PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Poverty Reduction's (the ministry) reconsideration decision dated October 16, 2017, which denied the appellant's request for funding for a trial rental of a continuous positive airway pressure (CPAP) device and associated accessories and supplies.

The ministry determined that the request met the requirements set out in section 3.9(2)(a) and (b) of Schedule C of the *Employment and Assistance for Persons with Disabilities Regulation* (EAPWDR), as the item had been prescribed by a medical practitioner and that a respiratory therapist had performed an assessment that confirmed the medical need for the item. However, the ministry found that the request did not meet the requirement set out in Schedule C, section 3.9(2)(c) of the EAPWDR as the minister was not satisfied that the item is medically essential for the treatment of moderate to severe sleep apnea.

The ministry also found that the appellant was not eligible to receiving funding for a CPAP trial (with mask) under the EAPWDR section 69 as a health supplement for a person facing a direct and imminent life threatening health need.

PART D – Relevant Legislation

EAPWDR section 69 and Schedule C, sections 3 and 3.9

PART E – Summary of Facts

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

- The appellant is a recipient of disability assistance.
- Letter from the appellant's general practitioner (the "Physician") dated February 10, 2017 with a prescription for CPAP therapy for treatment of obstructive sleep apnea noting CPAP pressure range/settings of 6-16 cm H20. The Physician indicates that all CPAP and bi-level therapy requires humidification, mask interface and is required indefinitely.
- A Medical Equipment Request and Justification form dated May 10, 2017 completed by a respiratory therapist (RT) indicating that the appellant's medical condition is sleep apnea. The RT recommends a CPAP with filters, mask, and humidifier.
- Oximetry Summary Report with test date August 2, 2017
- Fax Cover Sheet from a respiratory services provider dated August 3, 2017 (the "Assessment") indicating that the appellant has been diagnosed with obstructive sleep apnea, underwent an overnight sleep study and had a sleep disturbance index of 10.4. The Assessment indicates that the screening criteria index indicates a score of 5-15 is mild, 15-30 is moderate and 30+ is severe. The Assessment indicates that the appellant does not meet the listed screening criteria, however, a RT or medical practitioner has clearly outlined the medical necessity for CPAP therapy in writing.
- Quote from a respiratory services provider dated August 3, 2017 for a 2-month rental of a CPAP unit with humidifier and mask in the amount of $695.
- Letter from the Physician dated July 20, 2017 to a respiratory services provider indicating that the appellant has been diagnosed with sleep apnea and that a letter was sent to the ministry requesting coverage for medical equipment for sleep apnea
- Letter from the appellant ("RFR Letter") stating that although her request for funding for a CPAP was denied because her DEI was 10.4 which does not meet the ministry's regular policy, she is asking that the ministry reconsider its decision because without the CPAP she used to wake up every hour but that with it she can sleep through the whole night (6-7 hours) without breathless. The appellant states that she has multiple comorbidities such as Asthma, emphysema, and COPD so she does not have enough reservation when her airway is closed. The appellant states that even though she has mild sleep apnea, she feels choked and breathless before she uses the machine every night but with the machine the choked feeling disappears. The appellant also states that the Physician believes the CPAP will be beneficial for her.
- Letter from the Physician dated October 2, 2017 indicating that the appellant suffers from sleep apnea and multiple co-morbidities; severe COPD, asthma, depression, breast cancer, and decreased bone density. The Physician states that the appellant tried being on a CPAP machine with great success. The Physician highly recommends that the appellant remain on the CPAP machine as it will change her quality of life and help her overcome her constant fatigue and be more productive in her daily activities.
- The appellant's request for reconsideration (RFR) dated December 2, 2017

Additional Information

In her Notice of Appeal dated October 23, 2017 the appellant indicates that the reasons she disagrees with the ministry's reconsideration decision were set out in the RFR Letter. The appellant also provided a Pulmonary Function Report – Preliminary Report with a date stamp indicating that the ministry received it on October 28, 2017. The Pulmonary Function Report includes Spirometry data and comments from a therapist indicating: Good Effort. Home resp. meds: Ultibro (3 days), Spiriva

(30 min), and Symbicort (7 hours). Last cigarette: 1 hour prior.

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 ministry provided an email dated December 15, 2017 indicating that the ministry's submission will be the reconsideration summary provided in the Record of Ministry Decision.

Admissibility of New Information

The panel has admitted the Pulmonary Function Report into evidence as it is information in support of information and records that were before the ministry at the time of reconsideration, in accordance with section 22(4) of the *Employment and Assistance Act.* In particular, the Pulmonary Function Report provides further information regarding the appellant's pulmonary function and breathing tests.

The information in the Notice of Appeal was accepted as argument.

PART F – Reasons for Panel Decision

The issue on this appeal is whether the ministry' was reasonable in denying the appellant's request for funding of a 2-month trial rental of a CPAP device and associated accessories and supplies.

More specifically, was the ministry reasonable in determining that the appellant's request did not meet the criteria set out in EAPWDR Schedule C, section 3.9(2)(c) that the minister is satisfied that the item is medically essential for the treatment of moderate to severe sleep apnea? In addition, was the ministry reasonable in determining that the appellant did not qualify for funding for the CPAP under EAPWDR section 69 as the information does not establish that she faces a direct and imminent life threatening need for funding for a CPAP trail (with mask).

The relevant sections of the EAPWDR are as follows:

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).

[en. B.C. Reg. 61/2010, s. 4; am. B.C. Regs. 197/2012, Sch. 2, s. 8; 145/2015, Sch. 2, s. 12.]

EAPWDR, Schedule C:

Medical equipment and devices

3 (1) Subject to subsections (2) to (5) of this section, the medical equipment and devices described in sections 3.1 to 3.12 of this Schedule are the health supplements that may be provided by the minister if

(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.

(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,

(i) a suction unit,

(ii) an accessory that is required to operate a suction unit, or

(iii) a supply that is required to operate a suction unit;

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

(i) a percussor,

(ii) an accessory that is required to operate a percussor, or

(iii) a supply that is required to operate a percussor;

(e) if the minister is satisfied that the item is medically essential to avoid an imminent and substantial danger to health,

(i) a nebulizer,

(ii) an accessory that is required to operate a nebulizer, or

(iii) a supply that is required to operate a nebulizer;

(f) if the minister is satisfied that the item is medically essential to moisturize air in order to allow a tracheostomy patient to breathe,

(i) a medical humidifier,

(ii) an accessory that is required to operate a medical humidifier, or

(iii) a supply that is required to operate a medical humidifier;

(g) if the minister is satisfied that the item is medically essential to deliver medication,

(i) an inhaler accessory device,

(ii) an accessory that is required to operate an inhaler accessory device, or

(iii) a supply that is required to operate an inhaler accessory device.

(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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Panel Decision

Eligibility for funding for a CPAP trial (with mask)

The appellant's position is that she has sleep apnea with multiple comorbidities including asthma, emphysema, and COPD and that she requires the CPAP to sleep through the night and to help remove the feeling that she is choking. The appellant's position is that the Physician believes the CPAP will be highly beneficial for her as it will help to overcome her constant fatigue and be more productive with her DLA, and that the medical reports support her position that the ministry ought to approve her funding request.

The ministry's position, as set out in the reconsideration decision, is that the appellant's request does not meet the eligibility requirements set out in EAPWDR Schedule C, section 3.9(2)(c) as the ministry is not satisfied that the CPAP machine is medically essential for the treatment of moderate to severe sleep apnea. The reconsideration decision indicates that there are various factors used in diagnosing and assessing sleep apnea including the Apnea-Hypopnea Index (AHI), the Respiratory Disturbance Index (RDI), Oxygen Desaturation Index, also known as the Desaturation Event Index (DEI), daytime sleepiness, as well as strong indicators for the presence of sleep apnea. The reconsideration decision indicates that measurements of AHI and RDI are not provided and the Assessment indicates a DEI of 10.4, which is in the mild range for sleep apnea. The reconsideration decision notes that as 5-15 is mild, 15-30 is moderate and 30+ is severe based on the American Academy of Sleep Medicine. The ministry also notes that the Assessment indicates that the appellant does not meet the ministry's criterion of having moderate to severe sleep apnea and the Physician and RT do not describe the severity of the appellant's sleep apnea.

The ministry's position is that although the Physician indicates that the appellant has COPD and asthma, which are medical conditions known to impact breathing, a diagnosis of these conditions does not establish the presence of moderate to severe sleep apnea.

Under section 3.9(2)(c) of Schedule C of the EAPWDR, the minister must be satisfied that a CPAP device is medically essential for the treatment of moderate to severe sleep apnea. As the legislation does not define "moderate to severe sleep apnea", the panel considers it reasonable that the ministry would look to a generally accepted diagnostic approach based on measureable test results to determine whether the requestor met this requirement.

In the reconsideration decision, the ministry refers to the criteria set out by the American Academy of Sleep Medicine and determined that the DEI of 10.4 provided in the Assessment falls in the mild category of sleep apnea given the American Academy of Sleep Medicine's ranges as 5-15 is considered mild, whereas 15-30 is moderate and 30+ is considered severe. The reconsideration decision also indicates that the ministry considered the information in the Assessment in which the RT indicates that the appellant did not meet the ministry criterion of having moderate to severe sleep apnea. The reconsideration decision also indicates that the ministry considered the Physician's information that the appellant has comorbidities such as asthma and COPD, which are known to impact breathing but that the information provided did not establish the presence of moderate to severe sleep apnea.

The panel notes that the Physician recommends the CPAP for the appellant as it will be beneficial for her and the appellant's evidence is that she has already benefitted greatly from the CPAP trial as she is now sleeping through the night and no longer has the choking feeling that she had without the machine. However neither the Physician nor the RT describe the severity of the appellant's sleep apnea and the panel finds that the ministry reasonably concluded that the diagnosis of conditions such as asthma, and COPD are not sufficient to establish the presence of moderate to severe sleep apnea.

Given the DEI of 10.4 which indicates mild sleep apnea, the lack of other measurements of the severity of the appellant's sleep apnea such as AHI or RDI, the lack of further description from the Physician or the RT regarding the severity of the appellant's sleep apnea, the panel finds that the ministry was reasonable in determining that the information provided was not sufficient to meet the criteria of EAPWDR Schedule C, section 3.9(2)(c). The panel finds that the ministry reasonably determined that there is not enough evidence to demonstrate that a CPAP trial with mask is medically essential for the treatment of moderate to severe sleep apnea.

Eligibility due to a Life-Threatening Health Need

The appellant's position is that she needs the CPAP to sleep and breathe better. The appellant's position is that without the CPAP machine she wakes up every hour and feels breathless with a choking feeling but that the CPAP machine relieves the choking feeling.

The ministry's position is that section 69 applies to health supplements set out under Schedule C, section 2(1)(a) to (f) and section 3 and is intended to provide a remedy for those persons who are facing a direct and imminent life-threatening health need for these supplements and are not otherwise eligible to receive them. The ministry's position is that as the appellant is eligible to receive health supplements under section 2(1)(a) and (f) and section 3, she does not require a remedy under EAPWDR section 69.

The ministry's position is that the information submitted with the application and RFR does not establish that the appellant faces a direct and imminent life threatening need for funding for a CPAP trial (with mask). The reconsideration decision also states that the appellant's request has not met all the requirements specified in EAPWDR Schedule C, sections 2(1)(a) and (f) and 3 to 3.12 as the request does not meet the criteria set out in EAPWDR Schedule C, section 3.9(2)(c.

The panel finds that as the appellant is in receipt of disability assistance she is eligible to receive health supplements set out under the EAPWDR. Accordingly the panel finds that the ministry was reasonable in determining that the appellant does not require a remedy under EAPWDR section 69.

The panel also notes that while the information from the RT indicates that the appellant has mild sleep apnea and while the Physician's information indicates that the appellant suffers from sleep apnea and multiple co-morbidities including severe COPD, asthma, depression, breast cancer and decreased bone density, there is no information indicating that the appellant faces a direct and imminent life-threatening health need that the CPAP (with mask) would meet. The Physician indicates that the CPAP machine would be highly beneficial for the appellant and would help her overcome her constant fatigue and be more productive in her DLA. However, the word "imminent" requires a sense of urgency or immediacy and while the information indicates that the appellant has several serious health conditions and that the CPAP machine would be beneficial, the information does not establish that she faces a direct and imminent life-threatening health need.

As the panel concluded that the appellant's request for a CPAP does not meet the criteria of EAPWDR Schedule C section 3.9(2)(c) as noted above, the panel also finds that the ministry reasonably concluded that the appellant's request did not satisfy the criteria of EAPWDR section 69(d) as the request has not met all the requirements of EAPWDR Schedule C, section 2(1)(a) and (f) and 3 to 3.12.

Based on the above, the panel finds that the ministry reasonably concluded that the appellant is not eligible for the requested funding for a CPAP trial (with mask) under EAPWDR section 69.

Conclusion

The panel acknowledges that the appellant has difficulty breathing and several co-morbidities and that the CPAP machine helps her breathing and sleep. However, having reviewed and considered all of the evidence and the relevant legislation, the panel finds that the ministry's reconsideration decision, which found that the appellant's request did not meet the criteria set out in EAPWDR Schedule C, section 3.9(2)(c) or EAPWDR section 69 was reasonably supported by the evidence and a reasonable application of the legislation in the circumstances of the appellant. The panel therefore confirms the ministry's decision.