

PART C – DECISION UNDER APPEAL

The decision under appeal is the Ministry of Social Development and Poverty Reduction (ministry) reconsideration decision dated 27 August 2018, which determined that the appellant was not eligible for funding for a specific power wheel chair because he had not met all of the requirements set out in the legislation. The ministry determined that the appellant had demonstrated that he is eligible to receive health supplements. However, the ministry also found that the appellant had not demonstrated that he met the requirements set out in Schedule C, sections 3 and 3.2 of the Employment and Assistance for Persons with Disabilities Regulation. Specifically, the ministry was not satisfied that the medical equipment or device is the least expensive appropriate medical equipment or device as required by subsection 3(1)(b)(iii); and the item is medically essential to achieve or maintain basic mobility as set out in subsection 3.2(2).

PART D – RELEVANT LEGISLATION

Employment and Assistance for Persons with Disabilities Regulation (EAPWDR) – section 62 and Schedule C, sections 3 and 3.2.

PART E – SUMMARY OF FACTS

Evidence before the ministry at reconsideration consisted of the following:

1. **Medical Equipment Request and Justification** form dated 11 January 2018, describes the appellant's medical condition as athetoid cerebral palsy and L4/L5 anterolisthesis. The medical equipment recommended is a new power chair with complex head array, power tilt/recline, leg rests and custom seating.
2. **Equipment Funding Request**, a 1-page document, dated 25 January 2018 and prepared by a physiotherapist (PT) who describes the appellant's presenting issues, current equipment, physical issues, functional issues and recommendations. The recommendations are for a new power wheelchair capable of 'freewheeling' with power recline and Intelli-drive as well as new custom seating.
3. **Price Quote** dated 28 January 2018 for the custom wheelchair seating recommended by the appellant's PT.
4. **Price Quote** dated 29 December 2017 for the power wheelchair recommended by the appellant's PT.
5. **Price Quote** dated 25 April 2018 for a power wheel chair comparison quote requested by the ministry.
6. **Request for Reconsideration** dated 14 August 2018, in which the appellant states that the ministry was incorrect as to the make and model of appellant's current wheelchair, which enables him to function more independently in his life and community. The appellant argues that he needs the recline function because his back condition is worsening. The appellant also argues that the head array on the PT recommended wheelchair is necessary because it doesn't shift when tilting and reclining. The appellant also argues that is important that his wheelchair be able to "freewheel" when disengaged to allow care workers and his wife to move the chair in the bathroom and other small areas.

Additional information before the panel on appeal consisted of the following:

Notice of Appeal

In the Notice of Appeal dated 3 October 2018, the following reasons for appeal are provided: *the power recline and tilt are both needed. Power tilt alone is not meeting seating tolerance and pain control needs. [Appellant] has been needing pain medication the last couple years to deal with the pain and he sees Dr. [omitted]. He takes medication daily. The deteriorating condition of current chair is not the tolerance issue. We will have more supporting information to show this power recline is needed.*

Appeal Submissions

At the hearing, the appellant, with assistance from an advocate, argued that the PT recommended chair is essential to maintain his basic mobility and positioning and to meet his seating tolerance and pain control. The appellant explained that tilt alone is not enough to allow him to deal with his back pain as this means he is still seated at a 90-degree bend when he tilts back. He explained that he also requires recline as this would permit him to open his seated position beyond 90-degrees to 'unfold and recline' during the day. The appellant also explained that freewheeling is essential to his basic mobility as this allows the gears to be disengaged, which permits his helpers to assist him adequately and safely. The appellant argued that the ministry-approved chair does not permit freewheeling as only the brakes can be disengaged, but not the gears, which can be dangerous to those trying to assist him in small spaces.

The appellant submitted three documents on appeal:

1. A letter from a medical doctor (MD) at a spasticity clinic dated 4 October 2018, in which the MD provides his opinion that the appellant would benefit from a recline wheelchair so that he can take breaks from being in a seated position and avoid missing time at work.
2. A letter from the appellant's general practitioner (GP) dated 23 October 2018, in which the GP indicates that a recline wheelchair is medically necessary for the appellant because of his severe back pain.
3. A letter from the appellant's PT dated 24 October 2018, in which the PT explains why power recline is necessary for the appellant, and why the specific wheelchair recommended is required by the appellant. The PT also argues that only the PT-recommended chair permits the use of the head array required by the appellant. The head array is the device that permits the appellant to control the chair.

The ministry relied on the reconsideration decision.

Admissibility

The panel finds that the information provided in the appellant's Notice of Appeal and at the hearing consists of argument, which does not require an admissibility determination in accordance with section 22 (4)(b) of the *Employment and Assistance Act*. The panel finds that each of the three documents provided by the appellant are admissible in accordance with section 22 (4)(b) of the *Employment and Assistance Act* in that they are each in support of information and records that were before the ministry at reconsideration. Each of the documents provides some elaboration on the necessity of the appellant obtaining the PT recommended wheelchair. In making this determination, the panel notes that the ministry made no objection to the admission of the appellant's information and expressed no concerns regarding the content of the appellant's information.

PART F – REASONS FOR PANEL DECISION

The issue in this appeal is whether the ministry decision that determined that the appellant did not meet the following statutory requirements for the PT recommended wheelchair is reasonably supported by the evidence or a reasonable application of the legislation in the appellant's circumstances:

- the medical equipment or device is the least expensive appropriate medical equipment or device as required by subsection 3(1)(b)(iii); and
- the item is medically essential to achieve or maintain basic mobility as set out in subsection 3.2(2).

The following sections of the EAPWDR applies to this appeal:

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,
- (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.

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.

Schedule C

Medical equipment and devices — wheelchairs

3.2 (1) In this section, "wheelchair" does not include a stroller.

(2) Subject to subsection (4) of this section, 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 achieve or maintain basic mobility:

- (a) a wheelchair;
- (b) an upgraded component of a wheelchair;
- (c) an accessory attached to a wheelchair.

(3) 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.

(4) A high-performance wheelchair for recreational or sports use is not a health supplement for the purposes of section 3 of this Schedule.

The ministry was satisfied that the appellant is eligible to receive health supplements under section 62 and Schedule C of the EAPWDR as he is in receipt of medical services only as a person with PWD designation. Eligibility is not an issue in this appeal. The ministry also accepted that a power wheelchair is medically essential for the appellant to maintain basic mobility. The issue in this appeal is not whether the appellant requires a power wheelchair, but rather which power wheelchair is the least expensive appropriate medical equipment or device.

In the reconsideration decision the ministry determined that the appellant is not eligible for the PT-recommended power wheelchair because the ministry was not satisfied that it was the least expensive appropriate medical equipment that is medically essential for the appellant to achieve or maintain basic mobility. In reaching this

conclusion, the ministry made three key findings.

The first finding is that the appellant's request for "Intelli-Drive" for a power wheelchair does not meet section 3.2(2) in that it is medically necessary to achieve basic mobility. The panel finds that what is medically necessary to maintain basic mobility will vary according to individual needs. In the circumstances of the appellant, the panel finds that the appellant is an individual who uses public transit and attends his employment on a regular basis; these are therefore components of his basic mobility. The panel notes that while the ministry-approved wheelchair does have features to assist with safe driving, the appellant's PT specifically states in the Equipment Funding Request that Intelli-Drive is imperative for the appellant's head array driving ability. The PT notes that Intelli-drive, an electronic tracking package that the appellant currently uses, makes a big difference in the appellant's functional and safe outdoor mobility. The panel finds that this constitutes "an assessment by an occupational therapist or physical therapist confirming the medical need for the medical equipment or device" in accordance with section 3(2)(b). As well, the appellant argued at reconsideration and on appeal that Intelli-Drive allows him to use the city bus, navigate narrow halls and deal with uneven sidewalks safely. The panel finds that the information establishes that Intelli-Drive is medically necessary for the appellant to achieve basic mobility. The panel, therefore, finds the ministry's conclusion that Intelli-Drive is not medically necessary to achieve basic mobility is not reasonably supported by the evidence nor a reasonable application of the legislation in the appellant's circumstances.

The second finding was that the appellant's request for power recline does not meet section 3(1)(b)(iii) as the least expensive appropriate medical equipment and 3.2(2) as being medically necessary to achieve basic mobility. The ministry argued that the information from the appellant and the PT has not sufficiently explained why power tilt alone was not sufficient for the appellant to remain seated. The panel finds this conclusion to be unreasonable. The panel notes that the appellant, the PT, the MD and the GP have all indicated that tilt alone is not sufficient for the appellant. The information provided by all of these individuals indicates that the appellant suffers from serious back pain and must be able to reposition, stretch out and recline in order to relieve his pain to some extent when sitting in his chair for 10 hours per day on work days. The panel notes that the MD states that the appellant will benefit from power recline as it will allow the appellant to take frequent breaks from being in a seated position, and hopefully allow him to avoid missing work due to his pain, as he is otherwise unable to lie down at work due to his medical condition. As indicated above, the panel finds that the ability to attend work on a regular basis is a necessary component of basic mobility for the appellant. The panel finds that the information establishes that power recline is medically necessary for the appellant to maintain basic mobility. Further, the panel finds that as the PT-recommended power chair is the only one of the two comparison wheelchairs to have this feature, it is by definition the least expensive appropriate medical equipment.

The third finding was that the appellant's request for the specific PT-recommended wheelchair does not meet section 3(1)(b)(iii) as the least expensive appropriate medical equipment and 3.2(2) as being medically necessary to achieve basic mobility. This finding is based on three conclusions. First, the ministry argued that the cost for the ministry-approved wheelchair is less than that of the PT-recommended wheelchair. Second, the ministry argued that the PT and appellant have not provided information that suggests that the ministry-approved chair cannot be pushed by care staff and cannot freewheel. Third, the ministry argued that the PT has not stated that the power seat functions of other wheelchairs are insufficient to meet the appellant's needs. The panel finds the ministry's third set of conclusions as to the PT-recommended power wheelchair to be unreasonable.

With respect to the ministry's first argument as to cost, the panel notes that many of the ministry's conclusions seem to indicate that the appellant is required to rebut a presumption that the ministry-approved chair is the least expensive appropriate medical device and is medically necessary to achieve basic mobility. The panel accepts that in order to determine if the equipment requested is the "least expensive appropriate medical equipment or device" the ministry would reasonably require information on the cost and function of at least two appropriate items. However, the panel has already concluded that the ministry's first and second findings, with respect to Intelli-drive and power tilt, are unreasonable. The panel has concluded that the medical necessity of both Intelli-Drive and power recline have been established and the ministry-arrived wheelchair does not have either of these features. Only the power wheelchair recommended by the PT met the criteria needed by the applicant. Therefore, the panel finds that the ministry-approved wheelchair is not an appropriate medical equipment or device for the appellant.

In relation to 'freewheeling', the panel notes that the evidence provided by the PT and the appellant is that 'true

freewheeling', that is release of brakes and gears, is required to meet the appellant's basic mobility needs. The evidence provided by the PT and the appellant is that true freewheeling enables the appellant's care providers to push and maneuver the appellant in his chair, and to do so safely, when he requires assistance to use the washroom at work or navigate other tight spaces. The PT has specifically indicated that the ministry-approved chair does not have this capability. The panel, therefore, finds that the PT's evidence establishes that the ministry-approved chair would be unsafe or not possible for many care providers to push manually.

With respect to the power seat functions, the PT's evidence is that the power seat functions of other chairs are not sufficient to meet the appellant's needs. The panel notes that the PT specifically states in her appeal letter that the ministry-approved chair does not have adequate shear accommodation in the power reclining equipment. As the panel has concluded that power recline is medically necessary, the panel finds that the ministry-approved chair is not an appropriate medical device for the appellant.

The panel finds that the ministry's conclusion that the appellant's evidence doesn't demonstrate that the ministry-approved chair is insufficient in meeting the appellant's basic mobility needs is also unreasonable. The panel finds that the PT-recommended wheelchair is the least expensive appropriate medical device for the appellant and medically essential for his basic mobility.

Conclusion

The panel finds that the ministry's reconsideration decision, determining that the appellant had not met all of the legislated criteria for PWD designation, is not a reasonable application of the legislation in the circumstances of the appellant and is not reasonably supported by the evidence. The panel rescinds the ministry's reconsideration decision. The appellant is successful on 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

Jennifer Smith

SIGNATURE OF CHAIR

DATE (YEAR/MONTH/DAY)

2018/10/26

PRINT NAME

Dan McLeod

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2018/10/26

PRINT NAME

Don Storch

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2018/10/26