

**PART C – DECISION UNDER APPEAL**

The decision under appeal is the Ministry of Social Development and Poverty Reduction (“ministry”) reconsideration decision dated December 4, 2017 in which the ministry denied the appellant’s request for funding for a CPAP trial with mask (“CPAP”). The ministry found that the appellant is not eligible for the general health supplements or medical equipment and devices set out in Schedule C of the EAR as she is not one of the eligible persons described in section 67 of the Regulation. The ministry also found that the appellant is not eligible for CPAP under section 76 of the EAR as she did not meet the criteria for a health supplement for a person facing a direct and imminent life-threatening health need.

**PART D – RELEVANT LEGISLATION**

Employment and Assistance Regulation - EAR - sections 67, 76, and sections 3 and 3.9 of Schedule C

## PART E – SUMMARY OF FACTS

The evidence before the ministry at reconsideration consisted of:

1. The appellant's application for CPAP dated September 25, 2017, comprised of the following documents:
  - A price quotation from a medical equipment supplier dated September 25, 2017 and indicating a total cost of \$590 for CPAP equipment rental and mask.
  - A ministry *Health Supplement Information Sheet Medical Equipment - Positive Airway Pressure Devices*, listing the documents the ministry requires in order to process the application: *justification form*, *overnight sleep study*, *compliance report* (from positive airway pressure machine) and a quote from a supplier.
  - A *Medical Equipment Request and Justification* form dated September 8, 2017, with the following information:
    - Section 1, completed by the ministry indicates the appellant is not eligible for medical equipment under provincial disabilities legislation. The ministry indicated that the appellant does not have other resources to access the requested equipment.
    - Section 2, *Medical or Nurse Practitioner Recommendation*: Comment, "see attached Rx." Under *Specifications of medical equipment required to meet the applicant's needs*, the therapist wrote, "CPAP equipment, CPAP mask, CPAP filters, CPAP hose." This section was signed by a therapist ("RD") whose profession is not indicated.
  - A referral for *Respiratory Therapy Services*, dated May 23, 2012 and signed by a physician. The physician noted symptoms of Sleep Apnea as the reason for the referral and the appellant is diagnosed with asthma and hypothyroidism. The physician recommended *Obstructive Sleep Apnea Screening* and requested a *CPAP/BIPAP trial* if the screening or study is positive.
  - An *ApneaLink Report* dated July 6, 2017 and scored by a Registered Respiratory Therapist ("RRT"). The ministry noted that the data provided in this report are indicative of moderate sleep apnea.
  - A *Level III Sleep Study Report* dated June 9, 2017 and signed by a medical specialist ("respirologist"). The respirologist described the appellant's symptoms, indicated moderate Obstructive Sleep Apnea, referred the appellant for a *CPAP trial*, and requested reassessment following CPAP therapy.
  - A letter from a Nurse Practitioner ("NP") dated September 21, 2017 and stating that CPAP is "absolutely necessary for the treatment of [the appellant's] sleep-disordered breathing and overall health." The NP listed the appellant's medical conditions, including asthma, pre-diabetes, and obesity as well as ongoing chest pain that is being investigated by Cardiology and Internal Medicine and is without a specific diagnosis to date. The NP stated that the appellant experiences shortness of breath despite treatment for asthma and sleep apnea, and "without the CPAP machine these symptoms will be exacerbated."
2. A Request for Reconsideration ("RFR") signed by the appellant on November 6, 2017 and requesting an extension of time to follow up with her doctor.
3. An undated letter from a physician faxed to the ministry on November 12, 2017 and stating that the appellant was diagnosed with sleep apnea in June 2017 with moderate amounts of respiratory events resulting in significant oxygen desaturation. Since starting on CPAP, the appellant's night-time respiratory symptoms have improved. The physician indicated that the appellant is being investigated by Cardiology and Internal Medicine for chest and associated arm pain, and she continues to experience shortness of breath despite treatment for asthma and sleep apnea. The physician stated that without CPAP, the appellant's symptoms would be "greatly exacerbated".
4. The ministry's denial letters of December 4, 2017, and September 27, 2017. The ministry indicated the appellant applied for funding for CPAP on September 25, 2017; was denied on September 27, 2017, and her RFR was submitted on November 10, 2017.

### *Additional submissions*

Subsequent to the reconsideration decision the appellant faxed her *Notice of Appeal* dated December 8, 2017 in which she stated her argument on appeal. At the hearing, the appellant reviewed her argument and the ministry reviewed the legislation. The panel will consider the parties' positions in *Part F - Reasons*. At the hearing, the appellant also provided the following information on her situation: She stated that she is new to British Columbia and has been on income assistance for eight months as she is unable to pursue education or employment until her medical conditions are stabilized. The appellant explained that her conditions are still being investigated and she

has upcoming appointments with specialists. The appellant stated that she has dependent children who are also on income assistance and she pays the rent and other expenses. She stated that she is currently renting a CPAP machine for \$150 per month. She explained that a therapist gave her CPAP for free for 6 months and told her to apply for ministry funding. As the free trial ended, last month, she is required to pay the rental fee in order to keep the machine. The appellant stated that she has applied for Disability and her application is under reconsideration by the ministry.

The panel admits the oral submissions under section 22(4) of the *Employment and Assistance Act*, as evidence in support of the information and records that were before the minister at the time the decision being appealed was made. The panel finds that the appellant's testimony provides background information regarding her health issues and her request for funding for CPAP.

## **PART F – REASONS FOR PANEL DECISION**

The issue on appeal is whether the ministry's reconsideration decision of December 4, 2017 in which the ministry denied the appellant's request for funding for CPAP was reasonably supported by the evidence, or was a reasonable application of the legislation in the circumstances of the appellant. The ministry found that the appellant is not eligible for the general health supplements or medical equipment and devices set out in Schedule C of the EAR as she is not one of the eligible persons described in section 67 of the Regulation. The ministry also found that the appellant is not eligible for CPAP under section 76 of the EAR as she did not meet the criteria for a health supplement for a person facing a direct and imminent life-threatening health need.

The eligibility criteria for CPAP under *general health supplements* or *medical equipment and devices* are set out in section 67 and Schedule C of the EAR with definitions provided in section 66.1:

### **EAR - Division 5 - Health Supplements**

#### **Definitions**

**66.1** In this Division:

**"continued person"** means

- (a) a main continued person under section 66.3 (1) or 66.4 (1), or
- (b) a dependent continued person under section 66.3 (2) or 66.4 (2);

**"qualifying person"** means a person who

- (a) has persistent multiple barriers to employment, or
- (b) is a recipient of income assistance who is described in section 8 (1) [people receiving special care] of Schedule A.

#### **General health supplements**

**67 (1)** 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 income assistance, if

- (i) the family unit includes a qualifying person, or
- (ii) the health supplement is provided to or for a person in the family unit who is under 19 years of age,

(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 under 19 years of age, or

(c) a family unit, if the health supplement is provided to or for a person in the family unit who

- (i) is a continued person under section 66.3 (1) or (2) [access to medical services only], or
- (ii) is a continued person under section 66.4 (1) [access to transitional health services] and was, on the person's continuation date, a qualifying person or part of a family unit that then included a qualifying person, or
- (iii) is a continued person under section 66.4 (2).

## **Schedule C - Health Supplements**

### **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 67 [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.

**(2.1)** 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.

### **Medical equipment and devices - breathing devices**

**3.9 (1)** Subject to subsection (4) of this section, the following items are health supplements for the purposes of section 3 of this Schedule:

(a) if all of the requirements set out in subsection (2) of this section are met,

(i) a positive airway pressure device,

(ii) an accessory that is required to operate a positive airway pressure device, or

(iii) a supply that is required to operate a positive airway pressure device;

(b) if the minister is satisfied that the item is medically essential to monitor breathing,

(i) an apnea monitor,

(ii) an accessory that is required to operate an apnea monitor, or

(iii) a supply that is required to operate an apnea monitor;

(c) if the minister is satisfied that the item is medically essential for clearing respiratory airways,

**(2)** The following are the requirements in relation to an item referred to in subsection (1) (a) of this section:

(a) the item is prescribed by a medical practitioner or nurse practitioner;

(b) a respiratory therapist has performed an assessment that confirms the medical need for the item;

(c) the minister is satisfied that the item is medically essential for the treatment of moderate to severe sleep apnea.

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The eligibility criteria for funding medical equipment and devices for persons facing a direct and imminent life-threatening health need are set out in section 76 of the EAR:

**Health supplement for persons facing direct and imminent life threatening health need**

**76** 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).

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*Analysis*

The ministry noted that it may be authorized to provide CPAP [as described in section 3.9(1)(a) of EAR Schedule C] where the criteria under section 3.9(2) are met:

- The item is prescribed by a medical practitioner or nurse practitioner;
- a respiratory therapist has performed an assessment that confirms the medical need for the item; and
- the minister is satisfied that the item is medically essential for the treatment of moderate to severe sleep apnea.

In addition, the ministry noted that general requirements for medical equipment and devices are set out in sections 3(1) to 3(6) of EAR Schedule C. These include the requirement for pre-authorization from the minister for the equipment or device requested; that there are no resources in the family unit to pay for the requested equipment or device; and that the item requested is the least expensive, appropriate medical equipment or device.

In the reconsideration decision, the ministry did not consider whether the above-noted criteria were met. The ministry instead based the decision on EAR section 67: general eligibility requirements for the general health supplements or specific equipment and devices that are set out in Schedule C. The ministry also decided the reconsideration under section 76 of the EAR: eligibility for a health supplement for persons facing a direct and imminent life-threatening health need.

The panel provides the following analysis and decision for the legislative criteria the ministry determined were not met.

#### *EAR - section 67*

The ministry argued that the appellant is not eligible for the health supplements or the medical equipment and devices set out in Schedule C because she is not one of the persons described in section 67(1). Section 67(1) authorizes the ministry to provide the general health supplements or medical equipment and devices described in Schedule C, provided that the family unit, of the income assistance recipient requesting the item, includes a “qualifying person” as defined in the Regulation or where the item is provided to a person in the family unit under 19 years of age [subsections 67(1)(a)(i) and 67(1)(a)(ii)]. As noted by the ministry, a “qualifying person” is defined in the Regulation as a person who has *Persistent Multiple Barriers to Employment* [“PPMB qualification”] or is an income assistance recipient receiving “special care” as described in section 8(1) of Schedule A of the EAR.

At the hearing, the ministry explained that the appellant would not be eligible to apply for the PPMB qualification at this time as she has not been on income assistance for 12 months. The ministry also explained that a person receiving “special care” is someone who resides in a hospital or long term care facility. The appellant testified that she has applied for disability through the ministry and is awaiting the ministry’s reconsideration decision. However, she does not have the PPMB qualification at this time, nor does she reside in a hospital or long term care facility. Based on this evidence, the panel finds that the ministry reasonably applied the legislation in determining the appellant is not one of the eligible persons described in section 67(1)(a) of the EAR.

The ministry argued that the appellant is also not a person described in sections 67(1)(b) and (c) of the EAR. These sections authorize the ministry to provide the health supplements set out in Schedule C to persons in receipt of hardship assistance, if the health supplement is provided to or for a person in the family unit who is under 19 years of age [section 67(1)(b)], or who is a “continued person” under the sections of the Regulation that are referenced in section 67(1)(c).

As noted by the ministry, a “continued person” is defined in section 66.1 of the EAR as a person accessing *Medical Services Only* (“MSO”) assistance under sections 66.3(1) or section 66.3(2) of the Regulation; or a person accessing *Transitional Health Services* (“THS”) under section 66.4(1). At the hearing, the ministry explained that clients may transition to MSO when they “go off Persons with Disability (“PWD”) due to receipt of *Canada Pension Plan* benefits or when they have exhausted their annual earnings exemption.” The ministry explained that THS is for a single parent with dependents who has found employment, and the ministry “keeps their file open for one year so that the parent and children continue to have access to health benefits.” The ministry noted that the appellant is not eligible for THS because she has an active file with the ministry for receipt of income assistance. The ministry further noted that the appellant is also not a dependent of a “continued person” under section 66.4(2).

The evidence establishes that the appellant is not a “continued person” under the EAR as she is not receiving MSO or THS benefits, and she is also not a dependent of a “continued person”. The panel also notes that sections 67(1)(b) and (c) only apply to persons in receipt of hardship assistance from the ministry and the appellant is currently receiving regular income assistance. The panel therefore finds that the ministry reasonably determined the appellant is not eligible for the health supplements or the medical equipment or devices set out in Schedule C because she is not one of the persons described in sections 67(1)(a), (b), or (c) of the EAR.

#### *EAR - section 76*

The ministry noted that section 76 applies to the general health supplements and medical equipment and devices set out in Schedule C of the EAR, and is intended to provide a remedy for persons who are facing a direct and imminent life-threatening health need and who are not otherwise eligible for these supplements. The ministry acknowledged that the appellant has moderate sleep apnea and would benefit from CPAP. The ministry nonetheless argued that the information provided does not establish that the appellant requires CPAP due to a direct and imminent life-threatening health need. The ministry noted that both the NP’s and physician’s information indicated the appellant will experience an exacerbation of symptoms without CPAP. The ministry argued that these health professionals did not describe an imminent life-threatening health need for a CPAP machine and, therefore, the appellant is not eligible for ministry funding for CPAP under section 76 of the EAR.

The panel finds that the ministry reasonably determined the appellant is not eligible for CPAP under section 76. The Regulation authorizes the ministry to provide the medical equipment and devices set out in Schedule C, including CPAP, to persons who are not otherwise eligible for these items under the Regulation. It has been established that the appellant is not eligible for CPAP as she is not a person described under section 67 of the EAR. Accordingly, she is “otherwise not eligible” for CPAP pursuant to section 76 of the EAR.

Nevertheless, sections 76(a) to (d) set out additional eligibility criteria that must be met in order for the ministry to provide funding for the requested medical equipment or device. In addition to being “otherwise not eligible” for Schedule C supplements and devices under the Regulation, sections 76(a) and (b) also require evidence of a direct and imminent life-threatening health need and that the health supplement or specific equipment or device is necessary to meet the need. The panel finds that the ministry reasonably determined that the information from the NP and physician fell short of establishing an imminent life-threatening need for which CPAP is necessary. The appellant submitted that she is “very sick” and both the NP and the physician held the opinion that the appellant’s symptoms will be exacerbated without CPAP. However, neither their information nor the medical reports in the record stated that the appellant has a life-threatening condition for which there is an imminent need for CPAP. The appellant was found to have a moderate degree of sleep apnea in the investigations that were performed.

#### *Conclusion*

Despite the appellant’s argument that she needs help with paying for CPAP because she is unable to work and her children are also not working, the panel notes that a lack of available resources is not the determining factor in the ministry’s eligibility decision. The Regulation requires the applicant to qualify for Schedule C supplements, equipment or devices under sections 67 or meet all of the requirements in section 76 of the EAR. The panel finds that the ministry’s reconsideration decision that determined the appellant is not eligible for CPAP under sections 67 and 76 of the EAR was reasonably supported by the evidence and was a reasonable application of the Regulation in the circumstances of the appellant. The panel confirms the decision pursuant to section 24 of the *Employment and Assistance Act* and the appellant is not successful in her appeal.