

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation’s (the ministry) reconsideration decision dated June 14, 2016, which denied the appellant’s request for a power wheelchair. The ministry found that as the appellant is a person with disabilities (PWD), she is eligible to apply to the ministry for health supplements under the *Employment and Assistance for Persons with Disabilities Regulation* (EAPWDR) and the ministry was satisfied that the appellant meets the requirement of EAPWDR Schedule C, section 3(1)(b)(i) as she was seeking pre-authorization of the ministry for the item requested. However, the ministry was not satisfied as to the following:

- that there were no resources available to the appellant to pay the cost of or obtain the medical equipment or device as required by EAPWDR Schedule C, section 3(1)(b)(ii);
- that the power wheelchair was the least expensive appropriate medical equipment or device as required by EAPWDR Schedule C, section 3(1)(b)(iii);
- that the assessment by the occupational therapist (the “OT”) confirmed the medical need for the power wheelchair and seating as required by EAPWDR Schedule C, section 3(2)(b); and
- that the power wheelchair is medically essential to achieve or maintain basic mobility as required by EAPWDR Schedule C, section 3.2(2).

PART D – Relevant Legislation

EAPWDR Schedule C, section 62 and Schedule C, sections 3 and 3.2

PART E – Summary of Facts

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

- Prescription from a physician dated July 1, 2015 indicating that the appellant needs an electrical scooter for her daily activities.
- Medical Equipment Request and Justification form dated July 3, 2015 indicating that the appellant has left ankle osteomyelitis and recommending a QM-710 SC electrical power chair.
- Letter from the ministry to the appellant dated September 24, 2015 advising the appellant that before the request for a power wheelchair can proceed the appellant has to provide a completed assessment by an occupational therapist or physical therapist and provide a quote for the requested item from a ministry contracted supplier.
- Letter from an orthopedic surgeon (the “surgeon”) dated October 21, 2015 recommending that the appellant be provided with some home care assistance.
- Prescription from the surgeon dated November 16, 2015 stating that the appellant needs a power wheelchair as a result of a chronic left ankle problem.
- Prescription from a physician dated November 20, 2015 indicating that the appellant needs a power wheelchair as soon as possible due to left ankle chronic osteomyelitis.
- Quote from a medical equipment provider dated February 3, 2016 for the cost of a power wheelchair in the amount of \$9,005.20.
- Letter from the OT indicating that the appellant’s ongoing and complex medical situation around her left foot and ankle has precipitated the request for a power wheelchair and accompanying seating, backrest, and footrests. The appellant was diagnosed with osteomyelitis and reported that prior to her recent decline, she utilized crutches to mobilize. The OT indicates that when he met the appellant she was using a manual wheelchair rented by the hospital but the appellant explained that she has constant pain in her lower extremities and abdominal region and that her pain symptoms are exacerbated within moment of trying to self-propel. The OT indicates that there are a number of positive outcomes that will follow with the use of a power wheelchair as it will provide the appellant with the means to independently mobilize in her community, complete weekly activities like grocery shopping, attending medical/rehabilitation appointments, and work and it will allow her to do these activities with less pain and suffering. The OT indicates that as the power wheelchair will be used exclusively for community mobility, a backrest and seating is also recommended to provide stability and support as she commutes. The OT further indicates that adjustable footrests are important to allow for attending transfers when she transitions from home to community and vice versa. The OT indicates that the appellant is currently using crutches in her home but reports limited ability to bear weight on her affected foot. For the assessment she was using a hospital rented manual wheelchair for her community mobility. The OT states that if left to use a manual wheelchair the appellant will experience immense challenges with her community mobility that may lead to the detriment of all areas of her life.
- Letter from the surgeon dated March 29, 2016 stating that the appellant has a chronic left foot and ankle condition that precludes her from putting any weight on it and she can barely transfer on the left foot. The surgeon states that this is due to a fungal infection and secondary osteoarthritis in the ankle, subtalar, and talonavicular joints. The surgeon asks that the appellant be considered for a power wheelchair in light of her conditions. He states that she will likely be requiring surgery again in the future but the overall recovery could take a year.
- Ministry Health Assistance Branch medical equipment and devices decision summary.

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- Letter from the ministry to the appellant's advocate dated May 12, 2016 providing a reconsideration package.
 - Request for Reconsideration dated May 16, 2016 (RFR).
 - Letter from an advocate dated June 1, 2016 stating that the appellant has complied with all the requirements of EAPWDR Schedule C, sections 3, 3.2 and 3.3. The advocate states that the appellant has supplied various medical prescriptions and assessments that confirm her need for the Wheelchair. The advocate states that the ministry has negligently ignored the prescriptions of the doctors and has summarized her conversations with the occupational therapist (the "OT"), mechanically applied the statutory provision, and denied her request without giving reasons. The advocate states that the ministry has relied solely on the OT opinion, ignored the surgeon's opinion, and down played the extreme need of the appellant.
 - Letter from the surgeon dated May 20, 2016 stating that as a result of a devastating chronic foot and ankle infection the appellant has had to undergo significant bone resection, cement spacer application, and that she will require surgical reconstruction in the next few months with a risk of below-knee amputation. The surgeon indicates that the appellant will be unable to weight bear on this foot for likely another six months and has not been able to weight bear on it for at least 2 years from the information provided to me.
 - Letter from the surgeon dated June 1, 2016 stating that as a result of a devastating chronic foot and ankle infection, the appellant has had to undergo significant bone resection, cement spacer application and will require further surgical reconstruction in the next few risks. The surgeon states that the appellant has had over 1-2 years of disability and inability to weight-bear on that foot and as a result has become deconditioned in the lower and upper extremities. He states that her ability to perform daily living activities ("DLA") is also impaired as a result. The surgeon states that the appellant will not be able to weight bear on this foot for likely another six months and it is anticipated that an electric wheelchair would be to her advantage. The use of a standard wheelchair would be suboptimal and put her at risk of unnecessary physical and mental stress. He also states that extra motion required unintentionally when using a standard wheelchair could potentially put her foot/ankle healing at risk.

Additional Information

In her Notice of Appeal dated June 4, 2016 the appellant states that she disagrees with the ministry's decision as it is not reasonably supported by the evidence and is not a proper application of the law.

The appellant provided a submission by an advocate dated July 15, 2016 (the "Submission") indicating that the appellant disagrees with the ministry's finding that the appellant had not made any effort to obtain an electric wheel chair from alternative resources as the appellant was already using the manual wheel chair from a community provider. The appellant notes that while the ministry adjudicator spoke to the OT regarding the appellant's request it was not until the reconsideration stage that the appellant was asked to explore alternative resources. The advocate states that the ministry has negated the information provided by the physician and the surgeon and that the ministry has ignored the latest information provided by the surgeon. The advocate states that as per the BC Supreme Court decision of *Hudson v Employment and Assistance Appeal Tribunal*, 2009 BCSC 1461, significant weight must be placed on the evidence of the appellant, significant weight must be placed on the medical evidence provided, and any ambiguity must be resolved in favor of the appellant.

On July 28, 2016 the appellant's advocate provided another copy of the letter from the surgeon dated March 29, 2016.

On August 6, 2016 the appellant provided a letter from the surgeon dated July 27, 2016 in which he states that the appellant has an extremely rare and considerable condition in regards to her left foot and ankle. He states that she had severe talar infection that required resection of the bone and has been unable to weight bear for the last year and a half. The surgeon indicates that the appellant lives alone and has a mental disability as per the medical report. He states that her independence is severely affected as a result of the left foot and ankle and she has an upcoming surgery that may or may not help her and that her recovery may take another year. The surgeon states that the appellant requires a motorized wheelchair to maintain basic mobility. He states that in order to complete activities of daily living and grocery shopping, an electric wheelchair would allow the appellant to continue to be independent and that without such a device it is unlikely that she will continue to be independent in the community.

By letter dated August 18, 2016 the ministry indicated that the appellant's recent submission contains the same documents as the previous submission so the ministry's previous written response remains the same, which is that the ministry's submission will be the reconsideration summary provided in the Record of the Ministry Decision.

Admissibility of New Information

The ministry did not object to the new information. The panel has admitted the letter from the surgeon dated July 27, 2016 into evidence as it is in support of 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*. In particular, the new information relates to the appellant's medical condition and the surgeon's opinion as to the need for a power wheelchair.

The panel has accepted the information in the Notice of Appeal and the Submission as argument. As the copy of the letter from the surgeon dated March 29 2016 was already contained in the Record of the Ministry Decision that is not new information.

With the consent of both parties, the hearing was conducted as a written hearing pursuant to section 22(3)(b) of the *Employment and Assistance Act*.

PART F – Reasons for Panel Decision

The issue on this appeal is whether the ministry's decision to deny the appellant funding for the power wheelchair was reasonably supported by the evidence or was a reasonable application of the applicable enactment in the circumstances of the appellant. In particular, was the ministry reasonable in determining that the appellant was not eligible for the power wheelchair as the information provided did not establish

- that there were no resources available to the appellant to pay the cost of or obtain the medical equipment or device as required by EAPWDR Schedule C, section 3(1)(b)(ii);
- that the power wheelchair was the least expensive appropriate medical equipment or device as required by EAPWDR Schedule C, section 3(1)(b)(iii);
- that the assessment by an OT confirmed the medical need for the power wheelchair and seating as required by EAPWDR Schedule C, section 3(2)(b); and
- that the power wheelchair is medically essential to achieve or maintain basic mobility as required by EAPWDR Schedule C, section 3.2(2)?

EAPWDR

General health supplements

62 (1) Subject to subsections (1.1) and (1.2), 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 family unit if the health supplement is provided to or for a person in the family unit who is a recipient of disability assistance.

SCHEDULE C

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 (B.C. Reg. 197/2012)

(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: (B.C. Reg. 197/2012)

(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.

(B.C. Reg. 197/2012)

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.

Medical equipment and devices — wheelchair seating systems

3.3 (1) 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 a person's positioning in a wheelchair:

- (a) a wheelchair seating system;
- (b) an accessory to a wheelchair seating system.

(2) 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 2 years from the date on which the minister provided the item being replaced.

The appellant's position is that she requires the power wheelchair on an urgent basis to meet her basic mobility needs and to be independent in the community due to decreased mobility resulting from her chronic left foot and ankle condition. The appellant's position is that the OT, physician, and the surgeon have confirmed that she has a medical need for the power wheelchair and that she needs it to prevent imminent danger to her health. The appellant's position is that she cannot use a manual wheelchair due to her condition, particularly due to pain in her upper extremities when self-propelling in a manual wheelchair. The appellant's position is that the ministry has not reasonably considered the medical information provided, placing too much reliance on the OT assessment as opposed to the information from the surgeon. The appellant's position is that the ministry has not reasonably applied the legislation in her circumstances.

The ministry's position, as set out in the reconsideration decision, is that as the appellant is a recipient of disability assistance she is eligible to receive health supplements provided under

EAPWDR Schedule C, section 3 to 3.12. However, the ministry's position is that although the information provided by the OT establishes that the appellant has difficulty with mobility as a result of her left ankle condition, the appellant has not established that there are no resources available to the appellant to pay the cost of or obtain the medical equipment or device as required by EAPWDR Schedule C section 3(1)(b)(ii) or that the requested power wheelchair is the least expensive appropriate device as required by section 3(1)(b)(iii).

The ministry's position is that although the surgeon has recommended a power wheelchair and states that use of a manual wheelchair is suboptimal, the information provided does not establish that the appellant's current limitations with mobility are progressive in nature and that the appellant will have an ongoing need for an electric wheelchair in the future. The ministry's position is that it does not appear that the appellant has explored other options for obtaining an electric wheelchair and there is no evidence that the appellant has attempted to access the Red Cross short-term loan cupboard for a power mobility device that would meet the appellant's present needs so the legislative criteria of EAPWDR Schedule C section 3(1)(b)(ii) has not been met.

The ministry also argues that the OT assessment does not demonstrate that the power wheelchair is the least expensive appropriate medical device as required by EAPWDR Schedule C section 3(1)(b)(iii) as there is no indication that a scooter was even considered or trialed and a scooter is less expensive than an electric wheelchair. The ministry's position is that a power wheelchair is intended for those with a chronic and ongoing inability to weight bear with no prospect of regaining their physical capabilities, so it cannot be considered the least expensive appropriate medical device in the appellant's circumstances.

The ministry's position is that the assessment provided by the OT does not indicate that the appellant has a medical need for a power wheelchair as required by EAPWDR Schedule C section 3(2)(b). The ministry notes that the OT assessment appears to be largely based on the appellant's self-report, there was no assessment of the appellant's basic physical functioning and very little direct observation except of the appellant's weight bearing on the affected foot during which the appellant was observed "*using a very guarded position*".

The ministry's position is that the assessments provided do not indicate that a power wheelchair is medically essential to achieve or maintain basic mobility or that the assessments provided demonstrate that seating is medically essential to achieve or maintain position in a power wheelchair, so the ministry is not satisfied that EAPWDR Schedule C section 3.2(2) is met.

Panel Decision

The appellant is in receipt of disability assistance with no other income. The OT assessment indicates that the appellant was renting a manual wheelchair from the hospital and the Submission indicates that the appellant was using a manual wheelchair from Red Cross and was unable to get the electric wheelchair. As the appellant has made efforts to use a manual wheelchair from the hospital and Red Cross and has made efforts to obtain an electric wheelchair from Red Cross but was unable to do so, the panel finds that the ministry was not reasonable in determining that the appellant had not satisfied the legislative criteria of EAPWDR Schedule C section 3(1)(b)(ii).

EAPWDR Schedule C section 3(1)(b)(iii) requires that the requested item be the least expensive

appropriate medical equipment or device. While the assessments provided indicate that the power wheelchair and seating was the recommended item, there is no evidence that a scooter was considered or trialed. The OT indicates that the appellant was mobilizing indoors with crutches, was seen in a manual wheelchair but reported difficulties. However, there is no indication that a scooter was considered. In his letter dated June 1, 2016 the surgeon indicates that use of a manual wheelchair would be suboptimal but he does not specify whether a scooter would be suitable for the appellant and in his more recent letter dated July 27, 2016 the surgeon does not indicate whether a scooter was considered and/or whether a scooter would be suitable or not.

The appellant argues that the ministry never suggested that the appellant find out if a scooter was a viable alternative. While the panel finds that it may have been helpful if the ministry representative had raised that issue when speaking to the OT, there is no requirement that the ministry representative do so as it is up to the appellant to provide the necessary information to satisfy the legislative criteria. However, from a review of the notes between the adjudicator and the OT contained in the reconsideration decision it appears that the adjudicator did raise the issue of a scooter with the OT but the notes do not indicate whether the OT provided information as to whether a scooter was viable or not and the OT has not provided any further written information indicating whether a scooter is suitable or not. The panel finds that without some indication from the OT and the surgeon to indicate that there is no other medical equipment or device such as, but not limited to a scooter, that would satisfy the appellant's need, the ministry reasonably determined that the requested power wheelchair is not the least expensive appropriate medical equipment or device as required by EAPWDR Schedule C section 3(1)(b)(iii).

EAPWDR Schedule C section 3(2)(b) requires that there must be an assessment by an occupational therapist or physiotherapist confirming the medical need for the medical equipment or device. While the appellant argues that the ministry did not reasonably consider all of the medical information from the physician and the surgeon in addition to the OT, this section of the legislation specifies (on the request of the minister) that it must be the OT or a physical therapist that confirms the medical need. The OT indicates that the appellant was using crutches in her home but reports limited ability to weight bear on her affected foot and was observed using a very guarded position for her left foot. The OT indicates that the power wheelchair will provide a number of positive outcomes for the appellant including the means to independently mobilize in the community with reduced pain and suffering, completely weekly activities of grocery shopping, attending medical/rehabilitation programs and work. The panel finds that the ministry reasonably determined that while the power wheelchair would be of benefit to the appellant the OT assessment did not confirm the medical need for the power wheelchair. The panel finds that the ministry reasonably determined that the appellant did not meet the legislative criteria required in EAPWDR Schedule C section 3(2)(b).

EAPWDR Schedule C section 3.2(2) requires that the ministry be satisfied that the item requested is medically essential to achieve or maintain basic mobility. The OT, physician and surgeon all indicate that the power wheelchair would be beneficial to the appellant and help increase her independence in the community. The OT assessment indicates that the appellant was using crutches to ambulate at home and that the requested power wheelchair will be used exclusively for community mobility. In his letter dated June 1, 2016 the surgeon indicates that a manual wheelchair would be suboptimal but he does not indicate whether the power wheelchair is necessary to maintain basic mobility. In his letter dated July 27, 2016 the surgeon states that the appellant has been unable to weight bear for a year and a half and that her independence is severely affected as a result of her left foot and ankle. He

states that she has an upcoming surgery that may give her a chance of recovery but that her recovery may take another year. The surgeon states that in his opinion the appellant does require a motorized wheelchair to maintain basic mobility. The surgeon indicates that an electric wheelchair will allow the appellant to be independent in the community with respect to activities of daily living and grocery shopping and that without the electric wheelchair it is unlikely that she will continue to be independent in the community based on the information available.

However, the surgeon does not provide any information about the appellant's mobility within her home and whether she is still using crutches to mobilize in her home. While the surgeon states that she requires the electric wheelchair to maintain basic mobility it is not clear if he is referring to basic mobility in the home or with respect to increasing independence in the community as the rest of his letter and previous letters indicate. While the appellant argues that any ambiguity ought to be resolved in her favor, gaining independence in the community is not the same as basic mobility and neither the physician, the OT or the surgeon have provided any further information to describe what aspects of basic mobility will be met by the power wheelchair.

The panel finds that the ministry reasonably determined that the information provided was not sufficient to satisfy the ministry that the power wheelchair is medically essential to achieve or maintain basic mobility as required by EAPWDR Schedule C section 3.2(2).

Conclusion

The panel acknowledges that the power wheelchair has been recommended for the appellant and may be beneficial for her to gain independence in the community. Having reviewed and considered all of the evidence and the relevant legislation, the panel finds that the ministry was not reasonable in determining that EAPWDR Schedule C section 3(1)(b)(ii) was not met. However, the panel finds that the ministry's reconsideration decision finding the appellant ineligible for funding for the power wheelchair as the legislative criteria of EAPWDR Schedule C section 3(1)(b)(iii), 3(2)(b) and 3.2(2) were not met was reasonably supported by the evidence and a reasonable application of the legislation in the circumstances of the appellant. The panel therefore confirms the ministry's decision and the appellant is not successful in her appeal.