

APPEAL NUMBER

PART C – DECISION UNDER APPEAL

The decision under appeal is the Ministry of Social Development and Poverty Reduction (the ministry) reconsideration decision dated June 18, 2019, which denied the appellant's request for funding for Botox treatment because:

- 1) Botox treatment is not a funded therapy listed in legislation as per Schedule C, Section 2(1)(c) of the Employment and Assistance for Persons with Disabilities Regulation (EAPWDR), and,
- 2) the ministry is not satisfied that a medical or nurse practitioner has confirmed an acute need as per Schedule C, Section 2(1)(c)(i) of the EAPWDR.

PART D – RELEVANT LEGISLATION

EAPWDR Sections 61.1 and 62
EAPWDR, Schedule C, Subsection 2

PART E – SUMMARY OF FACTS**Information before the ministry at reconsideration:**

The appellant is a single female with Persons with Disabilities (PWD) designation. On April 29, 2019 the appellant submitted a request for Botox therapy accompanied by a letter from the appellant's medical doctor recommending the appellant as a good candidate for Botox therapy for chronic migraine management. A copy of this letter is appended to the ministry submission.

The ministry reviewed the request on May 2, 2019 and denied the request concluding that:

- 1) Botox treatment is not a therapy listed in legislation as per Schedule C, Section 2(1)(c) of the Employment and Assistance for Persons with Disabilities Regulation (EAPWDR) and,
- 2) the ministry is not satisfied that a medical or nurse practitioner has confirmed an acute need as per Schedule C, Section 2(1)(c)(i) of the EAPWDR and,
- 3) the ministry is not satisfied that the appellant has exhausted the 12 annual visits provided through MSP as per Schedule C, Section 2(1)(c)(ii) of the EAPWDR.

The appellant signed a request for reconsideration dated June 11, 2019 in which the appellant's doctor stated that she had a history of migraines since 1989 with severe debilitating and constant symptoms. Past treatments include a visit to the Mayo Clinic in 2001, multiple post cervical nerve blocks as well as all classes of medications with no success or pain relief. Pain is constant and extreme which affects her quality of life. The only remaining therapy is Botox and three treatments should be sufficient to decide whether additional treatments are needed (The panel notes that initially there was some confusion as to the source of the handwritten comments in section 3 of the request which calls for the requestor to provide reasons for the request. While the appellant did in fact sign the request, during the hearing she confirmed that it was the doctor who wrote section 3.)

On June 18, 2019 the ministry reviewed the appellant's request for reconsideration and denied the request noting that while the medical need for Botox therapy is not in question, such Botox treatments are not listed as a therapy in the legislation and, further, even if the request was for a therapy listed in the legislation, the ministry was not satisfied that the appellant has an acute need, as defined and required by the legislation as the appellant's condition is chronic and ongoing. The panel notes that the reconsideration decision does not contain the third reason as outlined by the ministry on May 2, 2019. The reconsideration decision does not allege that the appellant has exhausted the 12 annual visits provided through MSP as per Schedule C, Section 2(1)(c)(ii) of the EAPWDR. During the hearing the appellant provided information which detailed the conditions under which Pharma Care provides for the funding of Botox treatments and the treatment for headaches is not a covered condition.

Notice of Appeal

On July 8, 2019 the appellant submitted a notice of appeal in which she stated that there are no doctors, medicines or procedures available to me unless I go outside Canada.

Hearing

The panel conducted an oral in person hearing on September 4, 2019. In attendance at the hearing was the panel, ministry representative and the appellant.

In accordance with section 22(4) of the Employment and Assistance Act, the panel can only admit evidence that was before the ministry at the time of reconsideration and evidence that is in support of the information and records that were before the ministry at the time of reconsideration.

Prior to the hearing date the appellant submitted two documents that were dated subsequent to the reconsideration date. The first was a letter dated August 8, 2019 from the appellant's chiropractor which confirmed that the appellant has been a patient since January 2006 and stated that she had severe migraines since 2008 and has tried numerous treatments which have not helped to date. The second was a fax dated August 9, 2019 accompanied by a note from a retired registered nurse who has been a close friend of the appellant for 30 years. The letter confirms that she has witnessed the appellant's slow downward deterioration with chronic pain and notes

that a vibrant active working woman now rarely leaves her home, rarely drives and is dependant on her [REDACTED]-year-old mother for many of her daily living activities. The letter adds that the appellant has tried all manner of modalities to treat her symptoms without success. The panel reviewed both of these documents and concluded that they speak in support of the information and records that were before the ministry at the time of reconsideration and so was admissible.

During the hearing the appellant provided the panel and the ministry representative with a copy of a Pharma Care web page outlining the approved treatment coverage for Botox as a limited coverage drug. This was in response to questions by the panel around the issue of whether she had exhausted the 10 annual visits provided through MRSP as per Schedule C, Section 2(1)(c)(ii) of the EAPWDR (a reason for refusing funding by the ministry originally but not by the reconsideration decision). The appellant suggested this document had been submitted to the ministry and the Tribunal and she suggested this information supports her contention that the issue of 12 MSP visits was not relevant as it was moot as they do not cover Botox for headaches. The panel concludes this document may well exist in the ministry records and speaks in support of the information and records that were before the ministry at the time of reconsideration and so was otherwise admissible.

In her submission to the panel, the appellant repeated much of her written submission and added:

- She has had debilitating migraines since January 2008 which occur daily and sometimes last 24 hours.
- She has tried every therapy and treatment regime available with no success.
- She has taken counselling for over 2 years.
- This is her second period of having migraines. Her first episode started in 2004 and suddenly disappeared.
- This appeal is the last thing she has available and she does not blame the ministry workers for their decision. Their hands are tied.

The Ministry submission to the panel stated that the reconsideration decision found that Botox is not a funded treatment under the legislation and that the appellant's condition is chronic and ongoing and not acute which in their view is a worsening of a condition that is ongoing. The worker stated that if the finding had been this was an acute condition this would not change the final decision. The status of Botox as a treatment that is not on the list of funded treatments is a necessary precondition to considering the issues of being an acute condition and whether 12 MSP visits had been satisfied. The worker also confirmed that the ministry believes the diagnosis of chronic migraines is real and that condition is severe.

PART F – REASONS FOR PANEL DECISION**Issue on Appeal**

The issue on appeal is whether the ministry decision to deny the appellant's request for Botox therapy because:

- Under Schedule C, Section 2(1)(c) of the EAPWDR, Botox is not a listed therapy, and;
- A medical or nurse practitioner has not confirmed an acute need as per Schedule C, Section 2(1)(c)(i) of the EAPWDR;

was a reasonable application of the legislation in the appellant's circumstances or was reasonably supported by the legislation.

Relevant Legislation**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 Health Supplements**Definitions**

1. In this Schedule:

"occupational therapist" means an occupational therapist registered with the College of Occupational Therapists of British Columbia established under the Health Professions Act;

"physical therapist" means a physical therapist registered with the College of Physical Therapists of British Columbia established under the Health Professions Act;

"physical therapy" has the same meaning as in the Physical Therapists Regulation, B.C. Reg. 288/2008;

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]
- (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,
 - (i) for which a medical practitioner or nurse practitioner has confirmed an acute need,
 - (ii) if the visits available under the Medical and Health Care Services Regulation, B.C. Reg. 426/97, for that calendar year have been provided and for which payment is not available under the Medicare Protection Act, and
 - (iii) for which there are no resources available to the family unit to cover the cost:

Item	Service	Provided by	Registered with
1	acupuncture	acupuncturist	College of Traditional Chinese Medicine under the Health Professions Act
2	chiropractic	chiropractor	College of Chiropractors of British Columbia under the Health Professions Act
3	massage therapy	Massage therapist	College of Massage Therapists of British Columbia under the Health Professions Act
4	naturopathy	naturopath	College of Naturopathic Physicians of British Columbia under the Health Professions Act
5	non-surgical podiatry	podiatrist	College of Podiatric Surgeons of British Columbia under the Health Professions Act
6	Physical therapy	Physical therapist	College of Physical Therapists of British Columbia under the Health Professions Act

- (d) and (e) Repealed.
- (f) the least expensive appropriate mode of transportation to or from
(SUB) Nov 25/08
- (i) an office, in the local area, of a medical practitioner or nurse practitioner,
(AM) Nov 25/08
- (ii) the office of the nearest available specialist in a field of medicine or surgery if the person has been referred to a specialist in that field by a local medical practitioner or nurse practitioner,
- (iii) the nearest suitable general hospital or rehabilitation hospital, as those facilities are defined in section 1.1 of the Hospital Insurance Act Regulations, or
- (iv) the nearest suitable hospital as defined in paragraph (e) of the definition of "hospital" in section 1 of the Hospital Insurance Act, provided that (v) the transportation is to enable the person to receive a benefit under the Medicare Protection Act or a general hospital service under the Hospital Insurance Act, and (vi) there are no resources available to the person's family unit to cover the cost.
- (g) Repealed.
- (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) No more than 12 visits per calendar year are payable by the minister under this section for any combination of physical therapy services, chiropractic services, massage therapy services, non-surgical podiatry services, naturopathy services and acupuncture services.

Ministry Decision

The ministry reconsideration decision is that the appellant is not eligible for her request for Botox therapy because it is not one of the listed therapies allowed and described under Schedule C, Section 2(1)(c) of the EAPWDR. In addition, even if it were a listed therapy, the ministry is not satisfied that the therapy satisfies the further provision that it is a therapy that is one for which a medical or nurse practitioner has confirmed an acute need (Schedule C, Section 2(1)(c)(i) of the EAPWDR). The panel notes that the ministry reconsideration decision does not speak to the further requirement of the legislation in Schedule C, Section 2(1)(c)(ii) and (iii) of the EAPWDR which is that the visits available under the Medical and Health Care Services Regulation, B.C. Reg. 426/97, for that calendar year have been provided and for which payment is not available under the Medicare Protection Act (although this was cited in the ministry's original refusal to fund Botox), and for which there are no resources available to the family unit to cover the cost.

Appellant's Position

The appellant is a single recipient with PWD designation who suffers from chronic migraines with aura who has exhausted the treatments and medications available with no success. The appellant has requested funding for Botox therapy and has written support from her medical practitioner who states that she is a good candidate for Botox therapy for chronic migraine management. The appellant's symptoms are severe and limit her quality of life.

Panel Decision

There is no dispute as to the appellant's medical distress and the need for Botox therapy as a possible treatment therapy for her chronic migraine. The appellant has described her medical symptoms and their effects, and her medical practitioner writes that she is a good candidate for Botox therapy. The ministry does not dispute any of these facts. The appellant has provided evidence from a retired nurse/friend and her chiropractor which support her evidence of medical need and pursuit of an effective treatment.

In making their decision, the ministry has cited Section 62 of the EAPWDR which allows the ministry to provide any supplement set out in Section 2 (general health supplements) or 3 (medical equipment and devices) of Schedule C to:

- a family unit which is in receipt of disability assistance,
- a family unit in receipt of hardship assistance, if the health supplement is provided to or for a person in the family unit which is a dependant child,
- a family unit if the health supplement is provided to or for a person in the family unit who is a continued person.

This section establishes the authority of the ministry to fund a request for a health supplement for a family unit in receipt of disability assistance. The panel agrees that the appellant satisfies this condition.

The ministry then cites Schedule C (General Health Supplements) which lists the health supplements that may be paid for by the ministry. Schedule C, 2(1) and 2(2) contain the specific health supplements which may be funded and contains additional conditions imposed before they may be funded.

Schedule C, 2(1)(a) and (b) contain the specific medical or surgical supplies that may be funded. The panel notes that Botox is not a lancelet, or needle or ventilator or tracheotomy supplies and therefore agrees that this provision is not applicable to the appellant's request. Botox is not a medical device or equipment.

Schedule C, 2(1)(c) lists the treatment services that may be funded, and the panel agrees that Botox treatment is not a chiropractic, acupuncture, massage therapy, naturotherapy, non-surgical podiatry or physical therapy

treatment. Botox is certainly a therapy, but it is not a listed therapy. The panel agrees with the ministry's conclusion here.

After determining that the appellant was ineligible because Botox is not a listed therapy the ministry goes further to review some of the conditions which would be considered if Botox was a listed therapy. Schedule C2(1)(C) allows funding for a service:

- (i) for which a medical practitioner or nurse practitioner has confirmed an acute need,
- (ii) if the visits available under the Medical and Health Care Services Regulation, B.C. Reg. 426/97, for that calendar year have been provided and for which payment is not available under the Medicare Protection Act, and
- (iii) for which there are no resources available to the family unit to cover the cost:

The ministry asserts that a medical or nurse practitioner has not confirmed an acute need as per Schedule C, Section 2(1)(c)(i) of the EAPWDR, noting that the appellants condition is chronic and ongoing. The panel notes that while the ministry in its original decision asserted that the appellant has not exhausted the required 10 annual visits through MSP (Schedule C, Section 2(1)(c)(ii) of the EAPWDR) there is no mention of this in the reconsideration decision and no mention in either of the further requirement regarding the availability of family unit resources. The panel concludes that with the finding that the therapy does not satisfy the primary requirement of being a listed therapy there is no need to consider these secondary conditions further

In summary then, the ministry found that the appellant's request did not meet Schedule C, 2(1)(c) and denied the request. The panel agrees with the ministry position on Schedule C, 2(1)(c). The secondary conditions are not relevant. Botox therapy is not a permitted therapy under the legislation. The appellant cannot refute this argument with arguments that point to a medical need.

Conclusion

The panel confirms the ministry's reconsideration decision as it was a reasonable application of the legislation. The appellant is not successful upon appeal.

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

Keith Lacroix

SIGNATURE OF CHAIR

DATE (YEAR/MONTH/DAY)

2019/09/04

PRINT NAME

Phil Jones

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2019/09/05

PRINT NAME

Glenn Prior

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2019/09/05