and imminent life-threatening need and the applicable requirements in sections 3 to 3.12 of Schedule C were not met as required by s. 69 of the EAPWDR.

The relevant legislation is as follows:

EAPWDR

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 3.11, other than paragraph (a) of section 3 (1).

Schedule C

3 (1) Subject to subsections (2) to (5) of this section, the medical equipment and devices described in sections 3.1 to 3.11 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…

3.9 (1) Subject to subsection (4) 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 (2) of this section are met:

(a) a positive airway pressure device;

(b) an accessory that is required to operate a positive airway pressure device;

(c) a supply that is required to operate a positive airway pressure device.

(2) The following are the requirements in relation to an item referred to in subsection (1) 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.

(3) The period of time referred to in section 3 (3) (b) of this Schedule with respect to replacement of an item described in subsection (1) of this section is

(a) 5 years from the date on which the minister provided the item being replaced, for an item described in subsection (1) (a), and

(b) 1 year from the date on which the minister provided the item being replaced, for an item described in subsection (1) (b) or (c).

(4) A ventilator is not a health supplement for the purposes of section 3 of this Schedule.

* * *

Schedule C, section 3.9 – moderate to severe sleep apnea

The appellant's position - as advanced through her advocate - is that she has been assessed as having mild to moderate sleep apnea, and that if her AHI score had been higher the ministry's decision would have been to supply the Requested Items. The appellant argued that the Requested Items will reduce the number of seizures, thus reducing the government's overall costs because fewer ambulance rides and hospitalizations will be required.

The ministry's position is that the legislation does not authorize the ministry to supply the Requested Items since the appellant's sleep apnea is assessed as mild rather than moderate or severe. The ministry argued that the appellant's sleep study results of AHI score 7 and manual scoring of 10.1 events per hour are consistent with mild sleep apnea, as per the current consensus of the American Academy of Sleep Medicine. The ministry argued that ranges for AHI scores are 0-5 normal, 5-15 mild, 15-30 moderate, and 30+ severe. Accordingly, the ministry argued that the evidence does not demonstrate that the Requested items are medically essential for the treatment of moderate to severe sleep apnea.

Panel Decision:

The appellant has indicated that her sleep apnea was assessed as being mild to moderate. However, the medical evidence is consistent that the appellant's AHI scores are indicative of mild sleep apnea.

The beneficial effects of the Requested Items on the appellant's risk of seizures are not a factor that is relevant to the criteria prescribed in section 3.9(2)(iii) of Schedule C of the EAPWDR – that the Requested Items are medically essential for the treatment of moderate to severe sleep apnea. The cost/benefit analysis proposed by the appellant (overall cost reductions due to fewer hospitalizations) is not a prescribed criterion and doesn't assist in interpreting the legislation.

Since the medical evidence is clear that the appellant has mild sleep apnea rather than moderate or severe sleep apnea, the panel finds that the ministry reasonably determined that section 3.9(2) of Schedule C of the EAPWDR does not authorize the ministry to provide the Requested Items to the

appellant as they are not medically essential for the treatment of moderate to severe sleep apnea.

Section 69 – direct and imminent life threatening need

The appellant's position is that she has a direct and imminent life threatening need for the Requested Items since they significantly reduce the risk of Grand Mal seizures. She argued that the family physician has stated that without the Requested Items she will be at risk of further seizure activity, deterioration of cognitive functioning, and potential death from hypoxemia. She also argued that the alternative therapies suggested by the Sleep Medicine Specialist are not applicable to her situation – they are generalized recommendations provided by a physician who had never met the appellant and did not know about her other medical conditions. She also argued that the evidence of her family physician should be preferred over that of the neurologist since the family physician has a more thorough knowledge of the appellant's circumstances. Finally, the appellant argued that the Requested Items will significantly improve the quality of life of her and her family.

The ministry's position is that the evidence does not establish that the appellant is facing a direct and imminent life-threatening need, or that the Requested Items are necessary to meet a direct and imminent life-threatening need. The ministry also argued that the Requested Items do not meet the applicable requirements specified in sections 3 to 3.12.

Panel Decision

On the plain meaning of the legislative language, s. 69 of the EAPWDR applies where a person faces a direct and imminent life threatening need and a health supplement – in this case the Requested Items – are necessary to meet that need.

The appellant has proffered the family physician's letter of April 9, 2015 as evidence of the life-threatening nature of the appellant's medical condition. The panel is concerned with inconsistencies between this letter and other evidence. Firstly, none of the other medical evidence – the MERJ, Sleep Medicine Specialist's report of September 10 2014, the neurologist's letter of March 6 2015, or the family physician's letter of March 9 2015 – refer to the appellant's life being at risk. They primarily relate to improvements in the appellant's quality of life. One would expect that if there was a direct and imminent risk of death that would be met by provision of the Requested Items, it would have been addressed by the physicians at first instance or on reconsideration, rather than not being raised until this appeal. Secondly, the April 9, 2015 letter states that while using the Requested Items the appellant has not suffered any seizures except for one afternoon. However, the oral testimony of the appellant (as provided by her advocate) is that she has had at least three serious seizures since she has been using the Requested Items provided by the corporate supplier.

Because of these inconsistencies, the panel has decided to give little weight to the family physician's letter of April 9, 2015. In the panel's view, the ministry reasonably determined that the evidence does not support the appellant's contention that her medical condition poses a direct and imminent life threatening need that will be met by the Requested Items. There is also insufficient evidence to demonstrate that the degree of immediacy required by the term "imminent" is present in the appellant's circumstances.

Even if one was to accept that the "direct and imminent life threatening need" criterion was satisfied, section 69(d)(ii) still requires the applicable requirements of sections 3 to 3.12 to be met (other than paragraph (a) of section 3.1.) In the appellant's case, the applicable requirements are those of section 3.9 of Schedule C. For the reasons given above under the discussion of section 3.9(2), the

requirement for the appellant to have moderate to severe sleep apnea has not been satisfied.

Based on the foregoing evidence and analysis, the panel finds that the ministry reasonably concluded that the appellant did not satisfy the legislative criteria of s. 69. The panel acknowledges the appellant's argument that the Requested Items will improve her and her family's quality of life. Unfortunately, that is not sufficient grounds under the legislation to authorize the ministry to provide the Requested Items.

Conclusion

The panel acknowledges the difficult circumstances faced by the appellant and her family. However, the panel is bound by the legislation. Based on the foregoing reasons, the panel finds that the ministry's decision to deny the appellant's request for the Requested Items was a reasonable application of the legislation in the circumstances of the appellant, and accordingly confirms the decision.