

PART C – DECISION UNDER APPEAL

The decision under appeal is the Ministry of Social Development and Poverty Reduction's ("ministry") reconsideration decision dated May 14, 2018 in which the ministry found that the appellant was not eligible for brush toothettes ("toothettes") and nutricia phlexy-vits ("phlexy-vits") as health supplements under Schedule C of the Employment and Assistance for Persons with Disabilities Regulation ("EAPWDR") or as a life-threatening health need under section 69.

PART D – RELEVANT LEGISLATION

Employment and Assistance for Persons with Disabilities Regulation - EAPWDR - section 69 and Schedule C

PART E – SUMMARY OF FACTS

The evidence and documentation before the minister at the reconsideration consisted of:

1. A Request for Reconsideration (“RFR”) signed by the appellant on April 23, 2018, with a hand-written submission describing the appellant’s symptoms and medical need for the items requested. The submission explains that toothettes are a dental hygiene product for people who are unable to use a regular toothbrush (toothettes are used mainly in hospital settings and not available over the counter), while phlexy-vits are a “medical food.” The following documents were attached to the RFR:

- A copy of the package label for phlexy-vits indicating the product is a “concentrated, powdered vitamin, mineral and trace element preparation” and a “medical food” designed for older children and adults with phenylketonuria and similar amino acid disorders.
- A letter from a registered dietitian dated March 20, 2018, describing the appellant’s medical need for phlexy-vits. The dietitian notes that the appellant receives all of her nutrition “via g-tube,” and the appellant has received “vitamin and mineral supplementation” with phlexy-vits “to eliminate her micro-nutrient deficits.” The dietitian notes that the phlexy-vit powder mixes easily with water “and is given as a medication.” The dietitian explains that the appellant cannot tolerate a regular a vitamin-mineral tablet because even when crushed and mixed with water, any remaining grains result in a high risk of blockage within the appellant’s feeding tube. The dietitian explains the required dosage, indicating the appellant needs 4 boxes of phlexy-vits per year.
- A letter from a paediatrician dated July 15, 2016 (written in support of the appellant’s request for home-schooling). The paediatrician identifies the appellant’s primary diagnosis as “Severe perinatal hypoxic ischaemic encephalopathy” and her medical problems include cerebral palsy, recurrent pneumonias, poor oro-motor skills (risk of aspiration), and long term gastrostomy tube feeding, among other things. The paediatrician notes that the appellant’s condition has deteriorated since an episode of acute pancreatitis in 2014, with more frequent infections, reduced recovery, and increased risk of aspiration.

2. Information from the ministry’s record of decision which included:

- A letter dated May 14, 2018 in which the ministry advised the appellant she was not eligible for toothettes and phlexy-vits upon reconsideration of the ministry’s decision to deny these items.
- The reconsideration decision which indicates the appellant has Persons with Disabilities (“PWD”) designation. On February 22, 2018, the ministry received the appellant’s request for toothettes and phlexy-vits. On February 22, 2018, the ministry denied the request; and on April 20, 2018 the appellant submitted the RFR which was reviewed by the ministry on May 14, 2018.
- A letter dated February 22, 2018 (with attached Decision Summary) in which the ministry advised the appellant she was not eligible for toothettes and phlexy-vits as health supplements.
- A letter dated February 22, 2018 in which the ministry advised the appellant that her request for a number of health items/ medical supplies (including “Tube Feed Supplies and Nutrition”) was approved based on the appellant’s history of receiving the items under a separate ministry program when the appellant was a minor child. The letter states that toothettes and phlexy-vits are not eligible items.

Additional information

On May 28, 2018, the Tribunal received the appellant’s Notice of Appeal with attached type-written submission from an advocate (family member). The panel accepts the content of the submission as argument.

The ministry did not submit any new evidence.

Procedural matter

The appellant did not attend the hearing. Upon confirming that she was notified of the date and time for the hearing, the panel considered the appeal in the appellant’s absence as it is authorized to do under section 86(b) of the Employment and Assistance Regulation.

PART F – REASONS FOR PANEL DECISION

The issue on appeal is whether the ministry reasonably determined that the appellant was not eligible for toothettes and phlexy-vits as a health supplement under Schedule C of the EAPWDR or as a life-threatening health need under section 69. In particular, was the ministry's finding that the legislative criteria were not met, reasonably supported by the evidence or a reasonable application of the legislation?

The ministry based its reconsideration decision on the following legislation:

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,

Nutritional supplement — short-term

67.001 The minister may provide a nutritional supplement for up to 3 months to or for a family unit in receipt of disability assistance, if

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).

Schedule C - Health Supplements

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;

(a.1)the following medical or surgical supplies that are, at the minister's discretion, either disposable or reusable, if the minister is satisfied that all the requirements described in paragraph (a) (ii) and (iii) are met in relation to the supplies:

(i)lancets;

(ii)needles and syringes;

(iii)ventilator supplies required for the essential operation or sterilization of a ventilator;

(iv)tracheostomy supplies;

(a.2)consumable medical supplies, if the minister is satisfied that all of the following requirements are met:

(i)the supplies are required to thicken food;

(ii)all the requirements described in paragraph (a) (ii) and (iii) are met in relation to the supplies;

(b)Repealed. [B.C. Reg. 236/2003, Sch. 2, s. 2 (b).]

(c)subject to subsection (2), a service provided by a person described opposite that service in the following table, delivered in not more than 12 visits per calendar year, **[panel note: concerning various therapies]**

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(d) and (e)Repealed. [B.C. Reg. 75/2008, s. (a).]

(f) **[panel note: concerning medical transportation]**

2(1.1) For the purposes of subsection (1) (a), medical and surgical supplies do not include nutritional supplements, food, vitamins, minerals or prescription medications.

2.1 Optical supplements

2.2 Eye examination 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 **[panel note: pertaining to equipment/ devices set out in sections 3.1 to 3.12]**

3.1 Medical equipment and devices — canes, crutches and walkers

3.2 Medical equipment and devices — wheelchairs

3.3 Medical equipment and devices — wheelchair seating systems

3.4 Medical equipment and devices — scooters

3.5 Medical equipment and devices — toileting, transfers and positioning aids

3.6 Medical equipment and devices — hospital bed

3.7 Medical equipment and devices — pressure relief mattresses

3.8 Medical equipment and devices — floor or ceiling lift devices

3.9 Medical equipment and devices — breathing devices

3.10 Medical equipment and devices — orthoses

3.11 Medical equipment and devices — hearing instruments

3.12 Medical equipment and devices — non-conventional glucose meters

4 Dental supplements

4.1 Crown and bridgework supplement

5 Emergency dental supplements

6 Diet supplements

(2) A diet supplement under subsection (1) (d) may only be provided if the diet is confirmed by a medical practitioner or nurse practitioner as being necessary for one of the following medical conditions:

- (a) cancer
- (b) chronic inflammatory bowel disease;
- (c) Crohn's disease;
- (d) ulcerative colitis;
- (e) HIV positive diagnosis;
- (f) AIDS;
- (g) chronic bacterial infection;
- (h) tuberculosis;
- (i) hyperthyroidism;
- (j) osteoporosis;
- (k) hepatitis B;
- (l) hepatitis C.

Monthly nutritional supplement

7 The amount of a nutritional supplement that may be provided under section 67 [*nutritional supplement*] of this regulation is the sum of the amounts for those of the following items specified as required in the request under section 67 (1) (c):

- (a) for additional nutritional items that are part of a caloric supplementation to a regular dietary intake, up to \$165 each month;
- (b) Repealed. [B.C. Reg. 68/2010, s. 3 (b).]
- (c) for vitamins and minerals, up to \$40 each month.

8 Natal supplement

9 Infant formula

Analysis

The ministry was satisfied that the appellant is eligible to receive health supplements under section 62 and Schedule C of the EAPWDR as a person in receipt of PWD assistance. Thus, the criterion of basic eligibility is not in dispute. Upon reviewing the eligibility requirements for specific health supplements under Schedule C of the Regulation, and the criteria for life-threatening health need under section 69, the ministry determined that it is not authorized to provide toothettes and phlexy-vits.

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

Schedule C

Phlexy-vits is not a disposable or reusable medical supply under section 2(1)(a) of Schedule C and toothettes and phlexy-vits are not required for one of the purposes listed in the corresponding subsections

At the reconsideration, the ministry argues that phlexy-vits is not a disposable or reusable supply as required by section 2(1)(a) of EAPWDR Schedule C. The ministry argues that the information submitted by the appellant and her doctor does not establish that toothettes and phlexy-vits are directly required for any of the purposes listed in section 2(1)(a)(i) A to F of Schedule C.

In the appeal submission, the advocate argues that the requested supplies are necessary to avoid imminent and substantial danger to health. The advocate argues that toothettes should be considered in the same category as cleansing products which the ministry already provides in terms of other items such as gloves and wet wipes. Regarding phlexy-vits, the advocate argues they are necessary as part of the appellant's "G-tube feeding regimen" and are a "necessary health supplement to maintain bone strength and normal organ function." The advocate notes that the ministry provided the items when the appellant was a minor child. The advocate argues that the appellant still requires the items "to prevent detrimental health effects."

Panel's decision

Section 2(1)(a) of Schedule C requires medical or surgical supplies to be either disposable or reusable and also for one of the purposes listed under section 2(1)(a)(i). The legislated purposes include wound care, bowel care, catheterization, incontinence, skin parasite care, and limb circulation care. The ministry accepted that toothettes are a disposable medical supply but was not satisfied that toothettes are required for one of the purposes listed in the Regulation. The appellant indicates toothettes are for the purpose of dental hygiene. Neither of the letters from medical professionals provide information about toothettes. Based on the appellant's evidence that toothettes are a dental hygiene specialty product, the panel finds that the ministry reasonably concluded that toothettes are not required for wound care or for any of the purposes listed in section 2(1)(a)(i) of Schedule C.

The appellant describes phlexy-vits as a "medical food." The letter from the dietitian explains that flexi-vits is used for vitamin/mineral supplementation: mixed with water and given as a medication. There is insufficient evidence to establish that phlexy-vits is a disposable or reusable medical supply, necessary for wound care or for any of the other purposes listed in section 2(1)(a)(i) of Schedule C. The panel therefore finds that the ministry reasonably applied the legislation in concluding that toothettes and phlexy-vits are not eligible items under section 2(1)(a) of EAPWDR Schedule C.

In addition, the ministry argues that for the purposes of section 2(1)(a), medical and surgical supplies do not include a nutritional supplement or vitamin or mineral. The ministry bases its argument on section 2(1.1) of Schedule C which states: *for the purposes of subsection 1(a), medical and surgical supplies do not include nutritional supplements, food, vitamins, minerals or prescription medications.* Under the ministry's interpretation of the legislation, phlexy-vits ("a vitamin, mineral and trace element preparation"

and “medical food” according to the package label) cannot be considered as a medical or surgical supply for the purposes of Schedule C. The panel finds the ministry’s application of the legislation in determining that phlexy-vits is not a medical or surgical supply was reasonable under section 2(1.1) as well as section 2(1)(a) of Schedule C.

Phlexy-vits is not eligible as a consumable medical supply under section 2(1)(a.2) of Schedule C

The ministry argues that phlexy-vits is “for nutritional intake” and is not required to thicken food pursuant to the legislative criteria. The ministry notes that the appellant does not argue that phlexy-vits is eligible as a consumable medical supply.

Panel’s decision

Section 2(1)(a.2) of Schedule C authorizes the minister to provide consumable medical supplies as a health supplement if the supplies are required to thicken food (among other criteria being met which are not in dispute). While the dietitian confirms that phlexy-vits is clearly consumable, she indicates it is a nutritional supplement. There is insufficient evidence to establish that phlexy-vits is used to thicken food and the information in the record indicates the appellant is exclusively tube fed. Based on the evidence as a whole, the panel finds that the ministry reasonably applied the legislation in the circumstances of the appellant and reasonably found that phlexy-vits is not an eligible health supplement under section 2(1)(a.2) of Schedule C.

Toothettes and phlexy-vits are not eligible items under sections 3.1 to 3.12 of Schedule C and the legislated criteria in these sections and in section 3 (for each of the items listed) have not been met.

The ministry argues that toothettes and phlexy-vits are not among the health supplements listed in these sections and the legislative criteria for each specific item are also not met. The appellant does not provide an argument for eligibility under sections 3.1 to 3.12 of Schedule C.

Panel’s decision

The panel notes that in addition to the specific eligibility requirements for each item described in these sections, the general requirements under sections 3(1) and 3(2) of Schedule C must also be met. The panel finds that the ministry reasonably concluded that toothettes and phlexy-vits are not among the items listed in sections 3.1 to 3.12. These sections set out eligibility criteria for medical equipment and devices such as mobility aids, medical beds, and breathing apparatus among other things. Given that toothettes and phlexy-vits are not listed as medical equipment in sections 3.1 to 3.12 of Schedule C, the panel finds that the ministry reasonably determined they are not eligible health supplements under these sections of the Schedule and that the other legislative criteria in section 3 were not met.

Toothettes and phlexy-vits are not an item set out in any other sections of Schedule C [sections 2(1)(c), 2(2), 2(2.1), 2(1)(f), 2.1, 2.2, 4, 4.1, 5, 6, 7, 8 and 9] or in section 67.3, and the other legislated criteria for each of these health supplements have not been met

The ministry argues that toothettes and phlexy-vits do not meet the criteria for a therapy or for any of the other health supplements listed in Schedule C or section 67.3 [*sic*: section 67.001] of the Regulation and that the other legislated criteria for each of the supplements in these sections have not been met. The ministry notes that the health supplements covered by these sections include therapies, medical transportation, dental supplements, diet supplements, monthly nutritional supplements, and natal/infant supplements. The ministry states that toothettes and phlexy-vits “are not one of these.” Regarding a nutritional supplement under section 67.001, the ministry argues that phlexy-vits does not meet the criteria for acute short-term need. The appellant argues that phlexy-vits is a “medical food”, necessary to maintain bone strength and normal organ function as part of the appellant’s tube feeding regimen.

Panel's decision

The ministry is authorized to fund therapies [sections 2(1)(c), 2(2), and 2(2.1)]; eye care [sections 2.1 and 2.2], medical transportation [section 2(1)(f)], and dental procedures [sections 4, 4.1, and 5] provided that the specific eligibility criteria for each of these items are met. While toothettes are for the purpose of dental hygiene, there is insufficient evidence to establish that toothettes are a "dental service" set out in sections 4, 4.1, and 5 of Schedule C. The panel finds the ministry reasonably determined that toothettes and phlexy-vits are not health supplements under these sections and that the specific criteria for each of the supplements set out in these sections were also not met.

The remaining sections of Schedule C [sections 6 to 9] as well as section 67.001 of the EAPWDR allow the ministry to provide nutrition-related supplements for adults, pregnant women, and infants where specific eligibility criteria are met. Section 67.001 authorizes the minister to provide a short-term nutritional supplement for 3 months or less. The dietitian states that the appellant has used phlexy-vits "for many years". The panel therefore finds that the ministry was reasonable in determining that phlexy-vits is not a short-term nutritional supplement.

Regarding diet and nutritional supplements for adults, sections 6 and 7 of Schedule C set out the specific eligibility criteria for these supplements. Under section 6, the ministry may provide a diet supplement if it is necessary for one of the medical conditions listed in section 6(2) of Schedule C. The paediatrician's letter lists the appellant's medical conditions but does not mention any of the conditions that are set out in section 6(2). The panel therefore finds that the ministry reasonably determined that phlexy-vits is not a health supplement under section 6 of Schedule C.

Regarding the monthly nutritional supplement under section 7 of Schedule C, the legislation requires specific criteria to be met including the criteria that are set out in section 67 of the EAPWDR. The section 67 criteria require, among other things, an application for the monthly nutritional supplement to be completed by a medical or nurse practitioner [section 67(1.1)]. The letters from the dietitian and paediatrician do not specifically request a monthly nutritional supplement. The dietitian prescribes phlexy-vits to meet the appellant's nutrition needs. Other criteria for a monthly nutritional supplement such as the alleviation of specific symptoms under section 67(1.1)(b) are not addressed by the dietitian. At the hearing, the ministry confirmed it did not receive an application for the monthly nutritional supplement. Based on the evidence as a whole, the panel finds that the ministry reasonably determined that phlexy-vits is not eligible as a monthly nutritional supplement under section 7 of Schedule C.

Toothettes and phlexy-vits are not eligible as a life-threatening health need under section 69

The ministry found that the appellant is not eligible to receive toothettes and phlexy-vits as a health supplement for a person facing a direct and imminent life-threatening health need. The ministry argues that the appellant is eligible to receive health supplements under the EAWDR, Schedule C [general health supplements and medical equipment and devices] and, therefore, she does not require a remedy under section 69. The ministry argues that the information submitted with the RFR does not establish that the appellant faces a "direct and imminent" life-threatening need for toothettes and phlexy-vits. The ministry also argues that toothettes and phlexy-vits are not health supplements as set out in sections 2 and 3 of EAPWDR Schedule C.

The advocate argues that toothettes and phlexy-vits are "necessary to avoid imminent and substantial danger to health". The advocate explains that toothettes help prevent life-threatening aspiration pneumonia which the appellant "is extremely prone to" and phlexy-vits is necessary to prevent bone fractures which are "potentially life-threatening" given the appellant's medical condition. The advocate argues that both items are necessary to "prevent detrimental health effects."

Panel's decision

In order to be eligible for a health supplement under section 69, the person must not only be facing a direct and imminent life-threatening health need. There is also a requirement to be ineligible for health supplements under sections 2(1)(a) and (f) and section 3 of EAPWDR Schedule C. As a PWD recipient, the appellant meets the basic eligibility requirement for health supplements. The appellant is therefore eligible to receive the health supplements set out under section 2(1)(a) and (f) and section 3 of Schedule C provided that the specific criteria for each of the items in these sections are met. Accordingly, the panel finds that the ministry reasonably determined the appellant does not require a remedy under section 69.

In addition, the panel found that the ministry reasonably determined that toothettes and phlexy-vits are not health supplements as described in sections 2(1)(a) and (f) of Schedule C [disposable and reusable medical supplies, and medical transportation], nor are they included as eligible items under sections 3 and 3.1 to 3.12 of Schedule C. Without these criteria being met, the ministry has no legal authority to provide toothettes and phlexy-vits even where a life-threatening health need is established. The panel therefore finds that the ministry reasonably determined the appellant is not eligible for these items to meet a direct and imminent life-threatening health need under section 69.

Conclusion

The panel finds that the ministry reasonably applied section 69 and Schedule C of the EAPWDR to find the appellant ineligible for toothettes and phlexy-vits. The panel confirms the ministry's reconsideration decision. The appellant is not successful in her appeal.

PART G – ORDER

THE PANEL DECISION IS: (Check one)

UNANIMOUS

BY MAJORITY

THE PANEL

CONFIRMS THE MINISTRY DECISION

RESCINDS THE MINISTRY DECISION

If the ministry decision is rescinded, is the panel decision referred back to the Minister for a decision as to amount? Yes No

LEGISLATIVE AUTHORITY FOR THE DECISION:

Employment and Assistance Act

Section 24(1)(a) or Section 24(1)(b)

and

Section 24(2)(a) or Section 24(2)(b)

PART H – SIGNATURES

PRINT NAME

Margaret Koren

SIGNATURE OF CHAIR

DATE (YEAR/MONTH/DAY)

2018-06-15

PRINT NAME

Kulwant Bal

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2018-06-15

PRINT NAME

Kim Polowek

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2018-06-15