

[ ]

### PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the ministry) reconsideration decision dated January 10, 2017, which denied the appellant funding for monies owed for a monthly exercise program because she had not demonstrated that all of the legislative criteria set out in the *Employment and Assistance for Persons with Disabilities Regulation* had been met. In particular, the ministry found that the exercise program did not meet the legislated requirements of sections 62 and 69 and Schedule C, specifically section 2(1)(c) of Schedule C.

The minister determined that the appellant met the basic eligibility requirements under section 62 as a recipient of disability assistance, but only as effective September 1, 2016. The ministry also found under section 69, that while she has a life threatening health need, the requested exercise program is not a general health supplement under Schedule C, section 2(1)(a) or (f) or a medical equipment or device under section 3.

The ministry determined that the requested exercise program met the requirement under Schedule C, section 2(1)(c)(i) as a medical practitioner had confirmed an acute need.

### PART D – Relevant Legislation

*Employment and Assistance for Persons with Disabilities Regulation* (EAPWDR), section 62, section 69, Schedule C subsection 2

## PART E – Summary of Facts

The information before the ministry at reconsideration included the following:

- A fax dated November 5, 2017, from the appellant asking that the ministry pay the outstanding balance for a monthly exercise program at a recreation centre and the cost of medications.
- A letter, dated, November 5, 2016, from the appellant indicating that she is undertaking the exercise program as directed by her doctor and it is helping her a lot. The appellant also states that she cannot afford to pay for the program as she is on disability assistance and without the program and other therapies she lacks the energy to function. The program started in June 2016 and she will need to take it until December 2016. The total for the program is \$579, \$199 of which had been covered by a grant program, and the remaining \$380.63 is outstanding.
- An undated invoice from the recreation centre offering the exercise program with an outstanding balance of \$380.63 relating to charges incurred from June 2016 to December 2016.
- An undated Physician's Recommendations for Exercise form.
- A 6 Minute Walk Test Flow Sheet dated March 15, 2016.
- A Respiratory Consult Preliminary Report dated February 18, 2016.
- A letter dated December 9, 2016, from the appellant containing substantially the same information as the November 5, 2016 letter.
- A letter dated December 8, 2016, from a physician outlining the need for the appellant to workout with a registered physiotherapist to ensure her workouts are effective and appropriate for her condition. The physician also including the following: "[w]e are advocating for [the appellant] to receive some funds from the Ministry of Health in order to assist her at this extremely successful time."

In the Request for Reconsideration, dated December 21, 2016, the appellant included the following information:

- She is sending her doctor's letter one last time regarding her condition. She would like to have her exercise program covered. She needs this program to survive upcoming transplant surgery. If the program will not be covered she will die.
- She is the perfect example of how people end up on the street or overdose on drugs. Canada is one of the richest countries in the world, and for this government to treat their Canadians who have a disability like this is cruel. She deserves respect from the ministry and not have to deal with this stress.
- A letter dated December 15, 2016, from a physician asking that the decision to reject the appellant's request for coverage for the use of a physiotherapist be revisited as the most appropriate treatment for the appellant to maintain the required physical condition for transplant is one to one physiotherapy. The physician further indicates that failure to meet these standards will result in denial for the transplant and death.

The ministry reconsideration officer also sent a request for information to the recreation centre providing the exercise program asking who performs the initial assessment, whether the sessions are one to one, the professionals involved, and whether it is possible to obtain funding for the program from a specified Foundation source.

In response to this request a member of the recreation centre staff provided a flyer about the program

as well as the following information:

- The assessment and orientation is one to one;
- The assessment and program are taught by an individual with a Bachelor's of Exercise and Wellness who is an Exercise Physiologist through CSEP (Canadian Society of Exercise Physiologists); and
- It is not known whether funding from a Foundation specified by the reconsideration officer is available.

### **Notice of Appeal**

In the Notice of Appeal, dated January 17, 2017, the appellant provided the following information:

- She has a severe medical restriction and only receives an amount that she cannot even live off
- She cannot afford to pay for this program that is required for her to live
- She cannot have a traditional physiotherapist due to several prior surgeries

### **At the Hearing**

#### Appellant

The appellant's advocate spoke to a submission that went to argument; these arguments are addressed in Part F, Reasons for Panel Decision, below. In the course of presenting the submission, the advocate noted that the appellant's attempt to secure funding from the Ministry of Health was not successful. As well, the appellant sought assistance from her MLA in her effort to obtain funding from the Ministry of Health but this did not result in funding for the program. In addition, the advocate indicated that there is no information on the website of the Foundation mentioned in the reconsideration decision that would suggest that there is any funding offered by that organization that may be available to the appellant.

In addition, the appellant related a past bad experience with physiotherapy, emphasizing the uniqueness of her circumstances even among those suffering from the same rare disease that she suffers. The appellant explained that physiotherapy treatment that is standard for individuals with the appellant's medical condition is not appropriate for her due to her unique circumstances and the exercise program she is undertaking is the only suitable option for her.

#### Ministry

The ministry relied on its reconsideration decision at the hearing.

### **Admissibility of Additional Information**

The panel determined the information provided in the Notice of Appeal as well as the additional information provided at the hearing was admissible under s. 22(4) of the EAA as it was in support of, and tended to corroborate, the records before the minister at reconsideration.

## PART F – Reasons for Panel Decision

The issue in this appeal is whether the ministry was reasonable in denying the appellant funding for monies owed for a monthly exercise program because she had not demonstrated that all of the legislative criteria under section 62 and Schedule C of the *Employment and Assistance for Persons with Disabilities Regulation* had been met. More specifically, the issue is whether the evidence reasonably supported the following determinations or whether they were a reasonable application of the legislation in the appellant's circumstances:

The ministry determined that the appellant had not demonstrated that:

- the monthly exercise program was provided by one of the health professionals listed in Schedule C, subsection 2(1)(c),
- the visits that could be covered under the Medical Services Plan (MSP) were exhausted and payment was not available under the *Medicare Protection Act* in accordance with Schedule C, subsection 2(1)(c)(ii), and
- there are no resources available to cover the costs as required by Schedule C, subsection 2(1)(c)(iii).

The ministry found that the appellant had met the following requirements:

- the appellant is designated as a Person with Disabilities as out in section 62,
- the appellant's medical practitioner has confirmed an acute need as required by Schedule C, subsection 2(1)(c)(i), and
- the number of visits for which coverage is requested is less than the 12 per calendar year that the ministry is authorized to provide in accordance with Schedule C, subsection 2(2).

The ministry also determined that the appellant was not eligible to receive funding for the exercise program under the provisions relating to medical supplies, medical equipment or health supplements because the exercise program was not:

- a medical or surgical supply as set out in EAPDWR, Schedule C, section 2(1)(a);
- medical equipment as set out in EAPDWR, Schedule C, section 3; or
- one of the supplements set out in EAPDWR, Schedule C, sections 2.1, 2.2, 4, 4.1, 5, 6, 7, 8, and 9.

Finally, the ministry determined that the appellant was not eligible for funding for the exercise program as a person facing a direct and imminent life-threatening need, under section 69 of the EAPWDR because she is eligible for health supplements under sections 2(1)(a) and (f) and section 3.

The legislation provides:

### **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.

### **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).

### **Schedule C**

Section 1 of Schedule C contains relevant definitions.

The remaining sections deal with specific categories of health supplements, with category-specific criteria relating to such matters as exclusions, limits, purpose and replacement. These sections and the categories of supplement covered are listed below:

Section            Category

2 (1) General health supplements

- (a) Medical or surgical supplies that are disposable or reusable and 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;

**(c) The following services: acupuncture, chiropractic, massage therapy, naturopathy, non-surgical podiatry, physical therapy.**

- (f) Travel for the purposes of medical care.

2.1 Optical supplements

2.2 Eye examination supplements

3 Medical equipment and devices – general provisions

3.1 Canes, crutches and walkers

3.2 Wheelchairs

3.3 Wheelchair seating systems

3.4 Scooters

3.5 Bathing and toileting aids: (a) a grab bar in a bathroom;(b) a bath or shower seat;(c) a bath transfer bench with hand held shower;(d) a tub slide; (e) a bath lift; (f) a bed pan or urinal;(g) a raised toilet seat;(h) a toilet safety frame;(i) a floor-to-ceiling pole in a bathroom;(j) a portable commode chair; (k) a standing frame; (l) a positioning frame; (m) a transfer aid

3.6 Hospital beds: (a) a hospital bed; (b) an upgraded component of a hospital bed; (c) an accessory attached to a hospital bed; (d) a positioning item on a hospital bed

3.7 Pressure relief mattresses

3.8 Floor or ceiling lift devices

3.9 Positive airway pressure devices

3.10 Orthoses: (a) a custom-made or off-the-shelf foot orthotic; (b) custom-made footwear; (c) a permanent modification to footwear; d) off-the-shelf footwear required for the purpose set out in subsection (4.1)(a); (e) off-the-shelf orthopaedic footwear; (f) an ankle brace;(g) an ankle-foot orthosis; (h) a knee-ankle-foot orthosis; (i) a knee brace; (j) a hip brace; (k) an upper extremity brace; (l) a cranial helmet used for the purposes set out in subsection (7); (m) a torso or spine brace; (n) a foot abduction orthosis; (o) a toe orthosis

3.11 Hearing instruments

3.12 Non-conventional glucose meters

4 Dental supplements

4.1 Crown and bridgework supplement

5 Emergency dental supplements

6 Diet supplements

7 Monthly nutritional supplement

8 Natal supplement

**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:

...

(c) subject to subsection (2), a service provided by a person described opposite that service in the following table, delivered in not more than 12 visits per calendar year,

(i) for which a medical practitioner or nurse practitioner has confirmed an acute need,

(ii) if the visits available under the Medical and Health Care Services Regulation, B.C. Reg. 426/97, for that calendar year have been provided and for which payment is not available under the *Medicare Protection Act*, and

(iii) for which there are no resources available to the family unit to cover the cost:

Item	Service	Provided by	Registered with
1	acupuncture	acupuncturist	College of Traditional Chinese Medicine under the <i>Health Professions Act</i>
2	chiropractic	chiropractor	College of Chiropractors of British Columbia under the <i>Health Professions Act</i>
3	massage therapy	massage therapist	College of Massage Therapists of British Columbia under the <i>Health Professions Act</i>
4	naturopathy	naturopath	College of Naturopathic Physicians of British Columbia under the <i>Health Professions Act</i>
5	non-surgical podiatry	podiatrist	College of Podiatric Surgeons of British Columbia under the <i>Health Professions Act</i>
6	physical therapy	physical therapist	College of Physical Therapists of British Columbia under the <i>Health Professions Act</i>

(2) No more than 12 visits per calendar year are payable by the minister under this section for any combination of physical therapy services, chiropractic services, massage therapy services, non-surgical podiatry services, naturopathy services and acupuncture services.

(2.1) If eligible under subsection (1) (c) and subject to subsection (2), the amount of a general health supplement under section 62 of this regulation for physical therapy services, chiropractic services, massage therapy services, non-surgical podiatry services, naturopathy services and acupuncture services is \$23 for each visit.

**Eligibility**

Section 62 of the EAPWDR allows for the provision of health supplements to a family unit in receipt of disability assistance.

**The position of the parties**

The ministry's reconsideration decision indicates that the appellant has met this criterion, and notes that the appellant began receiving disability assistance in September 2016.

The appellant's advocate takes issue with September 2016 as the date of the appellant's eligibility for disability assistance but concedes that, even with the September 2016 date referred to by the ministry, the appellant had exceeded the annual maximum of 12 visits by the end of 2016 for which a health supplement can be provided. The appellant therefore, acknowledges that whether or not the appellant was eligible prior to September 2016 is not relevant to her eligibility for a health supplement.

### Panel Decision

The panel finds that the appellant is a recipient of disability, as agreed by the parties, and notes that there is no dispute between the parties on this matter.

### **Extended Therapy**

Schedule C, section 2(1)(c) allows the ministry to provide coverage for extended therapy services that are listed in this section. The listed therapies are: acupuncture, chiropractic, massage therapy, naturopathy, non-surgical podiatry and physical therapy. This section specifies that the services are to be:

- provided by the person described opposite the service in the included table
- not delivered in more than 12 visits per calendar year
- prescribed by a medical or nurse practitioner due to an acute need
- visits available under the Medical and Health Care Services Regulation have been exhausted and further payment is not available under the *Medicare Protection Act*
- there are no resources available to the family unit to cover the cost

The ministry determined in its reconsideration decision that the second and third criteria had been met. The ministry determined that the appellant's medical practitioner has confirmed an acute need and that the number of visits for which coverage is requested is less than the 12 per calendar year that the ministry is authorized to provide.

### **Service Provider**

This criterion requires that the service provided be provided by the practitioner listed opposite the service in the table set out in Schedule C, subsection 2(1)(c).

### The position of the parties

The appellant's argument is that the service provided to the appellant meets the definition of physical therapy as defined in the EAPWDR as having the same definition as that in the Physical Therapists Regulation, BC Reg 288/2008:

**"physical therapy"** means the treatment of the human body by physical or mechanical means, by manipulation, massage, exercise, the application of bandages, hydrotherapy and medical electricity, for the therapeutic purpose of maintaining or restoring function that has been impaired by injury or disease.

The appellant's advocate further argues that the appellant's physician noted in his letter that "the most appropriate treatment to support... for [the appellant] is to participate in 1:1 physiotherapy" and since this physician referred the appellant to the exercise program for which she seeks funding, the physician considers the program a physical therapy program.

The appellant argues that the ministry's finding that she is not eligible for coverage because a physiologist and not a physiotherapist administers the program is an unreasonable application of the legislation because it contravenes the purposes of the Act and Regulation. The purpose, the appellant argues, of the health supplement provisions are to provide funding for medically necessary treatments for which the requestor has no other means to pay. The appellant's advocate argues that the service for which funding is sought meets the definition of physical therapy, she was referred to this program by medical practitioners who confirm an acute need for the service, she has no other means to pay for this service and the service is necessary to preserve her life.

The appellant's advocate argues that failure to provide the appellant "with a health supplement leads to a result which is contrary to the purpose of the health supplement provisions, and the act more broadly, and is thus absurd." The appellant refers to *Re Rizzo and Rizzo Shoes Ltd.* [1998] 1 SCR 27, at para. 27 in support this argument. The passage to which the appellant's submission refers is: "a label of absurdity can be attached to interpretations which defeat the purpose of a statute or render some aspect of it pointless or futile."

The ministry's position in relation to this criterion is that the service (exercise program) for which the appellant seeks funding is not provided by one of the service providers listed in the table and, as such the appellant has not met this criterion. The ministry argues that the list of services and service providers set out in the table is fixed; there is no discretion to provide funding for anything other than what is specified in the legislation. In addition, the ministry argues there is no exception available in policy that would allow the ministry to provide services beyond the parameters set out in legislation.

The ministry's position is that the appellant is essentially requesting that the ministry make an exception in order to pay for her participation in the exercise program from June to December 2016. Funding for physical therapy, the ministry argues, can only be approved when it is provided by a physical therapist. The ministry argues that there is no discretion to approve funding for the provision of physical therapy by anyone other than a physical therapist who is registered with the College of Physical Therapists of British Columbia under the *Health Professions Act*.

#### Panel Decision

The panel finds that the appellant's submission that the exercise program services provided to the appellant "match the definition of a physical therapy" must fail.

Physical therapy under the EAPWDR must be provided by a physical therapist who is registered with the College of Physical Therapists of British Columbia under the *Health Professions Act*. The regulation to which the appellant's submission refers in arguing that the services are physical therapy also specifies that no person other than a physical therapist may practice physical therapy. The regulation further specifies that physical therapy may only be practiced by registrants of the College of Physical Therapists of British Columbia. The evidence indicates that the services for which funding is sought are provided by an individual with a Bachelor's of Exercise and Wellness who is an Exercise Physiologist through CSEP Canadian Society of Exercise Physiologists. There is no evidence that this provider is also registered with the College of Physical Therapists of British Columbia. The services provided to the appellant are, therefore, not physical therapy.

Contrary to the appellant's submission, it does not produce an absurd result for the EAPWDR to require that physical therapy services to be provided by registered with the College of Physical Therapists of British Columbia under the *Health Professions Act*; rather the opposite, because only registrants of this college are authorized to practice physical therapy. The panel further notes that all of the service providers listed in the table are required to be registrants of a college under the *Health Professions Act*.

For the forgoing reasons, the panel concludes that the ministry's decision that the services for which the appellant has requested funding do not meet the requirement set out in section 2(1)(c) was reasonable.

### ***MSP Exhaustion***

This criterion specifies that visits available for coverage under the Medical Services Plan (MSP) must be exhausted for that calendar year and that payment is not available under the *Medicare Protection Act*.

#### *The position of the parties*

The appellant's submission in relation to this criterion is that the appellant "is willing to seek Health Insurance BC payments in addition to this coverage from the Ministry". The appellant further submits that there are "difficulties in matching the invoicing policies of the [exercise program] to the requirements of Health Insurance BC" because the program is billed on a monthly or term basis, which even if overcome would leave the vast majority of the appellant's debt unpaid. The appellant further submits that "[w]hether Health Insurance BC will provide support for this service is thus not determinative of the issue of [the appellant's] eligibility for a supplement under the *Act* and EAPWD Regulation."

The ministry's position is that there is no indication that visits that could be covered under the Medical Services Plan were exhausted and payment was not available under the *Medicare Protection Act*. The ministry argues that the legislation only applies after MSP is exhausted, this step cannot be skipped.

#### *Panel Decision*

The panel finds that the plain language of the applicable regulatory provision does indeed indicate that MSP exhaustion is a pre-condition of extended therapy coverage. The appellant has not demonstrated she has exhausted her MSP visits for the 2016 calendar year. Therefore, the panel concludes that the ministry's decision on this criterion is reasonable.

### ***No Resources Available***

This criterion specifies that a health supplement may be provided for eligible services for which there are no resources available to the family unit to cover the cost.

#### *The position of the parties*

The appellant's argument is that there are no resources available to the family unit. The appellant argues that she has sought and obtained a grant of \$199 to offset the cost of the program. The appellant further argues that she unsuccessfully sought funding from the Ministry of Health. In addition the appellant argues that there is no information available on the website of the Foundation mentioned in the ministry's reconsideration decision that would indicate that funding might be available from this source.

The ministry acknowledges that the appellant does not have the resources available to pay for the services requested. The ministry's position is that information has not been provided to establish that funding from the Ministry of Health has been requested and is not available. The ministry's reconsideration decision also indicates that there is no information provided to establish that funding from a particular Foundation has been requested and is not available.

#### *Panel Decision*

The panel notes that the ministry has acknowledged that the appellant does not have the resources to pay for the services for which funding is requested. The panel further notes that the ministry was

aware at the time of the reconsideration decision that the appellant had sought funding from the Ministry of Health, as indicated in the physician's letter dated December 8, 2016. The panel finds that the argument provided by the appellant indicates that this effort was not successful. The panel also notes that the appellant obtained a grant to partially offset the cost of the program. The panel notes that the information acquired by ministry from the recreation centre in relation to the possibility of funding from the Foundation mentioned in the reconsideration decision is that the possibility of such funding is not known. There is no indication in the information before the ministry at reconsideration that funding might be available from this Foundation. The panel finds that the appellant has demonstrated that there are no resources available to the family unit to cover the cost of the services for which funding is sought. The panel finds that the ministry's determination on this criterion was not reasonable.

### **Other Supplements**

The appellant does not dispute the ministry's determination that the services for which funding is sought does not qualify as a medical supply, medical equipment or any of the remaining health supplements. Having reviewed the applicable provisions in the legislation, the panel concludes that the ministry's determination that the exercise program does not qualify under these provisions is reasonable.

### **Section 69**

The ministry's position is that the appellant is not eligible to receive funding for the exercise program under section 69 because the exercise program does not qualify as a medical supply, medical transportation, or medical equipment and devices and the appellant is otherwise eligible to receive these health supplements.

The appellant has not addressed section 69 in her argument.

The panel finds that because the appellant is "otherwise eligible" for health supplements under section 62, the ministry reasonably determined that section 69 of the EAPWDR did not apply.

### **EAPWDA Section 7**

The appellant's advocate raised an argument in relation to section 7 of the *Employment and Assistance for Persons with Disabilities Act* (EAPWDA). Section 7 is as follows:

#### **Financial assistance to service or program providers**

**7** The minister may provide financial assistance to a person who, or a group of persons that, undertakes to provide a service or program that, in the minister's opinion, will promote the purposes of this Act.

#### *The position of the parties*

The essence of the argument raised by the appellant's advocate is that the minister's failure to apply section 7 to the appellant's circumstance is unreasonable.

The ministry argued that section 7 cannot be used to override anything specifically written in the legislation.

#### *Panel Decision*

The panel does not have the jurisdiction to make a determination as to whether the minister could, under section 7, contract with a service provider to provide the exercise program requested by the

appellant. The panel notes that under section 16 of the EAPWDA, reconsideration and appeal rights are limited to the refusal, reduction or discontinuation of disability assistance, hardship assistance and supplements (the latter as specified by regulation, and does not include financial assistance provided under section 7). Thus a refusal by the minister to provide such financial assistance is not subject to reconsideration or appeal.

**Conclusion**

Having reviewed and considered the evidence and the legislation, the panel finds that the ministry's reconsideration decision, which denied the appellant's request for funding for monies owed for a monthly exercise program because she had not demonstrated that all of the legislative criteria had been met, is a reasonable application of the legislation in the circumstances of the appellant. The appellant is not successful in her appeal.