

**PART C – DECISION UNDER APPEAL**

The decision under appeal is the reconsideration decision of the Ministry of Social Development and Poverty Reduction (“the ministry”) dated 29 April 2019 that found that, pursuant to section 3(4) of Schedule C of the Employment and Assistance for Persons with Disabilities Regulation (EAPWDR), the appellant *may* be eligible for *repairs* to her current TENS machine, provided she establishes that it is more economical to repair the TENS machine than to replace it.

The ministry found that, in accordance with section 3(3) of Schedule C of the EAPWDR, the appellant is not eligible for funding of a *replacement* TENS machine, as such a device is not an eligible health supplement listed in section 3 of the EAPWDR. The ministry further found that a TENS machine is not in any of the other categories of health supplement set out in Schedule C of the EAPWDR.

The ministry also found that a replacement TENS machine cannot be funded as a life-threatening health need under section 69 of the EAPWDR or as a crisis supplement under section 57.

**PART D – RELEVANT LEGISLATION**

Employment and Assistance for Persons with Disabilities Regulation (EAPWDR), sections 57, 62 to 68, 69 and Schedule C.

Panel note

The EAPWDR is made under the authority of the *Employment and Assistance for Persons with Disabilities Act* (EAPWDA). This Act came into effect on 30 September 2002.

The EAPWDA replaced the *Disability Benefits Program Act* (DBPA), which was enacted in 1996.

The DBPA replaced the *Guaranteed Available Income for Need (GAIN) Act* introduced in 1976.

**PART E – SUMMARY OF FACTS****Background**

On 03 April 2019 the ministry rendered a reconsideration decision regarding the appellant's request for a TENS machine and another item. The reconsideration decision found that she was ineligible for funding of both items. The appellant subsequently pursued an appeal of the reconsideration decision.

On 27 May 2019 the Employment and Assistance Appeal Tribunal confirmed the ministry's reconsideration decision to deny funding for the other item, but rescinded the ministry's reconsideration decision to deny funding for the TENS machine. The Tribunal found the ministry failed to consider the appellant's request under the applicable EAPWDR provisions for *replacement* of the TENS machine [Schedule C, section 3(3)] and *repair* of a TENS machine [Schedule C, section 3(4)].

As a result, a new reconsideration decision, dated 29 April 2019, was rendered by the ministry to address the appellant's eligibility for funding of a TENS machine in consideration of the regulations for replacement and repair of medical equipment, as well as all other applicable regulations. It is this reconsideration decision that is under appeal.

**Information before the ministry**

The information before the ministry for this reconsideration included the following:

1. From the ministry's files:
  - ◇ The appellant is a recipient of disability assistance.
  - ◇ The appellant was provided funding for a TENS machine in April 1996. In January 2009, the ministry provided funding for a replacement TENS machine.
2. Information before the previous panel hearing the earlier appeal:
  - On February 13, 2019 the appellant submitted an application for a TENS machine (with accessories)
  - Letter from an occupational therapist, dated 13 February, stating:
    - ◇ The appellant has mobility limitations due to Legg-Calves Perthes disease in her left hip since childhood, tibia/fibula fracture dislocation to right ankle in 2015 requiring surgical plates/screws, post traumatic arthritis in right ankle, psoriatic arthritis, depression, anxiety and paranoid psychosis (2013).
    - ◇ The appellant has difficulty mobilizing due to left leg pain and right ankle pain.
    - ◇ The appellant found a TENS to be effective for pain relief and she requires a new TENS unit, electrodes and wall charger.
  - Price quote from a medical supplies store dated 07 February 2019, detailing the cost of a TENS machine and TENS accessories, with a total cost of \$222.30.
  - March 1, 2019 handwritten note from the appellant:
    - ◇ The appellant's current TENS machine no longer works.
    - ◇ The appellant has experienced chronic pain for 30 years and the TENS machine has provided effective pain management.
    - ◇ She has a possible left fibulae fracture and torn muscles around both knees.
    - ◇ She has been diagnosed with a vascular necrosis (left hip), compressed spinal

cord, 4 herniated discs, and cervical stenosis.

- January 18, 2019 letter from the appellant's physician
  - ◊ Long standing history of left hip arthritis secondary to Legg Calve Perthes disease.
  - ◊ States x-ray findings: advanced and severe left hip degenerative changes with marked narrowing. She has complex hip arthritic joint with chronic pain on the background of possible ongoing infection.
- March 19, 2019 handwritten Request for Reconsideration from the appellant:
  - ◊ She requests reconsideration for funding of a TENS machine and another item.
  - ◊ She provides a detailed description of her medical history, history of treatments, medical conditions, the impacts of chronic pain, the benefits of treatment by TENS machine and the need for the other requested item.
- Information provided by the appellant at the hearing before the previous panel:
  - ◊ A TENS machine was prescribed because the ministry would not cover the full cost of physiotherapy.
  - ◊ She was not able to see a chiropractor. A massage therapist was also not able to assist the appellant.
  - ◊ She was on 17 medications to control pain.
  - ◊ She had braces, canes, walkers, and a borrowed wheelchair.
  - ◊ The appellant stated that a TENS machine and the other requested item are not luxury items to her. They are items that are necessary.
  - ◊ The first TENS machine was provided in 1999 and the second was replaced on January 15, 2009.
  - ◊ In 2014 or 2015 she was told by the Ministry that the TENS machine would be replaced.
  - ◊ She asked the Ministry to repair the TENS machine but was told that it was too costly to repair the TENS machine and that it would need to be replaced.
  - ◊ Over the last 3.5 years the TENS machine stopped working.
  - ◊ In April 2016 two letters were sent from occupational therapists to the Ministry.

### **Notice of Appeal**

The appellant submitted her Notice of Appeal on 17 June 2019. She provided no reasons for appeal.

### **Appellant submission**

Before the hearing, on 28 June 2019, the Tribunal received a Submission from the appellant containing 2 documents:

- A letter from a nurse practitioner dated 21 June 2019 stating that the appellant would benefit from a TENS machine for her chronic pain.
- A letter from the colon screening program dated 27 June 2019 stating that as a result of a recent fecal immunochemical test (FIT) she will soon be contacted for follow-up.

### **The hearing**

At the outset of the hearing, the appellant expressed dismay that letters that she had asked her physician, her occupational therapist, and the medical supply store to be sent to the ministry

had not been made available to the panel.

The appellant reviewed at length her current and complex medical condition. She emphasized that she is in constant pain, and without a TENS machine, had to rely both on prescription drugs and over-the-counter medication. The latter were now causing bowel problems, requiring her soon to have a colonoscopy. She described how, as a result of the pain, she gets very little sleep. She explained how one of her hips was now out of its socket, causing not only a great deal of pain and loss of mobility function, but also the necrosis of the leg bone due to lack of blood supply. This is another reason why she needs a TENS machine – to promote limb circulation – as well as to relieve pain: she does not want to lose her leg. She has an appointment soon to see an orthopedic surgeon, but she worries that due to her overall health condition, the surgeon will not agree to do a hip replacement.

The appellant stated that she had been told by the medical supply store that a TENS machine is considered a disposable item and that nobody repairs them. Also, according to the medical supply store, a TENS machine similar to her old one, and related accessories, would cost \$20 less what the ministry paid in 2009.

The remainder of the appellant's presentation went to argument. (See Part F, Reasons for Panel Decision, below.)

The ministry stood by its position at reconsideration.

#### **Admissibility of additional information**

The ministry did not object to the information provided by the appellant in her Submission before the hearing or her testimony at the hearing.

The panel finds that the information provided by the appellant in her Submission received before the hearing and her testimony at the hearing is in support of the information and records before the ministry at reconsideration. This information tends to substantiate the information provided by the physician, the occupational therapist and the medical supply store and the information provided by the appellant in her handwritten notes/Request for Reconsideration. The panel therefore admits this information as evidence under section 22(4) of the *Employment Assistance Act*.

**PART F – REASONS FOR PANEL DECISION**

The issue in this appeal is whether the following ministry determinations were reasonably supported by the evidence or a reasonable application of the legislation in the circumstances of the appellant:

- in accordance with section 3(3) of Schedule C of the EAPWDR, the appellant is not eligible for funding of a *replacement* TENS machine, as such a device is not an eligible health supplement listed in section 3 of the EAPWDR.
- a TENS machine is not in any of the other categories of eligible health supplements set out in Schedule C of the EAPWDR.
- a replacement TENS machine cannot be funded as a life-threatening health need under section 69 of the EAPWDR or as a crisis supplement under section 57.

In its decision, the ministry found in the appellant's favour that, pursuant to section 3(4) of Schedule C of the EAPWDR, the appellant *may* be eligible for *repairs* to her current TENS machine provided she establishes that it is more economical to repair the TENS machine than to replace it.

The applicable legislation is from the EAPWDR:

Pursuant to Section 62 to 68 of the EAPWDR, the minister may provide the type of health supplement described in the section to or for a family unit in receipt of disability assistance or to others in a variety of scenarios. If that condition is met, Schedule C of the EAPWDR specifies additional criteria that must be met in order to qualify for a health supplement for various items.

**Schedule C:**

Schedule C is fully reproduced (15 pages) several times in the Appeal Record. The following is a summary:

Section 1 of Schedule C contains relevant definitions.

The remaining sections deal with specific categories of health supplements, with category-specific criteria relating to such matters as exclusions, limits, purpose and replacement and repair. These sections and the categories of supplement covered are listed below:

Section	Category
2	<p>General health supplements</p> <p>Medical or surgical supplies that are disposable or reusable and 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;</p> <p>Medical or surgical supplies: (i) lancets; (ii) needles and syringes; (iii) ventilator supplies; (iv) tracheostomy supplies.</p> <p>Consumable medical supplies required to thicken food.</p> <p>The following services: acupuncture, chiropractic, massage therapy, naturopathy, non-surgical podiatry, physical therapy.</p> <p>Travel for the purposes of medical care.</p>

2.1	Optical supplements
2.2	Eye examination supplements
3	Medical equipment and devices – general provisions <i>[see below]</i>
3.1	Canes, crutches and walkers
3.2	Wheelchairs
3.3	Wheelchair seating systems
3.4	Scooters
3.5	Bathing and toileting aids: (a) a grab bar in a bathroom;(b) a bath or shower seat;(c) a bath transfer bench with hand held shower;(d) a tub slide; (e) a bath lift; (f) a bed pan or urinal; (g) a raised toilet seat;(h) a toilet safety frame; (i) a floor-to-ceiling pole in a bathroom;(j) a portable commode chair; (k) a standing frame; (l) a positioning frame; (m) a transfer aid
3.6	Hospital beds: (a) a hospital bed; (b) an upgraded component of a hospital bed; (c) an accessory attached to a hospital bed; (d) a positioning item on a hospital bed
3.7	Pressure relief mattresses
3.8	Floor or ceiling lift devices
3.9	Breathing devices
3.10	Orthoses: (a) a custom-made or off-the-shelf foot orthotic; (b) custom-made footwear; (c) a permanent modification to footwear; d) off-the-shelf footwear required for the purpose set out in subsection (4.1)(a); (e) off-the-shelf orthopaedic footwear; (f) an ankle brace;(g) an ankle-foot orthosis; (h) a knee-ankle-foot orthosis; (i) a knee brace; (j) a hip brace; (k) an upper extremity brace; (l) a cranial helmet used for the purposes set out in subsection (7); (m) a torso or spine brace; (n) a foot abduction orthosis; (o) a toe orthosis; (p) a walking boot.
3.11	Hearing instruments
3.12	Non-conventional glucose meters
4	Dental supplements
4.1	Crown and bridgework supplement
5	Emergency dental supplements
6	Diet supplements
7	Monthly nutritional supplement
8	Natal supplement
9	Infant formula
10	Repealed
11	Alternative hearing assistance supplement

The relevant subsections of section 3 read: *[emphasis added]*

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.

(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**.

Other relevant legislation is from the EAPWDR: *[emphasis added]*

### **Crisis supplement**

**57** (1) The minister may provide a crisis supplement to or for a family unit that is eligible for disability assistance or hardship assistance if

- (a) the family unit or a person in the family unit requires the supplement to meet an unexpected expense or obtain an item unexpectedly needed and is unable to meet the expense or obtain the item because there are no resources available to the family unit, and
- (b) the minister considers that failure to meet the expense or obtain the item will result in
  - (i) imminent danger to the physical health of any person in the family unit, or
  - (ii) removal of a child under the *Child, Family and Community Service Act*.

- (3) **A crisis supplement may not be provided for the purpose of obtaining**
- (a) a supplement described in Schedule C, or
  - (b) any other health care goods or services.

### **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).

## **Analysis**

### The position of the appellant

The position of the appellant, as explained at the hearing, is that it is absurd for the ministry to suggest that a TENS machine can be readily repaired. The ministry should realize that once a TENS machine ceases to function, it is the kind of electronic device that is considered disposable and needs to be replaced with a new one. Indeed, she has been told by the medical supplies store that a new one, with improved performance, would in fact cost less than what the ministry paid for the one it provided in 2009. If the objective is for her to have a functioning TENS machine at less cost than what the ministry originally spent, as seems to be the intent of the legislation, then it makes sense to provide her with a replacement provided that it is more economical than the original.

Alternatively, the appellant takes issue with the ministry's finding that a TENS machine is not an eligible health supplement under Schedule C. She points to section 2(1)(a), arguing that, as discussed above, a TENS machine, while reusable, is also ultimately disposable, and she requires one for limb circulation care, given how she is facing the prospect of necrosis in her leg and requires the increased blood circulation to prevent her from losing her leg. Thus the TENS machine she requests qualifies as an eligible item under section 2(1)(a) of Schedule C.

### The position of the ministry

In the reconsideration decision, the ministry determined that a TENS machine is not listed as an eligible health supplement in Schedule C of the EAPWDR. In reaching this conclusion, the ministry canvassed in detail the range of health supplements listed in Schedule C. In summary, the ministry held that a TENS machine is not an eligible health supplement as any type of medical equipment or device under sections 3.1 to 3.12 of Schedule C, nor as an eligible medical supply under section 2(1) of Schedule C, nor does it meet the criteria of any of the remaining health supplements set out in Schedule C. As a TENS machine is not listed as an eligible health supplement in section 3(1) -- i.e. described in sections 3.1 to 3.12 -- the ministry found that under section 3(3) the appellant was not eligible for a TENS machine as a replacement for her current device.

In the reconsideration decision, the ministry also found that the appellant was not eligible for the requested item under section 69 of the EAPWDR. This section provides that the minister may provide health supplements set out in Schedule C sections 2(1)(a) [medical supplies] and (f) [medical transportation] and 3 [medical equipment and devices] if the health supplement is provided to or for a person who is not otherwise eligible for it under the Regulation and if the minister is satisfied that 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. The ministry found the appellant not eligible under section 69 because she is a recipient of disability assistance and is therefore "otherwise" eligible for health supplements under Schedule C and the requested item is not a health supplement under sections 2(1) or 3 of Schedule C.

The ministry further found that the appellant is not eligible for a TENS machine as a crisis supplement under section 57 of the EAPWDR, because such a device is medical equipment intended for health care (i.e. a health care good) and section 57(3) excludes health care goods and services as a purpose for providing a crisis supplement.

### Panel finding

In terms of the appellant's argument justifying replacement of her older, no longer functioning, TENS machine with a new one because the cost of the replacement is less than the cost of the one being replaced, the language of Schedule C, section 3(4) is specific: the cost comparison must be between the cost of repair and the cost of replacement, not between the cost of replacement and original cost of the unit being replaced. The panel therefore finds that the ministry, in determining that the appellant may be eligible for repair of her current TENS machine, was reasonable in adding the proviso set out Schedule C section 3(4) that she must establish that it is more economical to repair the TENS machine than to replace it.



While the appellant has provided compelling argument that she would benefit from a TENS machine for limb circulation care, the Schedule C section she cites – section 2(1)(a) – refers to “medical or surgical supplies that are, at the minister’s discretion, either disposable or reusable.” To the panel, considering the broader context of Schedule C, including section 3, medical or surgical supplies refer to when more than one of the same item is provided for medical purposes, with relatively low unit costs, though the cost of extended use may be significant. Examples would be single-use bandages for wound care, adult diapers for incontinence, and tension stockings for limb circulation care, with several pairs provided to account for the need for laundry. In the panel’s view, a TENS machine, particularly as it is powered by electricity, would be considered a “device,” that if eligible as a health supplement, would be listed in section 3 of Schedule C. Accordingly, the panel finds that the ministry was reasonable in determining that the appellant is not eligible for a TENS machine as a medical supply under section 2(1) of Schedule C.

The panel notes that the ministry first provided the appellant with a TENS machine in April 1996 under the GAIN legislation. The relevant legislation [Schedule F, section 1(1)(a)] described eligible medical equipment very generally:

“durable medical equipment and appliances that are medically necessary to provide for basic mobility, positioning, breathing or other functions essential to the sustenance of life...”

In the reconsideration decision, under a Ministry Note, the ministry explained that the appellant was previously approved for a replacement of the 1996 TENS machine in January 2009 under legislation that was in effect at the time. While noting that the EAPWDR was substantially changed on 1 April 2010, the ministry stated that the legislation that was in place prior to that date did not set out itemized descriptions of medical equipment the ministry was authorized to provide or the specific eligibility requirements for each type as it does now. The panel finds this latter statement somewhat misleading. Referring to BCLaws.ca, Regulations Point in Time, the panel notes that before being repealed and re-enacted on 1 April 2010, section 3(1) referred to the following medical equipment and devices that may be paid for by the minister:

(a) wheelchairs, personal motorized mobility devices, canes, crutches and walkers; (b) orthotics and bracing; (c) hearing instruments, and (d) positioning devices, and breathing devices. In the panel’s view, it cannot be said that a TENS machine falls within any of these classes of medical equipment and devices listed in Schedule C when the replacement was approved. It does not appear that section 3 as it read then had any provisions regarding repair or replacement.

In an Appendix to the reconsideration decision, the ministry reproduced the applicable policy for when the replacement TENS machine was funded in January 2009. This document shows a TENS machine as listed under eligible items, namely “Electrotherapy,” covering a basic TENS unit, gels and electrodes or accessories. Despite this policy, it is not clear under what legislative authority the ministry provided the January 2009 replacement TENS machine to the appellant.

Nevertheless, the ministry and the panel must be guided by the legislation as it now reads. Section 3(1) of Schedule C states that “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...” In other words, the medical equipment and devices that may be provided by the

minister are limited to only those described in sections 3.1 to 3.12. Since a TENS machine or other such electrotherapy device is not described in sections 3.1 to 3.12, it follows that the ministry was reasonable in finding that a TENS machine is not an eligible medical equipment or device. Further, since section 3(3) limits a replacement only for a unit previously provided by the minister *under this section* that is damaged, worn out or not functioning, and as the TENS unit that the appellant requests be replaced was not provided to her under this section *as it now reads*, the panel finds that the ministry reasonably denied her request under this section. (The panel's analysis above also suggests that the 2009 replacement was not provided under the legislation as it then read.)

The panel has reviewed the *Employment and Assistance for Persons with Disabilities Act* and the EAPWDR, and finds that the legislation does not establish any discretionary authority for the minister to make exceptions and provide any health care products or services as a supplement other than those set out in Schedule C. On the basis of the ministry's thorough review of the range of health supplements set out in Schedule C, the panel finds the ministry was reasonable in determining that the requested TENS machine, on its own or as a replacement, is not an eligible health supplements under the legislation.

The panel notes that section 69 refers to certain health supplements set out in Schedule C that the ministry may provide if other criteria are met. As the panel has found that the ministry reasonably determined that the requested item is not an eligible supply, equipment or treatment under all of Schedule C, and therefore not one of the Schedule C supplements specified in section 69, the panel finds that the ministry reasonably determined that the appellant was not eligible for the requested items under section 69. In addition, the panel finds that the ministry reasonably found that, given its purpose of providing pain relief, a TENS machine is a "health care good," and therefore under the exclusions contained in section 57(3) of the EAPWDR, the ministry cannot fund such a device as a crisis supplement.

### **Conclusion**

The panel acknowledges that the appellant, given that she undoubtedly would benefit from a new TENS machine, would feel that she has been treated unfairly and inconsistently in this matter. However, given the legislation as it now stands and the jurisdiction of the panel limited to deciding appeals strictly in accordance with the legislation, the panel finds that the ministry's decision denying the appellant's request for replacement TENS machine is a reasonable application of the legislation in the circumstances of the appellant. The panel therefore confirms the ministry's decision. The appellant's is thus not successful in her appeal.

Although not pertinent to this decision, given her medical circumstances, the panel would suggest that the ministry work with the appellant in exploring with independent funding organizations options to enable the purchase for her of this essential medical device.

APPEAL NUMBER

**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

Richard Roberts

SIGNATURE OF CHAIR

DATE (YEAR/MONTH/DAY)

2019 July 09

PRINT NAME

Susanne Dahlin

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2019 July 09

PRINT NAME

Robert McDowell

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2019 July 09