APPEAL NUMBER
2020-00084

PART C – DECISION UNDER APPEAL

The decision under appeal is the Ministry of Social Development and Poverty Reduction (the ministry) reconsideration decision dated January 17, 2020 where the ministry denied the applicant's request for a Soclean2 Continuous Positive Airway Pressure (CPAP) sanitizing System for the appellant's CPAP machine.

PART D – RELEVANT LEGISLATION

Employment and Assistance for Persons with Disabilities Regulation (EAPWDR). Section 62
Employment and Assistance for Persons with Disabilities Regulation (EAPWDR). Schedule C, sections 3 and 3.9

PART E – SUMMARY OF FACTS

Information before the ministry at reconsideration:

1. The appellant was provided with a CPAP machine (ResMed Airsense 10 Elite CPAP with built in humidifier) on June 10, 2017.
2. The appellant was provided with a replacement mask, tubing, and filters on June 20, 2018.
3. On September 20, 2019, the ministry received a pre-authorized request for a SoClean2 CPAP sanitizing system with an adaptor for a ResMed CPAP machine from a supplier with a total cost of $472.00.
4. The ministry notes receiving on September 19, 2019 a letter from a medical practitioner stating: "This is to certify that the appellant requires a sleep apnoea cleaning machine to reduce the incidence of apnoea related side effects – this is specifically a "SoClean2 CPAP equipment cleaner".
5. On October 4, 2019, the ministry denied the request as it was determined the requested device was not:
    a. A positive airway pressure device;
    b. An accessory that is required to operate a positive airway pressure device, or;
    c. A supply that is required to operate a positive airway pressure device.
6. On December 17, 2019, the appellant signed a request for reconsideration together with an extension request to January 17, 2020 in order to submit additional information. The appellant wrote; "I need an extension because this is complicated for me. The advocate can see me no sooner than January 9, 2020. P.S. You are missing the letter from the supplier. It was faxed to you. If you need a new letter please contact the clinic". The panel notes that the ministry states that they did not receive such a letter from the supplier but rather acknowledges a letter from the appellant's medical supplier with similar information. The panel also notes that the letter described by the appellant was actually a copy of the letter from the medical practitioner with the respiratory therapist business card attached to it was on the record.
7. The panel notes the original ministry denial contained what the panel believes was an administrative oversight error in the reversing of the X marks (Yes or No) on the form utilized to transmit the denial. The form indicated that the medical device hadn't been prescribed by a medical practitioner and that an assessment by a respiratory therapist had been received. The reverse was true.

Notice of Appeal

On March 18, 2020, the appellant completed a Notice of Appeal together with an Appeal Adjournment Request. The Notice of Appeal was filled out over the phone and it notes the appellant is in quarantine and will be requesting an adjournment to provide the Tribunal with more documents. The adjournment request states that the appellant is currently in quarantine due to COVID-19 and needs time to send in more information to the Tribunal.

Hearing

The panel conducted a teleconference hearing at the request of the appellant on April 23, 2020. In attendance at the hearing were the panel, the ministry representative and the appellant.

Prior to commencement of the hearing the appellant expressed some unease as to the best course forward given her lack of certainty as to whether the warranty on the CPAP machine would be impacted by the purchase of the Soclean2 sanitizing system, whether this was the best alternative compared to other makes and whether with the passage of time she would have better information without having to start over in the purchase approval process. The panel explained that there were alternatives to proceeding today including the withdrawal of the appeal and an adjournment. The appellant stated that she was confident in winning this appeal and so it was probably okay to proceed.

In advance of the hearing date, but subsequent to the date of the reconsideration decision, the appellant submitted additional information for the panel's consideration. The 49 page submission dated April 20, 2020 consisted of a typewritten, chronologically ordered narrative from the appellant, additional versions of the letter submitted by the appellant's medical practitioner that is part of the record and promotional/instructional information supplied by the manufacturer of the Soclean2 sanitizing system. The submission contains information for the panel to consider in terms of admissibility as well as its impact upon the reasonableness assessment the panel must make.

The panel notes that under the Employment and Assistance Act (EAA) section 22(4), it may consider evidence that was not part of the record if the information is required for a full and fair disclosure of matters related to the decision under appeal. The issues in the submission and the admissibility ruling by the panel are as follows:

1. In the appellant's typewritten narrative, the appellant asserts that she developed sinus problems during early use of the CPAP machine which required a prescription of corticosteroid that costs $20.00 every two months. The appellant believes that this arose because the appellant is sensitive to the brand of soap the

CPAP machine manufacturer recommends for cleaning it. The rationale for the Soclean2 sanitizing system is that it cleans with activated oxygen, eliminating the need for soap. In the long run the appellant believes this represents a lower cost. The appellant goes on to relate her subsequent experience with sinus irritation that involved attempts to reduce frequency of usage with the CPAP to reduce sinus irritation and attempts to experiment with other sinus medications that are not covered under PWD. The appellant asserts that, owing to sinus problems, usage of CPAP is limited to 25% of the time and this reduced usage is taking a toll with stress and lack of sleep. The appellant feels that, contrary to assertions in the ministry's material, there is a threat to the appellant's life because of denial of the request for the sanitizing system. The panel considers this information to be new (not on the record) but admissible as the information expands on the appellant's reasoning for the request and is required to be heard for a full and fair hearing.

2. The appellant's submission also consists of narrative in support of satisfying requirements under EAPWDR Schedule C, section 3.9(2((6) that require that a respiratory therapist confirm the medical need for the device. The appellant asserts that a respiratory therapist from the supplier of the sanitizing system has agreed to provide this by providing his business card attached to the letter from the medical practitioner which is part of the record and not new information.
3. The appellant's submission contains additional and less substantive information consisting of argument which the panel considers to be new but admissible as an elaboration of material in the record:
    - The appellant believes there are two items which are incorrect in the ministry's submissions. The appellant specifically disagrees with the assertion that she doesn't meet the test under EAPWDR Section 69, that; "The person faces a direct and imminent life threatening need and there are no resources available to the persons family unit with which to meet the need". The appellant states that: Yes, it is life-threatening. I could stop breathing when I'm asleep that is why I have CPAP sleep apnea machine. I have no resources to cover the cost.
    - The appellant has provided additional history in which the appellant describes the history around dealings with the ministry which the appellant found very frustrating.
    - The appellant has included a medical statement showing the purchases of prescriptions for the sinus problems discussed in the narrative.
    - The appellant has provided a list of testimonials showing favourable comments from users of the sanitizing system.

At the hearing the appellant stated that the matter was a concerning one as usage of the CPAP machine which she cleans with the recommended soap brand has led to sinus problems that has required expensive medication and forced a reduction in usage of the CPAP to about 25%. The appellant is concerned about violating warranties on the CPAP equipment. The appellant believes that reduced usage is dangerous and may be causing heart palpitations and a pre-diabetic condition. The appellant has no history of sinus problems and the use of a sanitizing system which uses a gas to clean seems to be the solution.

The ministry repeated the arguments in the reconsideration decision and specifically highlighted that the manufacturer's manual suggests only that a mild soap (with no reference to a specific brand) and water be used and that a sanitizing system is a convenience item and certainly not an accessory. Also, the ministry worker stressed that there was no assessment by a respiratory therapist and so the ministry failed to see a medical need. The information submitted by the appellant consisting of the respiratory therapist's card copied on the medical practitioner's letter was not an assessment.

The appellant was asked a number of questions:

- A panel member asked what proof was there that it is the usage of the machine that is causing the sinus problems. The appellant replied that problems did not occur until the machine was purchased and reductions in usage lessens severity. The appellant stressed that it is not the machine itself but believes it is the soap used to clean the machine.
- A panel member asked whether there has been a chance to use the Soclean2 in a test to see if it helps. The appellant replied no.
- A panel member asked whether the appellant has tried any other brands of soaps or cleaners to see if that made a difference. The appellant replied no.

The ministry worker was asked some questions to clarify the ministry position that did not contain any new information.

Ministry Position

The ministry in its reconsideration decision notes that the appellant's request must be considered in light of the legislated requirements as follows:

1. EAPWDR Schedule C, section 3(1)(b) requires the ministry to provide the least expensive appropriate medical device listed in EAPWDR, Schedule C, section 3.9 if:
    - the family unit has received the pre-authorization of the ministry for the medical equipment or device requested;
    - there are no resources available to the family unit to pay the cost of or obtain the medical equipment or device;
    - the medical equipment or device is the least expensive appropriate medical equipment or device.

    The ministry notes here that the request fails to meet the requirement that the device be the least expensive appropriate alternative as the manufacturers of CPAP equipment recommend that in respect of care and maintenance, washing the CPAP in warm soapy water.
2. EAPWDR, Schedule C, section 3.9 sets out specific eligibility requirement to be approved for positive pressure airway devices. Section 3.9(1)(a) sets out that, subject to section 3.9 (4), the following are health supplements for the purposes of the legislation if all of the requirements of EAPWDR Schedule C, section 3.9(2) are met:
    - a positive airway pressure device,
    - an accessory that that is required to operate a positive airway pressure device, or,
    - a supply that is required to operate a positive airway pressure device.

    The ministry notes that when the appellant was provided with a CPAP machine it was a positive airway device and the replacement mask, tubing, and filters provided the appellant are accessories and supplies that are required to operate a positive airway pressure device. A Soclean2 sanitizing system is not integral to the operation of a CPAP machine as are masks, filters, or tubes and thus fails to meet this requirement.
3. EAPWDR Schedule C, section 3.9(1)(f) stipulates that, subject to section 4, if the ministry is satisfied that the item is medically essential to moisturize air in order for a tracheostomy patient to breathe the following are health supplements for the purposes of Schedule C, section 3:
    - a medical humidifier;
    - an accessory that is required to operate a medical humidifier, or,
    - a supply that is required to operate a medical humidifier.
4. EAPWDR Schedule C, section 3.9(2) sets out the requirements that must be met in relation to an item referred to in section 3.9(1)(a):
    - the item is prescribed by a medical practitioner or nurse practitioner;
    - a respiratory therapist has performed an assessment that confirms the medical need for the item;
    - the ministry is satisfied that the item is medically essential for the treatment of moderate to severe sleep apnoea.

    The ministry notes that an assessment by a respiratory therapist has not been provided to confirm the medical need for use of the Soclean2 sanitizing system and this requirement is thus not met. The business card copied on the letter from the medical practitioners letter is not an assessment. The ministry is not satisfied that the item requested is medically essential for the treatment of moderate to severe sleep apnoea as, according to the manufacturer, the item requested automatically cleans the equipment and so eliminates the need for the appellant to do this manually. Thus, the requirement for medical need are not met.
5. EAPWDR, Section 69 sets out that the ministry may provide any health supplement set out section 2(1)(a) (medical supplies), section 2(1)(f) (medical transportation) and section 3 (medical equipment and devices), 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 ministry is satisfied that:
    - the person faces a direct and imminent life-threatening need and there are no resources to meet that need,
    - the health supplement is needed to meet that need,
    - the person's family unit is receiving premium assistance under the Medicare Protection Act, and,
    - the requirements specified in the following provisions of EAPWDR, Schedule C, as applicable, are met:
        i. paragraph (a) or (f) of section (2)(1);
        ii. sections 3 to 3.11, other than paragraph (a) of section 3(1).

    The ministry notes that the appellant does not need a remedy under EAPWDR, Section 69 as the appellant is eligible to receive health supplements under section 2(1)(a) and (f) and section 3. There is no information available to suggest there is a life-threatening need for a sanitizing system. A Soclean2 sanitizing system is

not a health supplement set out in EAPWDR, Schedule C, sections 2(1)(a) and (f) or section 3. In addition, the request has not met the requirements specified in EAPWDR, Schedule C, sections 2(1)(a) and (f) and 3 to 3.12. Therefore, the appellant is not eligible for the request under EAPWDR, section 69.

6. EAPWDR Section 57 sets out that the ministry may provide a crisis supplement if certain requirements are met. Section 57(3) sets out that:
    - A crisis supplement may not be provided for the purposes of obtaining:
        i. a supplement described in Schedule C, or,
        ii. any other health care goods or services.

    The ministry notes that a Soclean2 sanitizing system is not a supplement described in EAPWDR, Schedule C however it is considered a health care good and the ministry is not authorized to provide a crisis supplement to obtain it.

In summary the ministry finds that the request is denied because it does not meet the requirements under EAPWDR, Schedule C, sections 3.1(b) (iii), 3.9(1)(a), 3.9(2)(b) or 3.9(2)(c).

Applicant Position

The appellant has thoroughly described the negative reactions to the CPAP machine the appellant believes is attributable to its usage which has led to reduced frequency of use of the CPAP and expensive prescriptions for sinus medications. The appellant believes this is due to a reaction to the hand washing of the CPAP using the brand of soap the appellant believes is suggested by the manufacturer. The appellant also notes that the result of the less frequent usage of the CPAP is stress and tiredness and that there is the potential for this being life threatening. The appellant believes a sanitizing system to be the answer and points to the recommendation of the medical practitioner and respiratory therapist.

APPEAL NUMBER
2020-00084

PART F – REASONS FOR PANEL DECISION

Panel Decision
The reconsideration decision concludes the request is denied because it fails to meet the following requirements:

1. EAPWDR, Schedule C, section3(1)(b) (iii) that the medical equipment be the least expensive appropriate medical equipment or device. The ministry notes that the manufacture suggests that manual washing is recommended and therefore the request at a cost of $420.00 is not the least cost. The panel agrees that the request is not the least cost alternative (hand washing being the least cost) and notes that there is no evidence to suggest that it is not appropriate in the absence of an assessment from a respiratory therapist. The panel also notes the appellant has not attempted to use soaps other than the brand she believes is suggested by the manufacturer to alleviate the sinus condition.
2. EAPWDR, Schedule C, section 3.9(1)(a) sets out the items which are health supplements if all the requirements in section 3.9(2) are met. The panel agrees that the requested item is not in this list and notes that the item requested is: (i) not a positive pressure airway device, (ii) is not an accessory to a positive pressure airway device as it is not integral to a positive airway pressure device, such as a mask, (ii)not a supply for a positive pressure device such as filters. The panel also notes that a sanitizing system is not any of the other supplements covered under EAPWDR, Schedule C, section 3.9(1) (a) to (g).
3. EAPWDR, Schedule C, section 3.9(2)(b) requires that a respiratory therapist confirm the medical need for the item. The panel notes that the appellant has provided a copy of the letter prepared by the medical practitioner on which the appellant alleges a respiratory therapist employed by the equipment supplier has affixed a business card as evidence of satisfaction of this requirement. The panel agrees that an assessment by a respiratory therapist is required and that the appellant's evidence does not establish that the ministry was not reasonable in its conclusion.
4. EAPWDR, Schedule C, section 3.9(2)(c) requires that the ministry be satisfied that that the item is medically essential for the treatment of moderate to severe sleep apnea. The panel agrees that the ministry has been reasonable in its determination that this requirement is not met. The panel notes the evidence indicates the appellant suffers from a sinus condition that might be attributable to usage of the CPAP machine and the cleaning method the appellant uses. However, in the absence of the assessment from a respiratory therapist and in light of the information that the appellant has not tried other cleaners, it cannot be concluded that there is a medical need.

The panel notes that the appellant has failed to provide sufficient conclusive evidence to find the ministry's reconsideration determination to be not reasonable.

Conclusion
The panel confirms the ministry reconsideration decision as it was a reasonable application of the legislation in the appellants circumstances. The appellant is not successful upon appeal.

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, (AM) Sep 01/17
(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) E 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

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.
(2.1) For medical equipment or devices referred to in section 3.9 (1) (b) to (g), in addition to the requirements in that section 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 a respiratory therapist, occupational therapist or physical therapist confirming the medical need for the 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.
(5) Subject to subsection (6), the minister may provide as a health supplement repairs of medical equipment or a medical device that was not previously provided by the minister if,
(a) at the time of the repairs the requirements in this section and sections 3.1 to 3.12 of this Schedule, as applicable, are met in respect of the medical equipment or device being repaired, and,
(b) it is more economical to repair the medical equipment or device than to replace it.
(6) The minister may not provide a replacement of medical equipment or a medical device under subsection (3) or repairs of medical equipment or a medical device under subsection (4) or (5) if the minister considers that the medical equipment or device was damaged through misuse.

APPEAL NUMBER
2020-00084

Medical equipment and devices – breathing devices

3. 9 (1) Subject to subsection (4) of this section, the following items are health supplements for the purposes of section 3 of this Schedule:

(a) if all of the requirements set out in subsection (2) of this section are met,

(i) a positive airway pressure device,

(ii) an accessory that is required to operate a positive airway pressure device, or,

(iii) a supply that is required to operate a positive airway pressure device;

(b) if the minister is satisfied that the item is medically essential to monitor breathing,

(i) an apnea monitor,

(ii) an accessory that is required to operate an apnea monitor, or,

(iii) a supply that is required to operate an apnea monitor;

(c) if the minister is satisfied that the item is medically essential for clearing respiratory airways,

(i) a suction unit,

(ii) an accessory that is required to operate a suction unit, or,

(iii) a supply that is required to operate a suction unit;

(d) if the minister is satisfied that the item is medically essential for clearing respiratory airways,

(i) a percussor, (ii) an accessory that is required to operate a percussor, or,

(iii) a supply that is required to operate a percussor;

(e) if the minister is satisfied that the item is medically essential to avoid an imminent and substantial danger to health,

(i) a nebulizer,

(ii) an accessory that is required to operate a nebulizer, or

(iii) a supply that is required to operate a nebulizer;

(f) if the minister is satisfied that the item is medically essential to moisturize air in order to allow a tracheostomy patient to breathe,

(i) a medical humidifier,

(ii) an accessory that is required to operate a medical humidifier, or,

(iii) a supply that is required to operate a medical humidifier;

(g) if the minister is satisfied that the item is medically essential to deliver medication,

(i) an inhaler accessory device,

(ii) an accessory that is required to operate an inhaler accessory device, or

(iii) a supply that is required to operate an inhaler accessory device.

(2) The following are the requirements in relation to an item referred to in subsection (1) (a) of this section:

(a) the item is prescribed by a medical practitioner or nurse practitioner;

(b) a respiratory therapist has performed an assessment that confirms the medical need for the item;

(c)the minister is satisfied that the item is medically essential for the treatment of moderate to severe sleep apnea.

(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 (1) of this section is as follows:

(a) in the case of an item referred to in subsection (1) (a) (i), 5 years from the date on which the minister provided the item being replaced;

(b) in the case of an item referred to in subsection (1) (a) (ii) or (iii), one year from the date on which the minister provided the item being replaced;

(c) in the case of an apnea monitor, suction unit, percussor, nebulizer or medical humidifier, 5 years from the date on which the minister provided the item being replaced;

(d) in the case of an inhaler accessory device, one year from the date on which the minister provided the device being replaced;

(e) in the case of an accessory or supply for an item referred to in paragraph (c) or (d), one year from the date on which the minister provided the device being replaced.

(4) A ventilator is not a health supplement for the purposes of section 3 of this Schedule.

APPEAL NUMBER
2020-00084

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) 2020/04/24

PRINT NAME	
Jean Lorenz	
SIGNATURE OF MEMBER	DATE (YEAR/MONTH/DAY) 2020/04/25
PRINT NAME	
Glenn Prior	
SIGNATURE OF MEMBER	DATE (YEAR/MONTH/DAY) 2020/04/26