

PART C – Decision under Appeal

The decision under appeal is the reconsideration decision of the Ministry of Social Development and Social Innovation (the ministry) dated 07 March 2017 that denied the appellant’s request for a heavy duty commode and for an “easy wipe” toileting aid.

The ministry determined that the requested commode did not meet the criterion set out in sections 3(3)(a), 3(3)(b) and 3.5(2) of Schedule C of the Employment and Assistance for Persons with Disabilities Regulation (EAPWDR), as the ministry had provided the appellant funding for a commode on 30 May 2016 and therefore she is not eligible for a replacement until 30 May 2021, or 5 years after the minister provided the item being replaced.

The ministry determined that the requested “easy wipe” toileting aid is not an eligible health supplement set out in Schedule C of the EAPWDR, either as a bathing and toileting aid listed in section 3.5(1), or as any other type of medical equipment listed in sections 3.1 to 3.12, or as a medical supply listed in section 2(1)(a) or as any other health supplement covered in Schedule C.

The ministry further determined that the appellant was not eligible for the “easy wipe” toileting aid under Section 69 of the EAPWDR (“life threatening health need”) as she is eligible to receive health supplements under the EAPWDR and therefore does not require the remedy under section 69, the requested item is not a health supplement under sections 2(1)(a) and (f) or section 3 of Schedule C, and the information provided does not demonstrate that she faces a direct and imminent life threatening health need for the requested item.

PART D – Relevant Legislation

Employment and Assistance for Persons with Disabilities Regulation (EAPWDR), section 62 and 69 and Schedule C, sections 3 and 3.5

PART E – Summary of Facts

The information before the ministry at reconsideration include the following:

1. From the ministry's files:
 - The appellant is a recipient of disability assistance.
 - The ministry provided the appellant funding for a commode on 30 May 2016.
2. A "Final Equipment Recommendation" prepared by a health authority occupational therapist (OT), dated 16 January 2017, recommending a heavy-duty commode, attaching a quote from a medical equipment provider for \$245.65 (after 15% discount). The OP describes the appellant's health situation as follows:

"[The appellant] has multiple medical conditions and takes numerous medications. Her medical conditions include: hypothyroidism, pulmonary fibrosis, Raynaud's syndrome, hiatus hernia, acid reflux disease, fibromyalgia, chronic fatigue, migraines, dermatomyositis/polymyositis, autoimmune disorder, and sleep apnea. As a result, [the appellant] has significant pain and stiffness throughout her body that fluctuates daily and significantly impacts her mobility and ability to complete her activities of daily living."

The OT gives as rationale for the requested commode:

"The appellant requires a new bedside commode for the following reasons:

- 1) She cannot reach in to clean herself because the front of her current commode is flat and the opening is too small. This new commode has a dip in the middle and a larger opening and the appellant can manage reaching in to wipe herself independently.
- 2) Her current commode leaks quite a bit all over the place and makes a big mess for her caregivers to clean up.

This commode will increase the appellant's independence and safety with toileting. She has to use her commode on a daily basis, multiple times during the day and night, so she needs to be able to use it both safely and independently."

3. A medical equipment request completed by the same OT dated 23 November 2016 for an "easy wipe" toileting aid, attaching a quote from a medical equipment provider for \$66.00 (after 12% discount). The OT describes the appellant's health situation substantially along the same line as in para. 2 above. The OT gives as rationale for the requested item:

"[The appellant] urgently requires this adaptive device so that she can manage to clean herself independently after using the commode or toilet. Presently, she is having difficulty reaching to clean herself due to her pain, stiffness, decreased range of motion and strength in her upper extremities."

4. The appellant's Request for Reconsideration dated 22 February 2017. Under Reasons, the appellant refers to a submission prepared by the OT dated 22 February 2017. The OT writes:

"[The appellant] requires a new bedside commode so that she can safely and independently toilet herself. With her current commode that was provided in May 2016, [the appellant] cannot reach in to clean herself because the front of the commode is too small and flat across. [The appellant] has to stand with the current commode to clean herself and she cannot weight shift to clean safely in sitting. [The appellant] has a very difficult time in standing to clean herself due to significant pain. [The appellant] also has a larger abdomen that adds to her difficulties here. The current commode also leaks quite a bit and is a mess for caregivers to clean up all the time. The appellant also cannot empty the bucket on the current commode independently.

The new commode [make and model number, with attached quote] that [the appellant] requires has a larger opening and dip in the middle that allows the appellant to be able to

clean herself safely and independently in a sitting position. The appellant will also be able to empty and clean this commode independently. The appellant did try a “dry” trial of this commode on January 4th, 2017. It is important to note that the appellant did not trial the current commode that was provided to her in May 2016.”

Notice of Appeal

The appellant’s Notice of Appeal is dated 13 March 2017. Under Reasons, the appellant writes that the first commode she got was way too small. So the occupational therapist in [another town] ordered her the large commode that she has now. When she received it they did not dry test this commode. They did not discuss how she would use it. When she received the commode she was able to move a bit. She did not use it for a while. She moved in with her mother in July 2016. She started crippling up again just after she moved. When she tried to use the commode it would leak all over the floor.

The appellant then goes on to describe in some detail her difficulties with using this commode and the resulting mess, along the lines of the description provided by the OT in the reconsideration submission

The appellant then writes that her first occupational therapist was only concerned about whether the size of the commode was big enough for her to sit on. She never asked her to see if she could wipe herself or to see if she could reach her butt. The appellant explains that due to medications she has gained 150 pounds and has a large stomach, which is in the way when she tries to wipe. The occupational therapist should have asked to see if the commode could work for her. She had never had a commode before and she didn't know what to look for. She attaches 2 diagrams, one of the commode that she has and doesn't work, and one of the requested commode that would work for her.

The appellant concludes by stating that she didn't get the commode that's suits her medical needs. Also it was not designed right because it leaked and she had to find a different bucket to make it work, even though it is extremely heavy to pull out.

The hearing

At the outset of the hearing, the appellant stated that she did not wish to pursue further her request for the “easy wipe” toileting aid. She stated that she understood that this requested item was not eligible for ministry funding under the legislation. At the conclusion of the hearing, the appellant and her advocate repeated her decision in this respect.

With regard to the requested commode, the appellant explained that the commode that she now has was ordered for her by an OT when she was living in another town. This commode was delivered to her at the end of May, 2016. In fact, this was a second commode, the first one returned because it was too small for her. She stated that she had never used a commode before, and didn’t know what to look for to make sure it worked for her. At that time, all that her OT was interested in was whether this commode was big enough for her to sit on. At that time, the house she was living in had been designed to accommodate her disability and her bed was therefore close to the bathroom. She was then relatively mobile, and she did not need to use this commode.

In early July 2016, she moved to another town, where she now resides, and at the same time her health condition deteriorated, along with her mobility. At that point, and because her bed was no longer close to the bathroom, she began to use the commode. She soon found that this one did not work for her for a number of reasons, including that it was too small for her to be able to wipe herself without standing and that it leaked. At that point, she immediately contacted a health authority OT in

her local area. An OT investigated the situation, but whether because of personnel transfers, vacations, workload or not giving the situation high enough priority, and despite multiple requests by her and several interventions by her sister and caregivers, it was not until 16 January 2017, or six months later, that an OT submitted to the ministry the current request for a commode. She stated that she has dry-tested this commode and that in her view it would meet her needs.

The appellant and her advocate, her sister, explained that, in the meantime, in order to address the problem of the commode leaking, her sister was able to borrow a pail and install a splashguard to replace the collector vessel of the commode. The pail is difficult to extract from under the commode and difficult for her to empty and clean. This arrangement, while an improvement, still results in a mess that her caregivers have to clean up.

The appellant described how the situation with the current commode is adversely affected both her physical and emotional health. Standing to clean herself and having to lean on her bed presents a risk of falling. Not being able to clean herself properly has resulted in skin rashes and lesions, with resulting infection and the need to take higher doses of medication due to her auto immune deficiency.

The ministry stood by its position at reconsideration.

Admissibility of new information

The ministry did not object to the introduction of the new information provided by the appellant at the hearing. The ministry noted, however, that the information regarding the appellant's deteriorating health condition was not before the ministry at reconsideration and had not been confirmed by her physician.

Section 22(4) of the *Employment and Assistance Act* (EAA) provides that panels may admit as evidence (i.e. take into account in making its decision) the information and records that were before the minister when the decision being appealed was made and "oral and written testimony in support of the information and records" before the minister when the decision being appealed was made – i.e. information that substantiates or corroborates the information that was before the minister at reconsideration. These limitations reflect the jurisdiction of the panel established under section 24 of the EAA – to determine whether the ministry's reconsideration decision is reasonably supported by the evidence or a reasonable application of the enactment in the circumstances of an appellant. That is, panels are limited to determining if the ministry's decision is reasonable and are not to assume the role of decision makers of the first instance. Accordingly, panels cannot admit information that would place them in that role.

In this case, the only information before the ministry at reconsideration was the medical equipment requests prepared by the OT and the OT's submission attached to the appellant's Request for Reconsideration. None of these documents addressed the appellant's move from another town, her simultaneous change in health and its subsequent deterioration from using the commode, and the circumstances surrounding the delay in submitting a new request for a replacement commode. Therefore, the panel finds that the information on these matters provided in the appellant's Notice of Appeal or in the testimony of the appellant or her advocate/sister at the the hearing cannot be said to support anything before the ministry at reconsideration. Pursuant to section 22(4) of the EAA, the panel does not admit as evidence this information.

The panel finds the information provided by the appellant in her Notice of Appeal and in her testimony at the hearing regarding the shortcomings of her current commode, and difficulties using it, is in

support of the information before the ministry at reconsideration, as it tends to corroborate the information provided by the OT. The panel therefore admits this information as evidence.

PART F – Reasons for Panel Decision

The issue in this appeal is whether the ministry was reasonable in denying the appellant's requests for a heavy-duty commode and an "easy wipe" toileting aid. More specifically, the issue is whether the following ministry determinations are reasonably supported by the evidence or are a reasonable application of the legislation in the circumstances of the appellant:

- That the requested commode did not meet the criterion set out in sections 3(3)(a), 3(3)(b) and 3.5(2) of Schedule C of the Employment and Assistance for Persons with Disabilities Regulation (EAPWDR), as the ministry had provided the appellant funding for a commode on 30 May 2016 and therefore she is not eligible for a replacement until 30 May 2021, or 5 years after the minister provided the item being replaced.
- That the requested "easy wipe" toileting aid is not an eligible health supplement set out in Schedule C of the EAPWDR, either as a bathing and toileting aid listed in section 3.5(1), or as any other type of medical equipment listed in sections 3.1 to 3.12, or as a medical supply listed in section 2(1)(a) or as any other health supplement covered in Schedule C.
- That the appellant was not eligible for the "easy wipe" toileting aid under Section 69 of the EAPWDR ("life threatening health need") as she is eligible to receive health supplements under the EAPWDR and therefore does not require the remedy under section 69, the requested item is not a health supplement under sections 2(1)(a) and (f) or section 3 of Schedule C, and the information provided does not demonstrate that she faces a direct and imminent life threatening health need for the requested item.

The applicable legislation is from 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,

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).

The following sets out a general outline of 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
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2 (1)	General health supplements
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	(a) Medical or surgical supplies that are disposable or reusable and are required for one of the following
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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
- 9 Infant formula

Of particular relevance to this appeal are the following from Schedule C of the EAPWDR:

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

(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.

(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

- (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.

Medical equipment and devices — toileting, transfers and positioning aids

3.5 (0.1) In this section:

"**positioning chair**" does not include a lift chair;

"**transfer aid**" means a transfer board, transfer belt or slider sheet.

(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 facilitate toileting or transfers of a person or to achieve or maintain a person's positioning:

- (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 or bedroom;
- (j) a portable commode chair;
- (k) a standing frame for a person for whom a wheelchair is medically essential to achieve or maintain basic mobility;
- (l) a positioning chair for a person for whom a wheelchair is medically essential to achieve or maintain basic mobility;
- (m) a transfer aid for a person for whom the transfer aid is medically essential to transfer from one position to another.

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

Request for a heavy duty commode

Panel decision

In the reconsideration decision, the ministry determined that, as the appellant is a recipient of disability assistance, she is eligible to receive health supplements under section 62 of the EAPWDR. These include a portable commode chair as listed in section 3.5(1) of Schedule C. The ministry then reviewed the basic eligibility requirements set out in section 3(1)(b) of Schedule C – preauthorization of the ministry, no resources available to the family unit, and the requested item is the least expensive appropriate medical equipment or device.

The ministry based its denial on finding that the appellant's request does not meet the eligibility requirement set out in EAPWDR Schedule C sections 3(3)(a), 3(3)(b) and 3.5(2), which describes the circumstances under which the ministry may provide as a health supplement the replacement of medical equipment or medical device that is damaged or worn out or not functioning. The ministry explained that section 3(3)(a) states that the ministry may provide a replacement of medical equipment or device if it is more economical to replace than to repair the medical equipment or device previously provided by the minister. Under section 3.5(2), the period of time referred to in section (3)(3)(b) with respect to replacement of the commode is five years after the minister provided the item being replaced. The ministry noted that this period has not passed, as the ministry had provided funding for a commode on 30 May 2016. The ministry therefore found that the appellant is not eligible for a replacement commode until 30 May 2021.

The ministry went on to state that there is an exception in policy, which allows the ministry to provide an item before the expiration of the legislated time period for replacement has occurred, when the item is required due to changes in a person's medical condition or growth. The ministry noted however that there is no evidence confirming that the appellant's need for a heavy-duty commode

has arisen due to changes in her medical condition or growth. The ministry further stated that its discretion is limited to consideration of the information provided as it relates to this exception and that no other exception is available for consideration.

The panel is of the view that the ministry cannot develop policy that is inconsistent with or otherwise contradicts the requirements set out the Act or Regulation. The EAPWDR in this case does not contemplate discretion with respect to the timeframe. Accordingly, the panel will limit its discussion to the legislative requirements.

Given the legislation and its clear intent to limit the replacement of this item of medical equipment or device to not more frequently than once every 5 years, the panel finds the ministry determination to deny the appellant's request on these grounds to be a reasonable application of the legislation.

In the reconsideration decision, the ministry added a further note, citing the OT's statement in the reconsideration submission: "With her current commode that was provided in May 2016, [the appellant] cannot reach in to clean herself because the front of the commode is too small and flat across." and "It is important to note that the appellant did not trial the current commode that was provided to her in May 2016." The ministry noted that the information provided does not indicate that the appellant contacted the supplier of her current commode or the OT to discuss how the equipment provided was insufficient in meeting her needs.

The panel understands this ministry comment to relate to when the appellant's current commode was delivered to her. Section 3(3) provides for the ministry providing a replacement as a health supplement – i.e. paying for the item in response to a request. When an item is first delivered, the ministry has paid for it, and if the client finds the item unsatisfactory, any "replacement" would be, in the panel's view, not subject to section 3(3), but instead would depend on the "return" policy of the supplier. The client would be obliged to return it to the supplier on a timely basis. If a different item of the same class of medical equipment or device is required and if it costs more, this would become a matter between the client and the ministry, and would be adjudicated on the same basis as the original request.

In this respect, as the ministry noted, while the evidence from the OT points to the current commode being unsatisfactory when the request was submitted, there is no information before the ministry at reconsideration as to the appellant or her OT finding the commode not suitable when first delivered or first used, and no record of either the appellant or the OT following up by contacting the supplier or the ministry. The panel therefore finds that it was reasonable for the ministry to have a good-faith understanding that the commode provided in late May 2016 met the appellant's requirements. By the time the ministry received the appellants request for a different commode in January 2017, it was also reasonable for the ministry to conclude that the time had long since past for returning the commode to the supplier to exchange for a different one.

Considering the foregoing, the panel finds that the ministry was reasonable in denying the appellant's request for a heavy-duty commode based on the 5 year replacement provisions in the legislation.

Request for an "easy-wipe" toileting aid

Panel decision

In the reconsideration decision, the ministry noted that in the reconsideration submission, the OT does not speak to the need for an "easy-wipe" toileting aid. As reported In Part E above, at the hearing, the appellant stated that she did not wish to pursue further her request for the "easy wipe"

toileting aid. She stated that she understood that this requested item was not eligible for ministry funding under the legislation.

In these circumstances, the panel has heard no argument or been provide any evidence from either party. Accordingly, the panel has reviewed the reconsideration decision and the applicable legislation and finds that the following ministry determinations were a reasonable application of the legislation:

- That the requested “easy wipe” toileting aid is not an eligible health supplement set out in Schedule C of the EAPWDR, either as a bathing and toileting aid listed in section 3.5(1), or as any other type of medical equipment listed in sections 3.1 to 3.12, or as a medical supply listed in section 2(1)(a) or as any other health supplement covered in Schedule C.
- That the appellant was not eligible for the “easy wipe” toileting aid under Section 69 of the EAPWDR (“life threatening health need”) as she is eligible to receive health supplements under the EAPWDR and therefore does not require the remedy under section 69, the requested item is not a health supplement under sections 2(1)(a) and (f) or section 3 of Schedule C, and the information provided does not demonstrate that she faces a direct and imminent life threatening health need for the requested item.

The panel therefore finds that the ministry was reasonable in denying the appellant’s request for this medical equipment or device.

Conclusion

Based on the foregoing, the panel finds that the ministry decision, which denied the appellant’s requests for a heavy-duty commode and for an “easy-wipe” toileting aid, was a reasonable application of the legislation in the circumstances of the appellant. The panel therefore confirms the ministry’s decision. The appellant is thus not successful in this appeal.