

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation's (ministry) reconsideration decision dated January 30, 2017 which denied the appellant's request for a supplement to cover the cost of Lactaid tablets. The ministry found that the item requested does not meet all of the criteria in Section 2 of Schedule C of the Employment and Assistance for Persons with Disabilities Regulation (EAPWDR).

PART D – Relevant Legislation

Employment and Assistance for Persons with Disabilities Regulation (EAPWDR), Sections 62 and Schedule C, Section 2

PART E – Summary of Facts

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*.

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

- 1) Letter dated November 30, 2016 in which a medical practitioner wrote that the appellant has severe lactose intolerance which exacerbates her irritable bowel syndrome (IBS). Her conditions are ongoing and permanent. She will require permanent dietary modifications with the Lactaid supplements;
- 2) Letter dated December 1, 2016 in which the appellant's mother requested the ministry to consider changing the appellant's status to permanent, with automatic renewals;
- 3) Letter dated December 6, 2016 in which the ministry denied the appellant's request for Lactaid because this item is a nutritional supplement and "medical or surgical supplies" do not include nutritional supplements, food, vitamins, minerals or prescription medications [Section 2.1 of Schedule C of the EAPWDR];
- 4) Letter dated January 10, 2017 in which the medical practitioner wrote that the appellant requires Lactaid tablets to be taken with her food due to severe lactose intolerance which aggravates her IBS. Her condition is severe, ongoing and permanent. Her syndrome is characterized by diarrhea and fecal incontinence. She requires 16 tablets per day. Providing this medication for her is a financial hardship causing the appellant further distress/stress, which increases her IBS symptoms leading to more copious and severe diarrhea and fecal incontinence issues;
- 5) Request for Reconsideration dated January 16, 2017 in which the appellant's mother wrote that:
 - The appellant's request for Lactaid tablets was approved on April 15, 2015 on a two-year renewal basis.
 - The appellant's IBS is ongoing and permanent and she requires Lactaid tablets on an ongoing basis, to be taken with food at every meal and snack, and she is severely Lactose intolerant. This intolerance aggravates her severe IBS, which causes severe diarrhea and fecal incontinence.

Additional information

In her Notice of Appeal dated February 14, 2017, the appellant expressed her disagreement with the ministry's reconsideration decision and wrote that she thinks she should be approved based on Section 2(1)(a)(i)(D) of Schedule C of the EAPWDR as the supplies are required for incontinence, in addition to the sections that she already satisfied.

Prior to the hearing, the appellant provided the following additional documents:

- 1) Letter dated September 2, 2011 in which the ministry approved the appellant's request for Lactaid with a review date of September 30, 2013;
- 2) Letter dated August 28, 2013 in which the ministry renewed the appellant's request for Lactaid;
- 3) Letter dated December 2, 2014 in which the ministry denied the appellant's request for Lactaid as the item is not considered a "medical or surgical supplies" and, therefore, is not eligible for consideration;
- 4) Excerpt from a Reconsideration Decision dated April 15, 2015 in which the ministry approved the appellant's request on the basis that the ministry was satisfied that the appellant requires Lactaid tablets for the purpose of ongoing bowel care due to loss of muscle function;
- 5) Letter dated March 17, 2017 in which the medical practitioner added that the appellant's syndrome is characterized by diarrhea and fecal incontinence and these symptoms are due to involuntary dysfunctional muscular action of the entire colon (large and small) resulting in a loss of muscular function.

- 6) A Patient's guide to Living with IBS.
- 7) Written submission by an advocate on behalf of the appellant.

The ministry relied on the reconsideration decision as the ministry's submission in the appeal.

Admissibility of Additional Information

The ministry did not raise an objection to the admissibility of the additional information provided by the appellant, which included further detail of the circumstances surrounding the history of her request and her need for Lactaid tablets. The panel admitted this additional information as being 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*. The panel considered the written submission by the advocate as argument on the appellant's behalf.

PART F – Reasons for Panel Decision

The issue of the appeal is whether the ministry's decision, which denied the appellant's request for a supplement to cover the cost of Lactaid tablets because the item requested does not meet all of the criteria in Section 2 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 dependent 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 found that the requirement of Section 62 has been met in that the appellant is a recipient of disability assistance.

At issue is whether the requested Fleet Enema is an eligible item under Schedule C of the EAPWDR, including:

General health supplements

2 (1) The following are the health supplements that may be paid for by the minister if provided to a family unit that is eligible under section 62 [*general health supplements*] of this regulation:

(a) medical or surgical supplies that are, at the minister's discretion, either disposable or reusable, if the minister is satisfied that all of the following requirements are met:

(i) the supplies are required for one of the following purposes:

- (A) wound care;
- (B) ongoing bowel care required due to loss of muscle function;
- (C) catheterization;
- (D) incontinence;
- (E) skin parasite care;
- (F) limb circulation care;

(ii) the supplies are

- (A) prescribed by a medical practitioner or nurse practitioner,
- (B) the least expensive supplies appropriate for the purpose, and
- (C) necessary to avoid an imminent and substantial danger to health;

(iii) there are no resources available to the family unit to pay the cost of or obtain the supplies. ...

(1.1) For the purposes of subsection (1) (a), medical and surgical supplies do not include nutritional supplements, food, vitamins, minerals or prescription medications.

Panel decision

In the reconsideration decision, the ministry was satisfied that the appellant's request for Lactaid tablets met all but one criterion in Section 2 of Schedule C of the EAPWDR. The ministry was not satisfied that the Lactaid tablets are required for one of the purposes set out in Section 2(1)(a)(i) and, specifically, that the Lactaid tablets are required for the purpose of ongoing bowel care required due to loss of muscle function. The ministry wrote that the medical practitioner clearly stipulated that the appellant requires Lactaid tablets due to her severe lactose intolerance, which in turn exacerbates her IBS that includes fecal incontinence and severe diarrhea. The ministry wrote that the appellant's fecal incontinence is not due to loss of muscle function but is due to her lactose intolerance and IBS. In the written submission, the advocate for the appellant pointed out that the appellant's request for Lactaid tablets was previously approved by the ministry in letters on September 2, 2011 and August 28, 2013 and in a Reconsideration decision dated April 15, 2015, whereby the ministry specifically

confirmed that the Lactaid tablets were necessary for the purposes of ongoing bowel care due to loss of muscle function. The panel notes that the previous denials by the ministry of the appellant's request for Lactaid tablets, in letters dated December 2, 2014 and December 6, 2016, were based on the exclusion in Section 2(1.1) of Schedule C of the EAPWDR, which stipulates that for the purposes of subsection (1) (a), "medical and surgical supplies" do not include nutritional supplements, food, vitamins, minerals or prescription medications. Given that the medical practitioner referred to Lactaid tablets as "supplements" in the letter dated November 30, 2016 and as "medication" in her letter dated January 10, 2017, the panel finds that the ministry did not reasonably consider the applicability of the exclusion of Lactaid tablets from the definition of "medical and surgical supplies" pursuant to Section 2(1.1) of Schedule C of the EAPWDR.

Having included Lactaid tablets within the definition of "medical or surgical supplies," the ministry went on to consider whether the supplies are required for ongoing bowel care required due to loss of muscle function, as one of the several listed purposes in Section 2(1)(a)(i) of Schedule C. The listed purposes also include wound care, catheterization, incontinence, skin parasite care, and limb circulation care and, in her Notice of Appeal, the appellant wrote that she thinks she should be approved based on Section 2(1)(a)(i)(D) of Schedule C of the EAPWDR as the Lactaid tablets are required for incontinence. Given that the medical practitioner wrote in her letters dated January 10, 2017 and March 17, 2017, that the appellant requires Lactaid tablets due to severe lactose intolerance which aggravates her IBS, characterized by diarrhea and fecal incontinence, and the ministry also acknowledged that the appellant has fecal incontinence, the panel finds that the ministry did not reasonably consider that the requested Lactaid tablets are required for the purpose of incontinence.

While not a binding decision, the appellant's advocate pointed out that the ministry confirmed in the Reconsideration decision dated April 15, 2015, that Lactaid tablets assist in relieving and controlling the appellant's IBS symptoms of severe diarrhea and fecal incontinence and, therefore, the Lactaid tablets were necessary for the purposes of ongoing bowel care due to loss of muscle function. In the letter dated March 17, 2017, the medical practitioner clarified that the Lactaid tablets alleviate the appellant's lactose intolerance, which otherwise aggravates her IBS "...characterized by diarrhea and fecal incontinence" and "...these symptoms are due to involuntary dysfunctional muscular action of the entire colon (large and small) resulting in a loss of muscular function." Given the evidence from the medical practitioner regarding the purpose that the Lactaid tablets serve in the appellant's circumstances, the panel finds that the ministry unreasonably determined that the Lactaid tablets were not required for the purpose of "ongoing bowel care required due to loss of muscle function," pursuant to Section 2(1)(a)(i)(B) of Schedule C of the EAPWDR.

Conclusion

In conclusion, the panel finds that the ministry's decision to deny the request for a supplement to cover the cost of Lactaid tablets because the item requested does not meet all of the criteria in Section 2 of Schedule C of the EAPWDR was not a reasonable application of the applicable enactment in the circumstances of the appellant and, therefore, the panel rescinds the decision. The appellant's appeal, therefore, is successful and the decision is referred back to the ministry for a decision as to amount.