

PART C – DECISION UNDER APPEAL

The decision under appeal is the Ministry of Social Development and Poverty Reduction (the “Ministry”) reconsideration decision of March 15, 2018 (the “Reconsideration Decision”), which denied the Appellant a health supplement in respect of a canopy and second mirror on her scooter because the Appellant did not meet all the statutory requirements of sections 3(2) and 3.4(3)(c) of Schedule C to the *Employment and Assistance for Persons With Disabilities Regulation* (“EAPWDR”) because:

- the Appellant’s doctor did not explain why a canopy and second mirror was required due to the Appellant’s medical needs and no occupational or physical therapist confirmed a medical need for a canopy and second mirror; and
- the Appellant had not satisfied the Ministry that the canopy and second mirror was medically essential to achieve or maintain basic mobility.

PART D – RELEVANT LEGISLATION

EAPWDR, section 62,

EAPWDR, Schedule C- sections 3(2) and 3.4

PART E – SUMMARY OF FACTS

The information before the Ministry at the time of the Reconsideration Decision consisted of the following:

- a fax cover sheet and quotation, dated January 12, 2018 (the “Quotation”) for a canopy, spare mirrors, and the cost of installation for same;
- a Medical Equipment Request and Justification (the “Request”), signed by the Appellant’s doctor who notes that the Appellant suffers from “severe fibromyalgia, osteoarthritis” and recommends a scooter + canopy, mirrors, and reflective jacket/vest;
- the letter from the Ministry, dated January 25, 2018, denying the Appellant’s application for a scooter canopy and spare mirrors;
- the Appellant’s Request for Reconsideration, dated March 5, 2018 (“RFR”), which included a handwritten note from the Appellant in which she wrote that:
 - she had no other resources to cover the cost of a scooter canopy and mirror;
 - she has extreme fibromyalgia and osteoarthritis and wears a back brace;
 - she can only walk short distances;
 - she cannot use transit services;
 - her only form of transportation is her scooter;
 - she gets soaked and ill when it rains; and
 - she requires a mirror for traffic safety purposes

In her Notice of Appeal, filed March 29, 2018, the Appellant states that she has no other finances and needs a canopy and 1 mirror for her scooter.

The Appellant attached an additional letter (the “Letter”) to her Notice of Appeal in which she says that:

- she has fibromyalgia and osteoarthritis;
- she is unable to walk to and from bus stops;
- she always wears a brace;
- she uses her scooter approximately 4 to 5 times per week;
- rain causes her to get sick and obstructs her vision while riding her scooter;
- her groceries get wet in the rain on the scooter;
- she has hemorrhoids which hurt from sitting on a cold wet seat;
- needs a mirror for safety.

The Appellant did not attend at the hearing and, having confirmed that the Appellant had been notified of the hearing date and time, the hearing proceeded under Section 86(b) of the *Employment and Assistance Regulation*.

Admissibility of New Information

After filing her Notice of Appeal, the Appellant also submitted a letter, dated April 15, 2018, (the “Doctor’s Letter”), dated April 15, 2018. In the Doctor’s Letter, the doctor wrote that:

- the Appellant suffered from severe fibromyalgia and used multiple medications to control pain;
- the Appellant’s symptoms were particularly acute in wet weather;
- the Appellant is unable to see without her glasses;
- the Appellant has a stiff neck and difficulty moving and that side mirror would keep her safe; and
- the Appellant’s use of a safety vest would make her more visible and keep her safe.

The Ministry did not object to the admissibility of either the Letter or the Doctor's Letter and, with the exception of the portions of the Letter and Doctor's Letter which describe the Appellant's vision issues and hemorrhoids, the contents of both the Letter and the Doctor's Letter reference information that was before the Ministry at the time of the Reconsideration. Other than the references to the Appellant's vision and hemorrhoids, the panel admits the contents of the Letter and the Doctor's letter as written evidence in support of information and records that were before the Ministry at the time of the Reconsideration Decision, pursuant to section 22(4) of the *Employment and Assistance Act*.

PART F – REASONS FOR PANEL DECISION

Applicable Legislation

Section 62 of the EAPWDR authorizes the Ministry to provide 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 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 is a continued person.

Section 3 of Schedule C to the EAPWDR sets out the criteria generally for eligibility for health supplements and medical equipment:

- 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.
- (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.
- (4) Subject to subsection (6), the minister may provide as a health supplement repairs of medical equipment or a medical device that was previously provided by the minister if it is more economical to repair the medical equipment or device than to replace it.
- (5) Subject to subsection (6), the minister may provide as a health supplement repairs of medical equipment or a medical device that was not previously provided by the minister if
 - (a) at the time of the repairs the requirements in this section and sections 3.1 to 3.12 of this Schedule, as applicable, are met in respect of the medical equipment or device being repaired, and
 - (b) it is more economical to repair the medical equipment or device than to replace it.
- (6) The minister may not provide a replacement of medical equipment or a medical device under subsection (3) or repairs of medical equipment or a medical device under subsection (4) or (5) if the minister considers that the medical equipment or device was damaged through misuse.

Section 3.4 of Schedule C to the EAPWDR sets out the specific criteria for eligibility for health supplements related to scooters and related accessories:

- 3.4** (1) In this section, "**scooter**" does not include a scooter with 2 wheels.
- (2) Subject to subsection (5) of this section, the following items are health supplements for the purposes of section 3 of this Schedule if all of the requirements set out in subsection (3) of this section are met:
- (a) a scooter;
 - (b) an upgraded component of a scooter;
 - (c) an accessory attached to a scooter.
- (3) The following are the requirements in relation to an item referred to in subsection (2) of this section:
- (a) an assessment by an occupational therapist or a physical therapist has confirmed that it is unlikely that the person for whom the scooter has been prescribed will have a medical need for a wheelchair during the 5 years following the assessment;

- (b) the total cost of the scooter and any accessories attached to the scooter does not exceed \$3 500 or, if subsection (3.1) applies, \$4 500;
- (c) the minister is satisfied that the item is medically essential to achieve or maintain basic mobility.

- (3.1) The maximum amount of \$4 500 under subsection (3) (b) applies if an assessment by an occupational therapist or a physical therapist has confirmed that the person for whom the scooter has been prescribed has a body weight that exceeds the weight capacity of a conventional scooter but can be accommodated by a bariatric scooter.
- (4) The period of time referred to in section 3 (3) (b) of this Schedule with respect to replacement of an item described in subsection (2) of this section is 5 years after the minister provided the item being replaced.
- (5) A scooter intended primarily for recreational or sports use is not a health supplement for the purposes of section 3 of this Schedule.

Appellant's Position

The Appellant's position is that the canopy is medically necessary because without it, she is prone to getting wet, which causes her to get sick. The Appellant does not have proper rain gear and, in any event, her groceries get wet. The Appellant says that she requires the mirror because she has limited mobility in her neck and back, due to her fibromyalgia. This compromises her safety as she can not turn her neck from side to side.

Ministry Position

The Ministry's position is that the Appellant's request for a canopy and spare mirror do not meet the criteria set out in section 3(2) of Schedule C to the EAPWDR. In its Reconsideration and at the hearing, the Ministry argued that because the discretion, under section 3(2) of Schedule C to the EAPWDR, to requires one or both of a prescription from a medical or nurse practitioner or an assessment from an occupational or physical therapist that confirms the medical need for particular medical equipment belongs to the Ministry, it was reasonable for the Ministry to require an assessment from a physical or occupational therapist where the Appellant's doctor had not explained why the Appellant required a canopy and mirror because of her medical conditions.

The Ministry also took the position that, although the canopy and the mirror were accessories attached to a scooter, as contemplated in section 3.4(2) of Schedule C to the EAPWDR, the Appellant had not met the requirement of section 3.4(3)(c) that the Ministry be satisfied that the canopy and mirror were medically essential to achieve and maintain basic mobility, arguing that basic mobility had been established by virtue of the fact that the Appellant had been able to use the scooter and that a canopy and mirror were not required for the scooter to perform its basic function.

Panel Decision

Section 3(2) of Schedule C to the EAPWDR does confer discretion on the Ministry to require both a prescription from an applicant's medical or nurse practitioner and an assessment from an occupational or physical therapist confirming a need for a requested item. The section offers not guidance as to when it would be appropriate to require both the prescription and the assessment. In the Appellant's case, her doctor provided a prescription for both the canopy and the mirror in the Request. While the Request did not, as the Ministry noted, make it clear why the Appellant required a mirror and canopy, the Doctor's Letter, admitted by the panel without objection by the Ministry, did set out the reason for the prescription,

describing the Appellant as having a stiff neck from her fibromyalgia, compromising her ability to turn her head, and noting that her fibromyalgia symptoms are exacerbated in wet weather. In view of the information contained in the Doctor's Letter, the panel finds that the Ministry was not reasonable in its application of section 3(2) of Schedule C to the EAPWDR, by requiring an assessment from an occupational or physical therapist, in addition to the prescription of her family doctor.

Section 3 of Schedule C to the EAPWDR also requires that the requirements of sections 3.1 to 3.8 and 3.12 which are relevant to a request for a particular item also be met. The requirements for scooters and their accessories are set out in Section 3.4(3) of Schedule C to the EAPWDR. The Ministry found, in particular, that section 3.4(3)(c) had not been met because the information had not established that the canopy and mirror were medically essential to establish and maintain mobility for the Appellant.

Although the Appellant would appear to have achieved a basic level of mobility, by virtue of having the scooter (in the Letter, she referred to using the scooter 4 to 5 times per week), the issue isn't whether the scooter itself is functional on a basic level but whether the canopy and mirror are medically necessary for the Appellant to not only achieve basic mobility but for the Appellant to also maintain that basic mobility. To the extent that the Appellant's fibromyalgia symptoms are exacerbated by wet weather, as indicated by the Appellant's doctor in the Doctor's Letter, the panel finds that the Appellant's basic mobility is compromised in the absence of a canopy. Equally, where the Appellant's fibromyalgia inhibits her ability to turn her head and neck, compromising her safe use of her scooter, her basic mobility is inhibited and a mirror which allows her to safely operate her scooter is medically necessary to maintain her basic mobility. The panel finds that the Ministry was not reasonable in its application of section 3.4(3)(c) of Schedule C to the EAPWDR.

In view of all of the foregoing, the panel finds that the Ministry's denial of the Appellant's request for a supplement in respect of a canopy and mirror for her scooter was not a reasonable application of the relevant statutory provisions in the circumstances of the Appellant and, in the result, the panel rescinds the Reconsideration decision.

The Appellant is successful in her appeal.