

PART C – Decision under Appeal

The decision under appeal is the reconsideration decision dated December 11, 2015 made by the Ministry of Social Development and Social Innovation (the ministry) which determined that the appellant was not eligible to receive funding for a centre-mount joystick and replacement batteries for her power wheelchair because the information provided did not demonstrate that the appellant has a medical need for a power wheelchair or that a power wheelchair is medically essential to achieve or maintain basic mobility as required by section 3(2)(b) and 3.2(2) of Schedule C of the Employment and Assistance for Persons with Disabilities Regulation.

PART D – Relevant Legislation

The relevant legislation is section 62 of the *Employment and Assistance for Persons with Disabilities Act* (EAPWDA) and sections 3 and 3.2 of Schedule C the *Employment and Assistance for Persons with Disabilities Regulation* (EAPWDR).

PART E – Summary of Facts

The appellant is in receipt of disability assistance. She suffers from cerebral palsy, type II diabetes and renal failure. She is confined to a wheelchair and has almost no movement capability. She has 24 hour care.

The evidence before the ministry at the time of the reconsideration decision consisted of:

- (1) A request for a replacement manual wheelchair for the appellant dated June 25, 2015, which included a comprehensive assessment of the appellant's mental and physical functioning prepared by her Occupational Therapist (OT).
- (2) A request for a midline joystick mount for the appellant's power wheelchair dated August 11, 2015, which included a letter from the appellant's OT stating that the appellant is currently using a manual wheelchair but has a power wheelchair the purchase of which in 2004 was funded by "the Ministry of Children and Family". The request goes on to state that the appellant has not used the power wheelchair for quite some time, the batteries need to be replaced and that the appellant misses using her power wheelchair. The appellant has little movement in her upper extremities and requires the midline joystick in order to operate the power wheelchair. Using borrowed batteries the appellant has used the power wheelchair indoors but will need lessons and practice in order to operate the power wheelchair outdoors. The *Equipment Recommendation* states that the appellant would enjoy driving her power wheelchair for community access and will have continued supervision and support. Also included in this request for a midline joystick mount are: a Medical Equipment Request and Justification completed by a physician describing the appellant's medical condition as "multiple disabilities/w/c mobility" and recommends a "midline joystick mount for power W/C", and a quote for the midline joystick mount.
- (3) A request for replacement batteries for the appellant's power wheelchair dated August 28, 2015, which included a letter from the appellant's OT essentially the same as that provided in the request for a midline joystick mount except the *Equipment Recommendation* states the appellant, "will enjoy driving her power wheelchair for community access. She will have continued supervision and support when out in the community." Also included in this request were a quote for a power wheelchair billed to the Ministry of Children and Family Development dated May 21, 2004; a Medical Equipment Request and Justification completed by a physician, and a quote for replacement batteries.

On October 25, 2015, the ministry approved the appellant's request for a replacement manual wheelchair. On October 27, 2015, the ministry denied the appellant's request for replacement batteries. On December 3, 2015, the ministry confirmed that the October 27 letter was intended to deny both the replacement batteries and the midline joystick mount. The reason for the denial was:

The applicant was provided with a high-end manual wheelchair on October 27, 2015 [sic]. The medical need for repairs to a power chair has not been confirmed, as a manual wheelchair has been funded to meet the client's mobility needs. Consequently, repairs to a power wheelchair are not medically essential to achieve basic mobility.

In the appellant's Request for Reconsideration dated November 27, 2015, the appellant's OT states

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that the appellant has requested funding for batteries and a midline joystick mount so that she can “drive her wheelchair in the community.” She questions the ministry’s rationale that the appellant’s basic mobility needs are satisfied by her manual wheelchair on the basis that the ministry originally supplied the power wheelchair. The OT argues that since the ministry has provided the power wheelchair, it should be responsible for its basic maintenance and modifications. The OT goes on to state:

[The appellant] cannot physically propel her manual wheelchair and relies on others to help her. She has no freedom to mobilize herself independently. A power wheelchair would allow her the freedom to move her chair where and when she wants without the need for staff and family. I believe that self-mobility is a basic mobility need especially if she has already been provided with a power wheelchair. The Ministry must have deemed this power wheelchair a basic mobility device if they were willing to fund it in the first place.

Also included in the Request for Reconsideration was a hand-written letter dated November 19, 2015, by a third party which states:

[The appellant’s] family and [the appellant] are very keen to keep up her wellbeing and independence. I would ask that you reconsider funding for the upkeep of her chair.

As the ministry did fund the chair to begin with it is puzzling that it is now just sitting unable to be used. It is in need of a new battery and due to [the appellant’s] condition new joystick is in need. [The appellant] cannot manage to use the one that is on there.

Please re-look at the facts that the Chair is sitting there unable to be of use to someone whom is eager to keep living, keep up independence and desperately would like to try to keep her life up to good quality, where she is challenged in a way that is physically good for her and great for her mind as well.

The ministry found that the power wheelchair had not been provided by the ministry but by the Ministry of Children and Family Development (MCFD). While it is not clear why MCFD funded the chair as the appellant was well over 18 years old at the time of the purchase, maintenance and modifications to medical equipment or devices that were not provided by the ministry are subject to sections 3(2) and (5) and, in the case of a wheelchair, section 3.2 of Schedule C of the EAPWDR. This means that, unlike medical equipment which was provided by the ministry, medical equipment not provided by the ministry is subject to being confirmed by a medical practitioner and/or an OT as a “medical need” and the minister being satisfied that the item is “medically essential to achieve or maintain basic mobility”.

Applying these requirements to the appellant’s request for replacement batteries and a midline joystick mount, the ministry determined that based on the evidence of the OT reports and the fact that the appellant was recently approved a high-end manual wheelchair, that the information before it did not demonstrate the appellant has a medical need for a power wheelchair or that a power wheelchair is medically essential to achieve or maintain basic mobility and denied the appellant’s request for replacement batteries and a midline joystick mount.

At the hearing the appellant testified that she needs the power wheelchair to be as independent as possible in moving around in her community. She would like to be able to visit her sister who lives nearby more often and the power wheelchair would make that possible. The appellant's OT testified that the appellant has not used the power wheelchair in two years. Although the appellant could not use the power wheelchair in her house as it is too bulky, she would be able to move around her community more freely and independently with a power wheelchair. The appellant lives in a hilly area so that it is difficult for her caregivers to push her in her manual wheelchair. The appellant's father testified that he often pushes the appellant's manual wheelchair but is getting too old to continue to do so, that he has difficulty in pushing the manual wheelchair up ramps, particularly the ramp to the office of the appellant's specialist, and that one of the appellant's caregivers injured a wrist pushing the manual wheelchair.

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PART F – Reasons for Panel Decision

The issue under appeal is whether the ministry's determination that the appellant is not eligible to receive funding for a centre-mount joystick and replacement batteries for her power wheelchair because the information provided does not demonstrate that the appellant has a medical need for a power wheelchair or that a power wheelchair is medically essential to achieve or maintain basic mobility was reasonably supported by the evidence and/or a reasonable interpretation of the legislation.

The relevant legislation is sections 62 and Schedule C sections 3 and 3.2 of the EAPWDR.

General health supplements

62 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) a family unit in receipt of disability assistance,
- (b) a family unit in receipt of hardship assistance, if the health supplement is provided to or for a person in the family unit who is a dependent child, or
- (c) a family unit, if the health supplement is provided to or for a person in the family unit who is a continued person.

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.

(2.1) For medical equipment or devices referred to in section 3.9 (1) (b) to (g), in addition to the requirements in that section 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 a respiratory therapist, occupational therapist or physical therapist confirming the medical need for the medical equipment or device.

(3) Subject to subsection (6), the minister may provide as a health supplement a replacement of medical equipment or a medical device, previously provided by the minister under this section, that is damaged, worn out or not functioning if

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- (a) it is more economical to replace than to repair the medical equipment or device previously provided by the minister, and
 - (b) the period of time, if any, set out in sections 3.1 to 3.12 of this Schedule, as applicable, for the purposes of this paragraph, has passed.
 - (4) Subject to subsection (6), the minister may provide as a health supplement repairs of medical equipment or a medical device that was previously provided by the minister if it is more economical to repair the medical equipment or device than to replace it.
 - (5) Subject to subsection (6), the minister may provide as a health supplement repairs of medical equipment or a medical device that was not previously provided by the minister if
 - (a) at the time of the repairs the requirements in this section and sections 3.1 to 3.12 of this Schedule, as applicable, are met in respect of the medical equipment or device being repaired, and
 - (b) it is more economical to repair the medical equipment or device than to replace it.
 - (6) The minister may not provide a replacement of medical equipment or a medical device under subsection (3) or repairs of medical equipment or a medical device under subsection (4) or (5) if the minister considers that the medical equipment or device was damaged through misuse.

Medical equipment and devices — wheelchairs

3.2 (1) In this section, "**wheelchair**" does not include a stroller.

(2) Subject to subsection (4) of this section, the following items are health supplements for the purposes of section 3 of this Schedule if the minister is satisfied that the item is medically essential to achieve or maintain basic mobility:

- (a) a wheelchair;
- (b) an upgraded component of a wheelchair;
- (c) an accessory attached to a wheelchair.

(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 (2) of this section is 5 years after the minister provided the item being replaced.

(4) A high-performance wheelchair for recreational or sports use is not a health supplement for the purposes of section 3 of this Schedule.

THE APPELLANT'S POSITION

In her appeal submission and at the hearing the appellant and her advocate made the following arguments:

1. The ministry has already on a number of occasions funded repairs to the appellant's power wheelchair. This has set a precedent that the ministry should honour.
2. As a general rule, when a client transitions from the jurisdiction of MCFD to the jurisdiction of the ministry the medical equipment provided to the client by MCFD is grandfathered and the ministry treats the medical equipment as if it had been provided by the ministry. Not doing so in this case is an arbitrary exception to this rule.
3. If repairs and modifications to the power wheelchair must meet the requirements of "medical need" and "medically essential to achieve or maintain basic mobility", the evidence before the ministry at the time of the reconsideration decision was sufficient to establish that the appellant's

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power wheelchair met these requirements. That evidence establishes that:

- the appellant requires the power wheelchair to get around outside her home, engage with her community and carry out daily tasks;
- her neighbourhood is hilly, which makes it difficult to use a manual wheelchair;
- the ramp to her specialists office is difficult to climb in a manual wheelchair;
- her father, who is one of her primary caregivers, has difficulty with the manual wheelchair given his advanced age;
- the appellant cannot move around independently in the manual wheelchair.

THE MINISTRY'S POSITION

The ministry maintained:

1. The ministry acknowledged that it had previously funded repairs to the power wheelchair but maintained that this did not set a precedent as the legislation was at the time was different and in 2014 in response to a request for funding for replacement batteries for the wheelchair asked for more information about the wheelchair, at which time the request was withdrawn. In any case, the ministry is bound by the legislation rather than by precedent.
2. The ministry representative could not speak to the specific provisions regarding the appellant's point that as a general rule, when a client transitions from the jurisdiction of MCFD to the jurisdiction of the ministry the medical equipment provided to the client by MCFD is grandfathered and the ministry treats the medical equipment as if it had been provided by the ministry. However, whether or not that is the case, this situation is different in that the appellant was not a minor at the time MCFD funded the wheelchair purchase.
3. It is not in question that the ministry did not provide the power wheelchair. As the ministry did not provide this wheelchair it is bound by the legislation to apply the sections of the EAPWDR which establish that repairs and modifications to the power wheelchair must meet the requirements of "medical need" and "medically essential to achieve or maintain basic mobility". The evidence before the ministry at the time of the reconsideration decision was not sufficient to establish that the appellant has a medical need for a power wheelchair or that a power wheelchair is medically essential to achieve or maintain basic mobility. The physician's comments are sparse and simply recommend a midline joystick mount without explanation as to it being a "medical need" or "medically essential to achieve or maintain basic mobility". The OT report states that the appellant would "enjoy" being more independent, that she "misses" her power wheelchair and would "like" to be able to move about her neighbourhood more easily, and would use it to "visit friends". This information does not establish a "medical need" for the power wheelchair or that a power wheelchair is "medically essential to achieve or maintain basic mobility".

THE PANEL'S DECISION

1. Although it is not clear why MCFD funded the purchase of the power wheelchair, the fact that it did is not contested. As this is the case, the ministry is bound to apply the relevant legislative provisions. In this case, as the medical device was not supplied by the minister, the ministry was bound to apply sections 3(2) and (5) and, in the case of a wheelchair, section 3.2 of Schedule C of

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the EAPWDR. Precedent to the contrary (which may have occurred under different legislative provisions) does not give the ministry licence to ignore the legislation this time.

2. The appellant argued the point of the transition rule when a client moves from MCFD to the ministry, but did not provide evidence so that the panel cannot conclude that this is true. The legislation that the ministry applied and that was before the panel establishes that sections 3(2) and (5) and section 3.2 of Schedule C of the EAPWDR apply such that repairs and modifications to the power wheelchair must meet the requirements of “medical need” and “medically essential to achieve or maintain basic mobility”.
3. The panel notes that the ministry’s position is not that the appellant’s request does not meet the legislative criteria, but rather that the information before the ministry at the time of the reconsideration decision was not sufficient to allow the ministry to determine that those legislative criteria were met. The physician’s bare recommendation is certainly terse and goes no way to establishing a “medical need” or that the joystick mount is “medically essential to achieve or maintain basic mobility”. The OT report’s statements that the appellant would “enjoy” being more independent, that she “misses” her power wheelchair and would “like” to be able to move about her neighbourhood more easily, and would use it to “visit friends” are not compelling in this regard. Testimony to the effect that it is *difficult* for the appellant to move around her neighbourhood in her manual wheelchair does not go to establish that a power wheelchair is a “medical need” or “medically essential to achieve or maintain basic mobility”.

Based on the above analysis, the panel finds that the ministry’s determinations that:

- sections 3(2) and (5) and section 3.2 of Schedule C of the EAPWDR apply in this instance was a reasonable application of the legislation, and
- the information before the ministry at the time of the reconsideration decision was not sufficient to demonstrate that the appellant has a “medical need” for a power wheelchair or that a power wheelchair is “medically essential to achieve or maintain basic mobility” was reasonably supported by the evidence

The panel confirms the ministry’s decision.