

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the “ministry”) reconsideration decision dated October 23, 2015 wherein the ministry denied the appellant’s request for \$200 funding for preoperative eye tests and services. The appellant is a recipient of disability assistance, and the ministry determined that the appellant was not eligible for the preoperative eye tests and services:

- as an optical supplement or eye examination supplement as provided respectively in sections 2.1 and 2.2 of Schedule C of the Employment and Assistance for Persons With Disabilities Regulation (“EAPWDR”);
- as a medical supply, as provided in sections 2(1)(a), (a.1) or (a.2) of Schedule C;
- as medical equipment or devices, as provided in sections 3 to 3.12 of Schedule C; or
- as a health supplement for a person facing a direct and imminent life threatening need under s. 69 of the EAPWDR.

PART D – Relevant Legislation

EAPWDR section 69 [*health supplement for persons facing direct and imminent life threatening health need*]; and Schedule C.

PART E – Summary of Facts

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

The appellant is a recipient of disability assistance who has been recommended for cataract surgery by his ophthalmologist.

- a consent form used by the office of the ophthalmologist (the “Consent Form”). In Part A of the Consent Form the ophthalmologist recommended a preoperative eye test (“Eye Test A”), the cost for which would be covered by the BC Medical Services Plan (“MSP”). In Part B of the Consent Form, the ophthalmologist recommended the following “optional extra tests and services” that are not a benefit covered by MSP: preoperative corneal topography, optical coherence tomography of the macula, astigmatic wound location, astigmatic vector analysis, intraoperative corneal marking, astigmatic limbal relaxing incisions, intraoperative IOL positioning, and presbyopic counselling (collectively referred to in this decision as “Eye Test B”). The fee identified for Eye Test B is \$200. The Consent Form is undated, and does not record the appellant’s name or his signature.
- A prescription form from the appellant’s general practitioner dated August 31, 2015, stating “[The appellant] recently saw [the ophthalmologist] regarding bilateral cataracts and right epiretinal membrane. He would benefit from tests not covered by [MSP], but recommended by [the ophthalmologist].”
- A September 17, 2015 e-mail from the supervisor of the appellant’s former ministry worker, stating that “Unfortunately these tests are not covered under our Ministry Optical Fee Schedule. I think his only option would be to go through the reconsideration process and sorry not sure about if the doctor can make application to MSP.”

The appeal record contains a number of other documents that are not material to the issue in this appeal.

In his oral testimony the appellant stated that he was advised by the ophthalmologist that he would not need glasses after the cataract surgery if Eye Test B were done. He also stated that MSP has provided no response as to whether it would cover the cost of Eye Test B. The panel has accepted this oral testimony as evidence in support of the information and records that were before the ministry at the time of reconsideration, in accordance with section 22(4) of the *Employment and Assistance Act*.

The ministry relied on its reconsideration decision.

PART F – Reasons for Panel Decision

The issue on appeal is whether the ministry's decision to deny \$200 funding for Eye Test B is reasonably supported by the evidence or is a reasonable application of the applicable enactment in the circumstances of the appellant. In particular, was it reasonable for the ministry to determine that the appellant was not eligible for the requested item:

- as an optical supplement or eye examination supplement as provided respectively in sections 2.1 and 2.2 of Schedule C of the EAPWDR;
- as a medical supply, as provided in sections 2(1)(a), (a.1) or (a.2) of Schedule C;
- as medical equipment or devices, as provided in sections 3 to 3.12 of Schedule C; or
- as a health supplement for a person facing a direct and imminent life threatening need under s. 69 of the EAPWDR.

The relevant legislation is as follows:

EAPWDR Schedule C

"basic eyewear and repairs" means any of the following items that are provided by an optometrist, ophthalmologist or optician:

- (a) for a child who has a new prescription, one pair of eye glasses per year consisting of the least expensive appropriate
 - (i) single-vision or bifocal lenses, and
 - (ii) frames;
- (b) for any other person who has a new prescription, one pair of eye glasses every 3 years consisting of the least expensive appropriate
 - (i) single-vision or bifocal lenses, and
 - (ii) frames;
- (c) for a child or other person,
 - (i) new lenses at any time if an optometrist, ophthalmologist or optician confirms a change in refractive status in either eye,
 - (ii) a case for new eye glasses or lenses, and
 - (iii) necessary repairs to lenses or frames that come within this definition;

"eye examination" means a full diagnostic examination of a person's eyes by an optometrist or an ophthalmologist, that includes

- (a) a determination of the refractive status of the eyes and of the presence of any observed abnormality in the person's visual system,
- (b) any necessary tests connected to making determinations under paragraph (a), and
- (c) the provision of a written prescription for lenses if necessary;

"pre-authorized eyewear and repairs" means eyewear and repairs provided by an optometrist, ophthalmologist or optician and for which pre-authorization is given by the minister, but does not include basic eyewear and repairs;

General 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;

(ii) the supplies are

- (A) prescribed by a medical practitioner or nurse practitioner,
- (B) the least expensive supplies appropriate for the purpose, and
- (C) 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;

(a.1) the following medical or surgical 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:

- (i) lancets;
- (ii) needles and syringes;
- (iii) ventilator supplies required for the essential operation or sterilization of a ventilator;
- (iv) tracheostomy supplies;

(a.2) consumable medical supplies, if the minister is satisfied that all of the following requirements are met:

- (i) the supplies are required to thicken food;
- (ii) all the requirements described in paragraph (a) (ii) and (iii) are met in relation to the supplies; ...

Section 2(1.1) of Schedule C, provides that for the purposes of subsection 2(1)(a), "medical or surgical supplies" do not include nutritional supplements, food, vitamins, minerals or prescription medications.

Section 2(1)(c) provides that the following items are health supplements if the other criteria of the section are met: a service for acupuncture, chiropractic, massage therapy, naturopathy, non-surgical podiatry, physical therapy.

Section 2(1)(f) of Schedule C provides that the following items are health supplements if the other criteria of the section are met: the least expensive appropriate mode of transportation.

Section 2(3) of Schedule C provides that "If the minister provided a benefit to or for a person under section 2(3) of Schedule C of the Disability Benefits Program Regulation, B.C. Reg. 79/97, the Income Assistance Regulation, B.C. Reg. 75/97 or the Youth Works Regulation, B.C. Reg. 77/97, as applicable, for the month during which the regulation was repealed, the minister may continue to provide that benefit to or for that person as a supplement under this regulation on the same terms and conditions as previously until the earlier of the following dates:

- (a) the date the conditions on which the minister paid the benefit are no longer met;
- (b) the date the person ceases to receive disability assistance.

Optical supplements

2.1 The following are the optical supplements that may be provided under section 62.1 [*optical supplements*] of this regulation:

- (a) basic eyewear and repairs;
- (b) pre-authorized eyewear and repairs.

Eye examination supplements

2.2 The minister may pay a health supplement under section 67.2 [*eye examination supplements*] of this regulation for an eye examination that,

- (a) if provided by an optometrist, is provided for a fee that does not exceed \$44.83, or
- (b) if provided by an ophthalmologist, is provided for a fee that does not exceed \$48.90.

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.

(2) For medical equipment or devices referred to in sections 3.1 to 3.8 or section 3.12, 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. ...

Section 3.1 provides that the following items are health supplements for the purposes of section 3 of the Schedule, if the other criteria of the section are met: a cane, a crutch, a walker, an accessory to a cane, a crutch or a walker.

Section 3.2 provides that the following items are health supplements for the purposes of section 3 if the other criteria of the section are met: a wheelchair, an upgraded component of a wheelchair, an accessory attached to a wheelchair.

Section 3.3 provides that the following items are health supplements for the purposes of section 3 of the Schedule, if the other criteria of the section are met: a wheelchair seating system, an accessory to a wheelchair seating system.

Section 3.4 provides that the following items are health supplements for the purposes of section 3 of the Schedule, if the other criteria of the section are met: a scooter, an upgraded component of a scooter, an accessory attached to a scooter.

Section 3.5 provides that the following items are health supplements for the purposes of section 3 of the Schedule, if the other criteria of the section are met: a grab bar in a bathroom, a bath or shower seat, a bath transfer bench with hand held shower, a tub slide, a bath lift, a bed pan or urinal, a raised toilet seat, a toilet safety frame, a floor-to-ceiling pole in a bathroom, a portable commode chair, a standing frame, a positioning frame, a transfer aid.

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Section 3.6 provides that the following items are health supplements for the purposes of section 3 of the Schedule, if the other criteria of the section are met: a hospital bed, an upgraded component of a hospital bed, an accessory attached to a hospital bed, or a positioning item on a hospital bed.

Section 3.7 provides that a pressure relief mattress is a health supplement for the purposes of section 3 of the Schedule if the other criteria of the section are met.

Section 3.8 provides that the following item is a health supplement for the purposes of section 3 of the Schedule, if the other criteria of the section are met: a floor or ceiling lift device.

Section 3.9 provides that the following items are health supplements for the purposes of section 3 of the Schedule, if the other criteria of the section are met: specified breathing devices.

Section 3.10 provides that each of the following items is an orthosis which is a health supplement for the purposes of section 3 of the Schedule, if the other criteria of the section are met: a custom-made or off-the-shelf foot orthotic, custom-made footwear, a permanent modification to footwear, off-the-shelf footwear required for the prescribed purpose, off-the-shelf orthopaedic footwear, an ankle brace, an ankle-foot orthosis, a knee-ankle-foot orthosis, a knee brace, a hip brace, an upper extremity brace, a cranial helmet, a torso or spine brace, a foot abduction orthosis, a toe orthosis.

Section 3.11 provides that the following item is a health supplement for the purposes of section 3 of the Schedule, if the other criteria of the section are met: a hearing instrument.

Section 3.12 provides that a non-conventional glucose meter is a health supplement for the purposes of section 3 of the Schedule, if the other criteria of the section are met.

Section 4 of the Schedule provides that the health supplement that may be paid under section 63 [*dental supplements*] are basic dental services, if the other criteria of the section are met.

Section 4.1 provides that the health supplement may be paid under section 63.1 for crown and bridgework, if the other criteria of the section are met.

Section 5 of Schedule C provides that the health supplement that may be paid for under Section 64 of the EAPWDR is emergency dental services.

Section 6 of the Schedule provides that the amount of a diet supplement that may be provided under section 66 [*diet supplements*] is set out for various conditions, if the other criteria of the section are met.

Section 7 of the Schedule provides as follows:

- 7 The amount of a nutritional supplement that may be provided under section 67 [*nutritional supplement*] of this regulation is the sum of the amounts for those of the following items specified as required in the request under section 67 (1) (c):
- (a) for additional nutritional items that are part of a caloric supplementation to a regular dietary intake, up to \$165 each month;
 - (b) Repealed. [B.C. Reg. 68/2010, s. 3 (b).]
 - (c) for vitamins and minerals, up to \$40 each month.

Section 8 of the Schedule provides that the amount of a natal supplement that may be provided under section 68 [*natal supplements*] is set out, if the other criteria of the section are met.

Section 9 of the Schedule provides that the minister may provide infant formula under section 67.1 of the EAPWDR if the other criteria of the section are met.

EAPWDR

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

- 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) a person in the family unit is eligible to receive 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).

* * *

The appellant's position is that the legislation gives the Minister of Social Development and Social Innovation (the "minister") the discretion to effectively overrule the reconsideration decision and provide the requested funds for Eye Test B. He argued that his request was never put before the minister in order for the minister to make a decision. The appellant stated that he just wants a chance to improve his quality of life (by not having to wear glasses post cataract surgery) at the minister's discretion.

The ministry's position is that the legislation does not authorize it to fund Eye Test B. It argued that Eye Test B is not an optical supplement or an eye examination supplement as defined. It also argued that Eye Test B is not any of the medical supplies, medical equipment and devices, or any other supplements provided under the EAPWDR. Finally, the ministry argued that the appellant does not meet the criteria for a life-threatening health need under section 69 of the EAPWDR.

Panel Decision:

The minister's decision-making powers in respect of the EAPWDR are delegated to ministry staff. Even if the minister were to choose to exercise those powers herself, she would still be bound by the limitations and criteria for health supplements imposed by the *Employment and Assistance for Persons with Disabilities Act* and EAPWDR, as well as the reconsideration and appeal processes described in the *Employment and Assistance Act* and the *Employment and Assistance Regulation*. There is no statutory provision for the minister to hear a reconsideration or appeal of the appellant's case.

The minister (and therefore the ministry) is only authorized to provide health supplements as provided by the legislation. This means that a requested health supplement, such as Eye Test B, must fall into one of the categories set out in legislation and must satisfy any relevant statutory criteria.

Section 2.1 covers optical supplements in the form of eyewear and repairs. There is no evidence before the panel to indicate that Eye Test B is an optical supplement. Section 2.2 covers eye examination supplements. However, there is no medical information before the panel to demonstrate that Eye Test B will “provide a determination of the refractive status of [the appellant’s] eyes and of the presence of any observed abnormality in the person’s visual system” as specified in the definition of “eye examination”. There is also no evidence that Eye Test B is “necessary” for making those determinations. The panel notes that even if there were sufficient evidence on these points to demonstrate on the balance of probabilities that the legislative criteria had been satisfied, the ministry would be limited to funding up to \$48.90 rather than the ophthalmologist’s full \$200 fee.

In the panel’s view, Eye Test B does not reasonably meet the definition or criteria for any of the other health supplements prescribed in Schedule C. Accordingly, the panel finds that the ministry reasonably determined that it could not pay for Eye Test B as a health supplement under Schedule C.

With respect to coverage under section 69 of the EAPWDR, the legislation expressly applies to medical supplies and medical transportation as set out in sections 2(1)(a) and (f) respectively of Schedule C of the EAPWDR, and to medical equipment and devices as identified in section 3 of Schedule C. Section 69(d) specifies that the requirements prescribed in those provisions must be satisfied. As found by the panel above, the requested Eye Test B does not fit any these categories of prescribed health supplement and so is not covered by section 69. The panel also notes that there is no medical evidence indicating that the appellant faces a direct and imminent life threatening need for Eye Test B (since the ophthalmologist has described it in the Consent Form as being “optional”) or that Eye Test B is necessary to meet such a need. Accordingly, the panel finds the ministry reasonably concluded that the appellant was not eligible for Eye Test B under section 69 of the EAPWDR.

Conclusion

The panel acknowledges that Eye Test B may improve the likelihood of an optimal post-operative recovery; however this panel is bound to apply the legislation as it stands. Based on the foregoing reasons and analysis, the panel concludes that the ministry’s reconsideration decision is a reasonable application of the applicable enactment in the circumstances of the appellant. Accordingly, the ministry’s reconsideration decision is confirmed.