PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (ministry)'s reconsideration decision dated August 17, 2015, which denied the appellant's request for a 2-month trial of a breathing assistance medical device to alleviate his sleep apnea on the basis that the ministry did not consider that the appellant suffered from moderate to severe sleep apnea as required by subsection 3.9(2)(c) of Schedule C to the Employment and Assistance for Persons with Disabilities Regulation.

PART D – Relevant Legislation

The relevant legislation is subsections 3.9(1) and 3.9(2) of Schedule C to the Employment and Assistance for Persons with Disabilities Regulation (EAPWDR).

PART E – Summary of Facts

The appellant is in receipt of disability assistance.

On February 12, 2015 the ministry denied the appellant's request for a two month trial of a CPAP with accessories.

On May 28, 2015 the ministry received another request for two month trial of a CPAP with accessories. The ministry considered the following documents in making its reconsideration decision:

- A fax from a respiratory services organization containing:
  - A rental quote
  - A Medical Equipment Request and Justification Form dated December 17, 2014,
  - A consult letter to the appellant's physician dated October 21, 2014 and completed by a respirology specialist reporting the following:
    - A telephone follow-up completed with[the appellant] who has multiple sleep issues, background history of substance abuse, possibly PTSD following a motor vehicle accident and hyper somnolence
    - [Appellant] is on PRN muscle relaxants and a number of other drugs.
    - Tests indicating that [the appellant] suffers from mild overall sleep apnea though when in REM sleep it is severe to 28 further worsens in supine/REM to 55
    - No nocturnal hypoxemia but fluctuation in oxygen levels noted during REM sleep
    - [The appellant] was advised that the literature is limited in terms of treatment for isolated REM related OSA for which CPAP is recommended
    - The following is recommended: APAP for one week from cmH2O followed by CPAP at affixed pressure of 95%; compliance report sent to the respirology specialist in one month; and follow-up clinic visit in six months.

- A consult letter to the appellant's physician dated April 28, 2015 and completed by the respirology specialist which states:

  Please refer to my prior note which fully outlines the results of [the appellant's] sleep study. He has been found to have severe sleep apnea during REM sleep. Though it is reported as being mild overall, this includes NRPM sleep however, the concern is that REM is a type of sleep that is necessary for a healthy night's sleep and brain functioning. It is not something that can or is advised to be suppressed with the use of strategies such as positioning or medications. Even if possible, is not advised. Thus he is likely to achieve REM sleep every night during sleep and therefore, every night that he sleeps he is having pauses in his breathing into severe range. This can put them at risk for heart disease e.g. CAD, MI, CHF and arrhythmia as well as CVA and daytime fatigue with drowsy driving. He is very known to have excessive daytime somnolence and background severe respiratory disease. It is for this reason that CPAP is highly recommended and your assistance in providing them the funding he needs is greatly appreciated.

- A submission dated July 31, 2015 from the appellant's advocate in which she presents arguments against the ministry's position.

- A results report for the appellant completed by the respirology specialist dated October 16, 2014 which, among other things, notes the following:
    - *The appellant has a BMI of 31*
    - *The appellant scored 8/24 on the Epworth Sleepiness Scale which is normal*
    - *Known history of asthma and chronic bronchitis with severe airflow obstruction with reversibility*
    - *Prior traumatic brain injury secondary to MVA*
    - *Known history of substance abuse on a daily basis with hyper somnolence*
    - *Query PTSD*
    - *Query PLM and possible OSA for diagnostic study*
    - *Prior nocturnal oximetry reveals normal ODI three but 54% of the nights spent below 90% in terms of oxygen levels with periods of sawtooth pattern on oxygen tracing*
    - *Total apnea hypopnia index was mildly elevated at 8.8. In REM sleep, this increase to the severe range of 29 with further worsening to 55 with concurrent REM and supine sleep.*
    - *Impression:*
        - *Recurrent background history of TBI [traumatic brain injury] with MVA and possible resultant hypersomnia*
        - *Query PTSD and mood disturbance*
        - *Background substance abuse including daily alcohol intake at greater than 12 drinks per day with marijuana use*
        - *Severe REM related OSA with reduction in oxygen levels noted particularly with REM sleep*
        - *No suggestion of sleep-related movement disorder or parasomnia.*
    - *Recommendation:*
        - *Trial all CPAP is suggested given the severity in REM sleep with variability in oxygen levels as well as daytime symptoms.*
        - *Reduction in daily alcohol and marijuana use.*
        - *If persistent symptoms on treatment, consider MSLT to rule out daytime hypersomnolence.*

The ministry representative did not attend the hearing. The panel confirmed that the ministry was properly notified of the time and place of the hearing and proceeded with the hearing in accordance with section 86(b) of the Employment and Assistance Regulation.

At the hearing the appellant submitted a new letter from the respirology specialist dated Sept 21, 2015 which states “the appellant has sleep apnea overall and it becomes very severe in supine/REM sleep. Also his full PSG suggested worse findings that his overnight oximetry. The panel considered the admissibility of the letter. It found that the letter contained no new information. Accordingly, the panel admitted the letter pursuant to section 22(4) of the EAA as corroborating the information available at the time of the reconsideration decision.

PART F – Reasons for Panel Decision

The issue under appeal is the reasonableness of the ministry's reconsideration decision dated August 17, 2015, which denied the appellant's request for a 2-month trial of a breathing assistance medical device to alleviate his sleep apnea on the basis that the ministry did not consider that the appellant suffered from moderate to severe sleep apnea as required by subsection 3.9(2)(c) of Schedule C to the EAPWDR.

The relevant legislation is subsections 3.9(1) and 3.9(2) of Schedule C to the EAPWDR.

Medical equipment and devices — breathing devices
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:
(a) if all of the requirements set out in subsection (2) of this section are met,
(i) a positive airway pressure device,
(ii) an accessory that is required to operate a positive airway pressure device, or
(iii) 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) (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.

At the hearing the appellant's advocate reiterated her written argument submitted to the ministry at reconsideration. That is:

> *[The applicant's] application for funding for a CPAP machine has been denied. The Ministry's explanation for the denial of the funding is, in pertinent part, as follows: "the assessment performed by the respiratory therapist (PSG) shows[the appellant's] apnea reports mild OSA, although [the appellant] is reported to have severe OSA in REM sleep the overall study confirms mild OSA. We object to the adjudicator's application of Schedule C, Section 3.9 (2) (C). That section reads as follows: (2) the following are the requirements in relation to an item referred to in subsection (1) of this section… (C) the minister is satisfied that the item is medically essential for the treatment of moderate to severe sleep apnea. The adjudicator essentially takes the position that this section requires severe apnea 100% of the time. It does not. It requires severe apnea. [The appellant's respiratory specialist] has stated publicly that [the appellant] has severe apnea. I quote here from the letters written by [the appellant's respiratory specialist] provided to the ministry with [the appellant's] application:*
>
> > *His PSG reveals essentially mild overall sleep apnea though when in REM sleep it is severe to 28 worsens in supine/REM to 55. His been found to have severe sleep apnea during REM sleep. Though it is reported as being mild overall this includes NREM sleep. However the concern is that REM is a type of sleep that is necessary for healthy nights sleep and brain functioning. It is not something that can or is advised to be suppressed with the use of strategies such as positioning or medications. Even if*

possible, it is not advised. Thus he is likely to achieve REM sleep every night during sleep and therefore, every night that he sleeps he is having pauses in his breathing into the severe range.

It has therefore been established that [the appellant] likely experiences severe sleep apnea every night. In light of this, and in light of the wording of Schedule C, Section (3.9) (2) (c), [the appellant's] application for the CPAP machine should be granted.

In summary, the appellant's advocate is arguing that the ministry is misinterpreting the legislation. Specifically, that the ministry's interpretation of subsection 3.9(2)(c) is incorrect. That subsection requires only that the minister be satisfied that the CPAP device "is medically essential for the treatment of moderate to severe sleep apnea", while the ministry is interpreting this section to mean that the minister must be satisfied that the appellant has an overall sleep apnea score that indicates moderate to severe sleep apnea. In this case, argues the appellant's advocate, there is ample medical evidence that the appellant suffers from moderate to severe sleep apnea, if only while in REM sleep, and that the CPAP device is recommended as medically essential for the treatment of the appellant's sleep apnea.

The Ministry's position in the reconsideration decision is that:

Your request does not meet the requirements set out in Schedule See, subsection 3.9(2)(c) *off the EAPWD Regulation, which stipulates that the ministry must be satisfied that the item is medically essential for the treatment of moderate to severe apnea.*

REM [Rapid Eye Movement sleep] is one of the five stages of sleep that most people experience lightly. The amount of REM sleep varies. It normally makes up around 20 – 25% of adults' total time spend asleep. However, determination of the degree of severity of sleep apnea is based on the number of events of apnea hypoxia over the course of an entire night's sleep.

The oximetry test results submitted with your request indicate an apnea hypopnea index rate of 8.8. This is consistent with mild obstructive sleep apnea and is characterized as such by [your respirology specialist]. Therefore, it cannot be determined at your request has met the requirements set out in subsection 3.9(2)(c) of the legislation.

That is, the reconsideration decision denied the appellant's request on the basis that the ministry was not satisfied that the appellant met the legislative requirement that the CPAC device is "medically essential for the treatment of moderate to severe sleep apnea" as, in the ministry's opinion, the appellant suffers from only mild sleep apnea.

The question before the panel then, is whether the ministry's interpretation of the subsection 3.9(2)(c) is reasonable. That is, was it reasonable for the ministry to consider the appellant's overall mild Apnea Hypopnea Index rate of 8.8 rather than the higher scores in the moderate to severe range experienced by the appellant during REM sleep?

Important here is the exact words of the legislation. Subsection 3.9(2)(c) reads as follows:

The minister is satisfied that the item is medically essential for the treatment of moderate to severe sleep apnea.

As the panel reads this subsection what is required is that the minister be satisfied that:
(1) that the applicant is suffering from moderate to severe sleep apnea, and (2) that the requested item is medically essential to treat this condition. The ministry's decision to deny the applicant is based on its finding that he does not meet (1). There is no argument before the panel regarding (2). It is therefore (1), the Ministry's determination that the appellant does not suffer from moderate to severe sleep apnea, which the panel must consider.

In this case the panel looks to the wording of the legislation. The panel finds that the wording of the legislation does not refer to the overall Apnea Hypopnea Index rate, nor to an average sleep apnea score, nor does it require or permit the ministry to take into consideration the percentage of an applicant's sleep which is affected by sleep apnea. Rather, the legislation simply requires that an applicant suffer from moderate to severe sleep apnea.

Based on the information that was before the ministry at the time of its reconsideration decision, the panel finds that there was ample evidence showing that the appellant suffers from moderate to severe sleep apnea. It may well be that that was only for part of his sleep, during REM sleep, but that does not change the fact that the appellant has been diagnosed with moderate to severe sleep apnea. That is all the legislation requires.

The panel finds that it was not reasonable for the ministry to determine, based on the evidence before it at the time of the reconsideration decision, that the appellant does not suffer from moderate to severe sleep apnea and so does not meet the requirement of subsection 3.9(2)(c).

Accordingly, the panel concludes that the ministry's determination to deny the appellant a two-month trial of the CPAP device was not a reasonable interpretation of the legislation in the circumstances and rescinds the ministry's decision.