

APPEAL NUMBER

PART C – DECISION UNDER APPEAL

The decision under appeal is the Ministry of Social Development and Poverty Reduction (the "Ministry") reconsideration decision of September 3, 2019 (the "Reconsideration Decision"), which denied the Appellant's request for coverage for twelve physiotherapy treatments, in addition to twelve treatments for which funding had previously been provided in 2019 pursuant to section 2(2) of Schedule C to the *Employment and Assistance For Persons With Disabilities Regulation* ("EAPWDR").

PART D – RELEVANT LEGISLATION

EAPWDR, sections 61.1 62, 69
Schedule C of the EAPWDR, section 2

PART E – SUMMARY OF FACTS

The Appellant is a recipient of disability assistance.

The information before the Ministry at the time of the Reconsideration Decision included:

- a purchase authorization, dated March 5, 2019, approving twelve physiotherapy treatments for the Appellant at \$23.00 per session (the "First Purchase Authorization");
- a letter from the Ministry to the Appellant, dated June 5, 2019, denying funding for extended therapy beyond 12 sessions for 2019;
- a handwritten note from the Appellant, dated June 5, setting out that:
 - he has been dealing with trying to get his knee rehabilitated for four years;
 - the recovery of his knee was in the "home stretch";
 - he wanted to get healthy enough to go back to work;
 - he needs to be able to make money as it is extremely hard to live on \$1,000.00 per month;
- a physiotherapy referral from the Appellant's doctor, dated May 3, 2019 (the "May 3, 2019 Referral"), in which the doctor described:
 - the Appellant's need for at least one more cycle of 12 physiotherapy sessions;
 - the Appellant's having had a partially unsuccessful knee replacement;
- a treatment plan from the Appellant's physiotherapist, dated June 4, 2019 (the "First Treatment Plan"), in which the physiotherapist:
 - described the extensive work that the Appellant had put in to restore range of motion in his right knee, describing the improvements in both flexion and extension;
 - noted that, as at June 4, 2019, the Appellant had used up his 10 Medical Services Plan ("MSP")-covered physiotherapy treatments; and
 - opined that the Appellant would need up to 3 or 4 months of physiotherapy treatments and recommended once weekly treatments for 3 to 4 months;
- a Request for Reconsideration, dated August 2, 2019, with which the Appellant sought an extension in time to August 12, 2019 to complete and file his Request for Reconsideration;
- the Appellant's Request for Reconsideration, dated August 13, 2019, with which the Appellant included:
 - a referral for physiotherapy, dated July 25, 2019;
 - a treatment plan from the Appellant's physiotherapist, dated July 30, 2019 (the "Second Treatment Plan"), in which the physiotherapist:
 - pointed out that the Appellant had used 10 of 12 visits paid for by the appropriate health authority and his MSP-funded physiotherapy treatments;
 - provided an update on the Appellant's progress; and
 - recommended physiotherapy twice weekly due to slower improvement in his range of motion;
 - a note from the Appellant's doctor, dated August 8, 2019, in which the doctor recommends an additional 2-3 months of physiotherapy treatments, once per week, to ensure that the gains that the Appellant has made in his recovery are not lost.
 - two typed letters from the Appellant, dated August 1, 2019, and August 9, 2019, requesting funding for additional physiotherapy treatments, describing his financial circumstances, and his work history.

In the Appellant's Notice of Appeal, filed September 4, 2019, the Appellant indicated that he disagreed with the Reconsideration because without more physio he would never be able to work again.

At the hearing of the Appeal, the Appellant provided a Patient Note (the "Patient Note") from his physiotherapist. As the representative for the Ministry did not attend the hearing in person, the Patient Note was read to the Ministry representative, who did not object to its admissibility, despite not having received a copy of it.

In the Patient Note, the physiotherapist described the Appellant's medical history, including a total right knee replacement in April of 2018 with a surgical revision in May of 2019 due to the inability of the Appellant to regain full range of motion. The physiotherapist likewise described the Appellant's diligent adherence to his prescribed exercises and drive to regain full function in his knees. The Patient Note also describes the Appellant's current treatment regime, the progress that has been made to date, the Appellant's goal of being able to return to his previous employment, which requires considerable standing tolerance, and the importance of physiotherapy insofar as reaching that goal is concerned. Finally, the physiotherapist makes a recommendation that the Appellant continue with physiotherapy on a weekly basis for three months, a bi-weekly basis for a further three months, and a reduction to a monthly basis for another three to six months.

At the hearing of the appeal, the Appellant described himself as currently homeless and living in a warehouse that has no heat, which affects the osteoarthritis that he has in his knees and affects his ability to get better and increase his range of motion. He described exercising regularly, echoing the comments of the physiotherapist in both the Patient Note, the First Treatment Plan, and the Second Treatment Plan about his motivation to get better. The Appellant also described a long and frustrating history with the medical system before he could even get the first knee replacement done in April of 2018. He described his previous employment, which he advised earned him an income of up to \$60,000.00 annually, as satisfying. He described never having been out of work before he started to experience problems with his knees. The Appellant stated that he simply needs a little bit of help to get himself back to work, after which time he expected that he would be able to pay for physiotherapy treatments himself. He described physiotherapy as a chance to wean himself off of opioid medications.

Currently, the Appellant is receiving medical benefits only as he is receiving a Canada Pension Plan disability pension. In the end, the Appellant stated that he simply wanted to be able to again have the pride of earning a paycheque and having a place of his own to live in. The Appellant stated that he feels that he is almost at the end of his recovery and that any further delays in getting physiotherapy will require him to spend another winter in the cold, which could undo the progress that he has made to date. He stated that the clinic at which he did his physiotherapy permitted him to be seen for free by one of their students after he had exhausted both his MSP-funded and Ministry-funded physiotherapy sessions but that the student was finishing up her practicum and would no longer be available to help him.

The Appellant's doctor also gave evidence at the hearing on behalf of the Appellant. He stated that the reason for the revision surgery in May of 2019 was that the Appellant had not made good progress after the total knee replacement surgery in April of 2018, which may have been caused by the Appellant's not having accessed sufficient physiotherapy thereafter. The Appellant's doctor stated that physiotherapy is necessary to get the Appellant back to work and that delays in physiotherapy could undo much of the progress that has already been made in his recovery. When asked what the impact of a cessation of physiotherapy now and a resumption in early 2020 might be, the Appellant's doctor explained that a cessation of physiotherapy could cause a regression in the progress that the Appellant had made to date.

The Ministry representative explained the position of the Ministry, setting out that the Ministry agrees that the Appellant meets all of the criteria required by sections 2(1) and 2(2) of Schedule C to the EAPWDR, except for the fact that the Appellant has already received funding for 12 physiotherapy visits in the 2019 calendar year. Likewise, the Ministry's position is that the Appellant is ineligible for additional treatments

as an emergency medical supplement under section 69 of the EAPWDR because those supplements are only available where a recipient is otherwise ineligible to receive health supplements and the Appellant is not only eligible to receive health supplements but had a prior request for supplements for physiotherapy treatments approved by the Ministry. In addition, the Ministry noted that, in any event, physiotherapy treatments are not one of the health supplements that can be provided under section 69 because they are not set out in sections 2(1)(a) and (f) or section 3 of Schedule C to the EAPWDR.

The panel admits the evidence given at the hearing by the Appellant and the Appellant's doctor as oral testimony in support of the information and records that were before the Ministry at the time of the Reconsideration Decision pursuant to section 22(4) of the *Employment and Assistance Act* ("EAA").

Likewise, the panel admits the Patient Note as written testimony in support of the information and records that were before the Ministry at the time of the Reconsideration Decision pursuant to section 22(4) of the *Employment and Assistance Act* ("EAA").

PART F – REASONS FOR PANEL DECISION

The issue in this appeal is whether the Ministry reasonably denied the Appellant's request for coverage for twelve additional physiotherapy treatments because funding had previously been provided for twelve physiotherapy treatments within in the 2019 calendar year, pursuant to section 2(2) of Schedule C to the EAPWDR.

Relevant Legislation

Section 61.1 of the EAPWDR sets out when a person is eligible for medical services only:

Access to medical services only

61.1 (1) Subject to subsection (4), a person is a main continued person if

(a) the person was

(i) part of a family unit identified in subsection (3) on the date the family unit ceased to be eligible for disability assistance, and

(ii) a person with disabilities on that date,

(b) the person has not, since that date, been part of a family unit in receipt of income assistance, hardship assistance or disability assistance, and

(c) in the case that the family unit referred to in paragraph (a) (i) was a family unit identified in subsection (3) (g), the agreement referred to in subsection (3)

(g) is in force.

(2) Subject to subsection (6), a person is a dependent continued person if

(a) the person was a dependant of a main continued person under subsection (1) on the main continued person's continuation date and is currently a dependant of the main continued person, or

(b) the person is a dependant of a person who is a main continued person under subsection (1) as a result of having been part of a family unit identified in subsection (3) (b), (c), (d), (e), (f) or (g).

(3) A family unit is identified for the purposes of subsection (1) (a) if the family unit, while in receipt of disability assistance, ceases to be eligible for disability assistance

(a) on a date the family unit includes a person aged 65 or older,

(b) as a result of a person in the family unit receiving an award of compensation under the *Criminal Injury Compensation Act* or an award of benefits under the *Crime Victim Assistance Act*,

(c) as a result of a person in the family unit receiving a payment under the settlement agreement approved by the Supreme Court in Action No. S50808, Kelowna Registry,

- (d) as a result of a person in the family unit receiving employment income,
- (e) as a result of a person in the family unit receiving a pension or other payment under the *Canada Pension Plan* (Canada),
- (f) as a result of a person in the family unit receiving money or value that is maintenance under a maintenance order or a maintenance agreement or other agreement, or
- (g) as a result of a person in the family unit receiving financial assistance provided through an agreement under section 12.3 of the *Child, Family and Community Service Act*.

(4) Subject to subsection (5), a person's status as a main continued person under subsection (1) is suspended for a calendar month if

- (a) the person fails to meet an applicable income test under subsection (7) in the calendar month and in each of the immediately preceding 12 calendar months, and
- (b) the person's continuation date is before those immediately preceding 12 calendar months.

(5) Subsection (4) does not apply to a person who is a main continued person under subsection (1) as a result of having been part of a family unit described in subsection (3) (c) or (g).

(6) A person's status as a dependent continued person under subsection (2) of a main continued person under subsection (1) is suspended if the main continued person's status is suspended under subsection (4).

(7) For the purposes of subsection (4),

- (a) a person who is a main continued person under subsection (1) as a result of having been part of a family unit identified in subsection (3) (a), (b), (d) or (f) meets the income test for a calendar month if,
 - (i) in the case that the main continued person is aged 65 or older or the main continued person's family unit includes a person aged 65 or older, the main continued person or another person in the family unit is in receipt of a qualifying federal benefit, and
 - (ii) in the case that neither the main continued person nor another person in the main continued person's family unit is aged 65 or older, the main continued person or another person in the family unit is eligible to receive premium assistance under the *Medicare Protection Act*, and
- (b) a person who is a main continued person under subsection (1) as a result of having been part of a family unit identified in subsection (3) (e) meets the income test for a calendar month if,
 - (i) in the case that the main continued person is aged 65 or older or the main continued person's family unit includes a person aged 65 or older,

the main continued person or another person in the family unit is in receipt of a qualifying federal benefit, and

(ii) in the case that neither the main continued person nor another person in the main continued person's family unit is aged 65 or older, the main continued person or another person in the family unit receives a pension or other payment under the *Canada Pension Plan* (Canada).

(8) Despite this Division, a person is not eligible, as a main continued person under subsection (1), to receive a health supplement under this Division for the calendar month in which the person's continuation date occurs.

(9) Despite this Division, a person is not eligible, as a dependent continued person under subsection (2) of a main continued person under subsection (1), to receive a health supplement under this Division for a calendar month in which the main continued person's continuation date occurs.

Section 62 authorizes the Ministry to provide general health supplements under sections 2 and 3 of Schedule C to the 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,
- (b) a family unit in receipt of hardship assistance, if the health supplement is provided to or for a person in the family unit who is under 19 years of age, or
- (c) a family unit, if the health supplement is provided to or for a person in the family unit who is a continued person.

Section 2 of Schedule C sets out the health supplements that may be paid for by the Ministry, including for physiotherapy, described as "physical therapy":

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:

...

(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 <i>Health Professions Act</i>
2	chiropractic	chiropractor	College of Chiropractors of British Columbia under the <i>Health Professions Act</i>
3	massage therapy	massage therapist	College of Massage Therapists of British Columbia under the <i>Health Professions Act</i>
4	naturopathy	naturopath	College of Naturopathic Physicians of British Columbia under the <i>Health Professions Act</i>
5	non-surgical podiatry	podiatrist	College of Podiatric Surgeons of British Columbia under the <i>Health Professions Act</i>
6	physical therapy	physical therapist	College of Physical Therapists of British Columbia under the <i>Health Professions Act</i>

...

(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.

Panel Decision

The Appellant is eligible for medical services only by virtue of being a main continued person who is in receipt of a disability pension under the Canada Pension Plan, pursuant to section 61.1(3)(e) of the EAPWDR.

The Appellant's status as a continued person makes him eligible for any of the health supplements, pursuant under section 62(c) of the EAPWDR, set out in section 2 of Schedule C to the EAPWDR.

Subsection 2(1)(c) of Schedule C to the EAPWDR provides that a family unit that qualifies for health supplements under section 62 of the EAPWDR may be eligible for up to twelve total visits in any calendar year for acupuncture, chiropractic, massage therapy, naturopathy, non-surgical podiatry, or physical therapy treatments if:

- the treatments are prescribed by a medical practitioner or nurse practitioner who has confirmed an acute need;
- the visits available under the Medical and Health Services Regulation for that calendar year have been provided and for which payment is not available under the Medicare Protection Act; and
- there are no resources available to the family unit to cover the cost.

For greater clarity, section 2(2) of Schedule C to the EAPWDR caps the number of total visits for *any combination* of acupuncture, chiropractic, massage therapy, naturopathy, non-surgical podiatry, or physical therapy treatments in a calendar year at 12. There is no discretion in the EAPWDR for the Ministry to provide any more than 12 visits for the above-described treatments in a calendar year.

In the Reconsideration Decision, the Ministry found that the Appellant met all of the criteria to receive coverage for physiotherapy (physical therapy treatments) under section 2(1)(c)(i) through 2(1)(c)(iii) of Schedule C to the EAPWDR.

The treatments were clearly prescribed by a medical practitioner, the Appellant's doctor, who confirmed that the Appellant's need for physiotherapy would become acute if he did not continue with physiotherapy treatments and the Ministry found that the Appellant did meet this requirement.

Likewise, the Appellant had exhausted the ten visits that were available to him through MSP by early June and, again, the Ministry found that the Appellant had also satisfied this requirement under section 2(1)(c) of Schedule C to the EAPWDR.

Finally, the Ministry determined that the Appellant had no other resources with which to pay the costs of treatment, satisfying the final requirement of section 2(1)(c) of Schedule C to the EAPWDR.

Notwithstanding that the Ministry found that the Appellant met the criteria set out in section 2(1)(c)(i) through 2(1)(c)(iii) of Schedule C to the EAPWDR, the Ministry found that section 2(2) of Schedule C to the EAPWDR operated to prevent it from paying for any more than 12 physiotherapy treatments in any calendar year and, as the Ministry had already provided funding for 12 such visits for the 2019 calendar year, it was not legally authorized to provide funding for any more physiotherapy sessions in 2019.

The panel finds that, in view of the foregoing and the provisions of the EAPWDR, the Reconsideration Decision was a reasonable application of section 2(2) of Schedule C to the EAPWDR. In actual fact, the Ministry was not legally authorized to decide otherwise. Unfortunately for the Appellant, despite otherwise qualifying under section 2(1)(c) for a supplement in respect of physiotherapy, the legislature has simply not given the Ministry any legal authority to provide funding for further treatments once a family unit has used up the 12 calendar year visits provided for under section 2(2) of Schedule C to the EAPWDR.

The Ministry also considered whether or not the Appellant could be eligible for funding of additional physiotherapy treatments as a person facing a direct and imminent life threatening need but found that, as a person otherwise eligible for health supplements, the Appellant did not qualify for a health supplement under section 69 of the EAPWDR either. Furthermore, physiotherapy treatments are not a health supplement that can be paid under section 69, because they are not one of the health supplements set out in sections 2(1)(a) and (f) or section 3 of Schedule C of the EAPWDR. Given the wording of section 69, which authorizes a health supplement only for "a person in the family unit who is otherwise not eligible for the health supplement under" the EAPWDR, and the restrictions on the health supplements that can be paid under that section, the panel finds that the Ministry also reasonably applied section 69 of the EAPWDR in assessing the Appellant's eligibility.

The Appellant is not successful in this 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

Adam Shee

SIGNATURE OF CHAIR

DATE (YEAR/MONTH/DAY)

2019/September/30

PRINT NAME

Susan Ferguson

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2019/Oct/01

PRINT NAME

Perry Mazzone

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2019/October/1