

## PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (ministry) reconsideration decision dated July 4, 2016 which denied the appellant's request for a supplement to cover the cost of a two-month trial of a CPAP machine and mask under Section 3.9 of Schedule C of the Employment and Assistance for Persons With Disabilities Regulation (EAPWDR). The ministry found that the appellant's request did not meet the legislative criteria in Schedule C of the EAPWDR because:

- A respiratory therapist has not performed an assessment that confirms the medical need for the item, as required by Section 3.9(2)(b); and,
- The ministry was not satisfied that the item is medically essential for the treatment of moderate to severe sleep apnea [Section 3.9(2)(c)].

## PART D – Relevant Legislation

Employment and Persons with Disabilities Regulation (EAPWDR), Section 62 and Schedule C, Section 3.9

## PART E – Summary of Facts

The appellant presented her evidence and submissions on the hearing and then chose to leave the hearing when the ministry commenced an explanation of the reasons for the ministry's position that the reconsideration decision should be upheld.

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

- 1) Sleep Analysis Report dated October 29, 2015 which indicated the appellant's AHI [apnea hypopnea index] is '9.2', in the range of a suspected pathological breathing disorder;
- 2) Sleep Study Report dated November 4, 2015 in which the physician, who is a specialist in respiratory and internal medicine, indicated that the appellant's AHI is 9 events per hour and within the "mild" range of 5 to 15 events per hour. The recommendation included conservative measures of lifestyle modifications of weight loss, smoking cessation and no alcohol after dinner, as well as trial of a CPAP. The physician wrote "F/U [follow up] evaluation in 1 month on treatment;"
- 3) Letter dated November 20, 2015 in which the general practitioner (GP) wrote that the appellant needs a CPAP to treat OSA [obstructive sleep apnea] with pressures between 6 to 16 cm H<sub>2</sub>O indefinitely;
- 4) Medical Equipment Request and Justification (MERJ) dated December 10, 2015, in which the GP recommended a CPAP machine for sleep apnea, and the respiratory therapist specified a 2-month trial of CPAP, mask and humidifier, (illegible) and filters as being "...required to meet the applicant's needs";
- 5) Quote dated December 29, 2015 from a sleep equipment supplier (the supplier) for rental of CPAP unit and mask for 2 months at a total cost of \$695;
- 6) Letter dated February 4, 2016 from the ministry denying the appellant's request for a 2-month trial of a CPAP machine and mask; and,
- 7) Request for Reconsideration dated July 21, 2016, in which the appellant wrote:
  - She has been diagnosed with sleep apnea and she has had it most of her life. The older she has got, the worse the disease has become.
  - She does not have any history of substance abuse, she does not smoke and she has tried to eat healthy and avoid the known triggers.
  - Last May, she fell asleep driving and rolled her car over an embankment.
  - When she tried the breathing machine, she did not wake up with headaches for the first time in her life. She is not cranky and she actually enjoys life again. She lost 12 lbs.
  - She has no financial ability to purchase the machine.
  - Without it, she has a "lousy quality of life" and she cannot participate in reasonable daily activities.

### ***Additional information***

In her Notice of Appeal dated July 16, 2016, the appellant expressed her disagreement with the ministry's reconsideration decision and wrote that without it she has no life. She will have to quit driving and she has no transportation. She is totally exhausted since not having the CPAP. Her doctor has stated that she needs it. She has had 3 TIA's [Transient Ischemic Attack], a "full blown" one more recently, and "there is a connection here."

At the hearing, the appellant stated that:

- She is not sure why this appeal is necessary when she has already used the CPAP machine for about 5 months and she returned the equipment about 2 months ago.

- 
- The supplier assured her that there was no money to be paid, that this was a “free trial.” She did not sign an agreement with the supplier prior to being given the equipment for a trial and she did not rent anything. She would not have taken the equipment if she had to pay. She does not have the funds to pay for the CPAP machine, which is very expensive.
  - She needed the CPAP machine permanently, not just a trial but trying to explain things is not easy for her. She has a brain injury.
  - She is wondering why the ministry would have to pay anything when she was told by the supplier that it was a free trial.
  - She had the CPAP machine for 2 months and the supplier told her to keep it as the trial had been extended. Her doctor wrote that she needs a CPAP machine and had been “pushing” for her to get the equipment.
  - After about 5 months, the supplier contacted her and asked her to return the equipment, which she did.
  - She has not received a bill from the supplier. She believes that the Quote dated December 29, 2015 was strictly a quote and not a bill. She only saw the quote when she received the reconsideration documents.
  - The MERJ was completed by her doctor and a respiratory therapist from the supplier who fitted her with the equipment and requested the 2-month trial rather than purchase of the CPAP machine.

The ministry relied on its reconsideration decision as summarized at the hearing.

***Admissibility of Additional Information***

The panel considered the appellant’s oral testimony as information regarding the appellant’s need for trial of a CPAP machine, which is in support of information and records that were before the ministry at the time of reconsideration, in accordance with Section 22(4)(b) of the *Employment and Assistance Act*.

## PART F – Reasons for Panel Decision

The issue on the appeal is whether the ministry's reconsideration decision, which denied the appellant's request for a supplement to cover the cost of a two-month trial of a CPAP machine and mask under Section 3.9 of Schedule C of the Employment and Assistance for Persons With Disabilities Regulation (EAPWDR), is reasonably supported by the evidence or a reasonable application of the applicable enactment in the circumstances of the appellant.

Pursuant to Section 62 of the EAPWDR, the applicant must be a recipient of disability assistance, or be a dependant of a person in receipt of disability assistance in a variety of scenarios. If that condition is met, Schedule C of the EAPWDR specifies additional criteria that must be met in order to qualify for a health supplement for various items. In this case, the ministry has not disputed that the requirement of Section 62 has been met in that the appellant has been approved as a recipient of disability assistance.

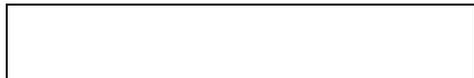
At issue is whether the appellant's request for a supplement to cover the cost of a two-month trial of a CPAP machine and mask meets the requirements under Schedule C of the EAPWDR.

Section 3.9 of Schedule C provides in part:

### **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;
- (b) if the minister is satisfied that the item is medically essential to monitor breathing,
  - (i) an apnea monitor,
  - (ii) an accessory that is required to operate an apnea monitor, or
  - (iii) a supply that is required to operate an apnea monitor;
- (c) if the minister is satisfied that the item is medically essential for clearing respiratory airways,
  - (i) a suction unit,
  - (ii) an accessory that is required to operate a suction unit, or
  - (iii) a supply that is required to operate a suction unit;
- (d) if the minister is satisfied that the item is medically essential for clearing respiratory airways,
  - (i) a percussor,
  - (ii) an accessory that is required to operate a percussor, or
  - (iii) a supply that is required to operate a percussor;
- (e) if the minister is satisfied that the item is medically essential to avoid an imminent and substantial danger to health,
  - (i) a nebulizer,
  - (ii) an accessory that is required to operate a nebulizer, or
  - (iii) a supply that is required to operate a nebulizer;



- (f) if the minister is satisfied that the item is medically essential to moisturize air in order to allow a tracheostomy patient to breathe,
  - (i) a medical humidifier,
  - (ii) an accessory that is required to operate a medical humidifier, or
  - (iii) a supply that is required to operate a medical humidifier; . . .
- (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.

*Assessment by a respiratory therapist to confirm the medical need*

*Ministry's position*

The ministry's position is that Section 3.9(2)(b) of Schedule C of the EAPWDR requires that a respiratory therapist confirm in an assessment that there is a medical need for the item which, in this case, is a two-month trial of a CPAP machine and mask. The ministry argued that the respirologist classified the appellant's sleep apnea as mild and prescribed the CPAP machine for one month, after which a full evaluation is to be conducted, and this does not establish a medical need for the item requested.

*Appellant's position*

The appellant's position is that she had wanted to request the purchase of a CPAP machine and mask and not a two-month trial but the request was completed by a therapist for the trial. At the hearing, the appellant stated that she was assured that the trial was free and she has already completed a trial period of 5 months and the equipment has been returned to the supplier. In her Notice of Appeal, the appellant wrote that without the CPAP machine she has no life since she will have to quit driving and she has no other transportation. The appellant wrote that she is totally exhausted since not having the CPAP and her doctor has stated that she needs it. She has had 3 TIA's, a "full blown" one more recently, and "there is a connection" to not using the CPAP machine.

*Panel decision*

Section 3.9(2)(b) of Schedule C of the EAPWDR stipulates that a respiratory therapist has performed an assessment that confirms the medical need for the item, specifically the requested two-month trial of the CPAP machine and mask. The ministry relied on the Sleep Study Report dated November 4, 2015 as the relevant assessment, and this Report was completed by a physician who is a specialist in respiratory and internal medicine, and not by a respiratory therapist. The specialist noted that the appellant's AHI is 9 events per hour and although this is within the "mild" range of 5 to 15 events per hour, the specialist found that this level warranted recommendations to the appellant that included trial of a CPAP machine and "...follow up evaluation in 1 month on treatment." In the Sleep Analysis Report dated October 29, 2015 which indicated the appellant's AHI is '9.2', it was also reported that this score is in the range of a suspected pathological breathing disorder. In contrast to Section 3.9(2)(c) of Schedule C of the EAPWDR, Section 3.9(2)(b) does not require that a specific degree of sleep apnea has been established, being moderate to severe, but only that the respiratory therapist confirm the medical need for the item.

In the MERJ, which was completed on December 29, 2015, after the date of Sleep Study Report, the

respiratory therapist recommended a two-month trial of the CPAP machine and mask and other accessories as being “required to meet the applicant’s needs,” as printed on the form. Both the specialist physician and the respiratory therapist have provided confirmation that there is a medical need for a trial of a CPAP machine and, in the case of the specialist physician, that there would then be further evaluation of the appellant’s sleep apnea during the trial. The panel finds that the ministry’s determination that a respiratory therapist has not confirmed the medical need for a two-month trial of the CPAP machine and mask under Section 3.9(2)(b) of Schedule C of the EAPWDR was not reasonable.

*Medically essential for the treatment of moderate to severe sleep apnea*

*Ministry’s position*

The ministry’s position is that it is not satisfied that the two-month trial of the CPAP machine and mask is medically essential for the treatment of moderate to severe sleep apnea. The ministry argued that the information provided in the Sleep Report indicated an AHI of 9.2, which is in the mild range for sleep apnea. The ministry wrote that additional information from a respiratory therapist or respirologist was not submitted by the appellant.

*Appellant’s position*

The appellant’s position is that she had wanted to request the purchase of a CPAP machine and mask and not a two-month trial but the request was completed by a therapist for the trial. In her Notice of Appeal, the appellant wrote that without the CPAP machine she has no life since she will have to quit driving and she has no other transportation. The appellant wrote that she is totally exhausted since not having the CPAP and her doctor has stated that she needs it. She has had 3 TIA’s, a “full blown” one more recently, and “there is a connection” to not using the CPAP machine. In her Request for Reconsideration, the appellant wrote that without a CPAP machine she has a “lousy quality of life” and she cannot participate in reasonable daily activities.

*Panel decision*

Section 3.9(2)(c) of Schedule C of the EAPWDR stipulates that the minister must be satisfied that the item, or two-month trial of a CPAP machine and mask, is medically essential for the treatment of moderate to severe sleep apnea. In the MERJ dated December 10, 2015 and in a letter dated November 20, 2015, the appellant’s GP confirmed the diagnosis of sleep apnea and the need for a CPAP machine, and the therapist specified in the MERJ that the two-month trial was required to meet the appellant’s need. However, the ministry must also be satisfied that the trial of the CPAP machine and mask is medically essential specifically for the treatment of moderate to severe sleep apnea. The physician, who is a specialist in respiratory and internal medicine, indicated in the Sleep Study Report dated November 4, 2015 that the appellant’s AHI is 9 events per hour, which falls within the “mild” range for sleep apnea of 5 to 15 events per hour, rather than the moderate range of 15 to 30 events per hour or the severe range of more than 30 events per hour. As the specialist recommended a further evaluation be conducted after one month of the trial, there may be further information available regarding the relative severity of the appellant’s sleep apnea, but there was no further information provided to the panel on the appeal. Therefore, the panel finds that the ministry reasonably concluded that there was insufficient evidence to show that the item, specifically a two-month trial of a CPAP machine and mask, is medically essential for the treatment of moderate to severe sleep apnea, as required under Section 3.9(2)(b) of Schedule C of the EAPWDR.

*Conclusion*

While the panel finds that the ministry was unreasonable in concluding that a respiratory therapist has



not confirmed the medical need for a two-month trial of the CPAP machine and mask, pursuant to Section 3.9(2)(b) of Schedule C of the EAPWDR, the panel also finds that the ministry reasonably determined that the appellant's request does not meet the other requirement under 3.9. Specifically, the panel finds that the ministry was reasonable in determining that there was insufficient evidence to show that the requested two month trial of the CPAP machine and mask is medically essential for the treatment of moderate to severe sleep apnea, as required under Section 3.9(2)(b).

In conclusion, the panel finds that the ministry reconsideration decision is a reasonable application of the applicable enactment in the appellant's circumstances and confirms the decision. The appellant's appeal, therefore, is not successful.