APPEAL NUMBER
2020-00073

PART C – DECISION UNDER APPEAL

The decision under appeal is the Ministry of Social Development and Poverty Reduction (ministry) reconsideration decision dated February 26, 2020 which denied the appellant's request for a health supplement, specifically a ventilator. The ministry found that a ventilator is not a health supplement under Schedule C, section 3 of the Employment and Assistance for Persons with Disabilities Regulation and therefore cannot be funded.

PART D – RELEVANT LEGISLATION

Employment and Assistance for Persons with Disabilities Regulation (EAPWDR) sections 62, 69; Schedule C, section 3

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PART E – SUMMARY OF FACTS

Information before the minister at reconsideration included:

- A letter from the ministry to the appellant dated May 28, 2019 denying the request.
- A copy of a prescription dated May 8, 2019 for a mechanical ventilator for home use in the appellant's name.
- A copy of an article from *Wikipedia* titled "Medical Ventilator" and a page titled "Is CPAP a ventilator?"
- A letter "To Whom it May Concern" dated December 5, 2019 from a manager of the Provincial Respiratory Outreach Program explaining why the appellant does not qualify for their services.
- A document outlining the appellant's medical history from 2013 to the present, listing hospital admissions in 2013 with the process to obtain a ventilator started at this time and subsequent attempts to fund the equipment.
- The appellant's Request for Reconsideration signed January 26, 2020 with an explanatory note stating the background of the appellant's request and argument related to the appeal.

The appellant submitted a written statement with the Notice of Appeal to the Tribunal which states that the appellant has cerebral palsy, seizure disorder, severe kyphoscoliosis, profound developmental delay, asthma, recurrent low-grade aspirations with pneumonias and that they reside in a group home. The appellant has a ventilator on loan that is nearing its life end. The appellant wrote that there is nowhere to turn and asks that section 8 of the *Interpretation Act* be applied by the Tribunal to find that the ministry did not reasonably apply the legislation to the facts of this case.

The panel accepted this document as part of the appellant's argument.

The ministry, in their Reconsideration Decision, stated that the ministry is able to provide breathing devices as outlined in section 3.9 of Schedule C, EAPWDR, but section 3.9(4) specifically states that a ventilator is not a health supplement for the purposes of section 3 of the Schedule, therefore the ministry does not have the authority to provide the requested item.

PART F – REASONS FOR PANEL DECISION

The issue in this appeal is the reasonableness of the ministry decision to deny the appellant's request for a health supplement, specifically a ventilator. The ministry found that a ventilator is not a health supplement under Schedule C, section 3 of the Employment and Assistance for Persons with Disabilities Regulation and therefore cannot be funded.

LEGISLATION

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.

Health supplement for persons facing direct and imminent life threatening health need

69 (1)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)the adjusted net income of any person in the family unit, other than a dependent child, does not exceed the amount set out in section 11 (3) of the Medical and Health Care Services Regulation, 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).

(2) For the purposes of subsection (1) (c),

(a)"adjusted net income" has the same meaning as in section 7.6 of the Medical and Health Care Services Regulation, and

(b)a reference in section 7.6 of the Medical and Health Care Services Regulation to an

"eligible person" is to be read as a reference to a person in the family unit, other than a dependent child.

Schedule C

Medical equipment and devices

3 (1)Subject to subsections (2) to (5) of this section, the medical equipment and devices described in sections 3.1 to 3.12 of this Schedule are the health supplements that may be provided by the minister if

(a)the supplements are provided to a family unit that is eligible under section 62 *[general health supplements]* of this regulation, and

(b)all of the following requirements are met:

(i)the family unit has received the pre-authorization of the minister for the medical equipment or device requested;

(ii)there are no resources available to the family unit to pay the cost of or obtain the medical equipment or device;

(iii)the medical equipment or device is the least expensive appropriate medical equipment or device.

(2)For medical equipment or devices referred to in sections 3.1 to 3.8 or section 3.12, in addition to the requirements in those sections and subsection (1) of this section, the family unit must provide to the minister one or both of the following, as requested by the minister:

(a)a prescription of a medical practitioner or nurse practitioner for the medical equipment or device;

(b)an assessment by an occupational therapist or physical therapist confirming the medical need for the medical equipment or device.

(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.

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.

The appellant's position is that the two provisions of Schedule C, section 3 are in conflict. In section 3.9(1)(a)(i) funding is permitted for a positive airway pressure device and in section 3.9(4) ventilators are excluded from funding. The appellant argues that section 8 of the *Interpretation Act* should be applied to allow "fair, large and liberal construction and interpretation" of every enactment and therefore the provision of a ventilator should be allowed in this case.

The ministry position is that provision of a ventilator is specifically excluded from the allowable health supplements under Schedule C and the appellant's request does not meet the criteria for approval under any other category of health supplement set out in the EAPWDR.

Analysis

Ventilator as medical equipment:

Sections 3.1 to 3.12 of Schedule C, EAPWDR list the medical equipment and devices that may be provided. A ventilator is not among those listed, and section 3.9, which provides for funding for breathing devices, lists the purposes for which breathing devices may be provided. This section states that a positive airway device or accessory may be provided if medically essential for the treatment of apnea; an apnea monitor may be provided if medically essential to monitor breathing; a suction unit, percussor or accessories may be provided if medically essential for clearing respiratory airways; a nebulizer or accessory may be provided if medically necessary to avoid imminent and substantial danger to health; a medical humidifier or accessory may be provided if medically essential to moisten air in order to allow a tracheostomy patient to breathe and an inhaler accessory device may be provided if required to operate an inhaler if medically essential to deliver medication. The appellant's request does not comply with any of these specific requirements. The panel finds that the ministry reasonably determined that a ventilator is not a health supplement for the purpose of section 3 of Schedule C, and notes that a ventilator is specifically excluded as a health supplement. The panel acknowledges that it does not know why a ventilator is excluded as a health supplement but section 3.9(4) is clear.

Ventilator as a medical supply:

EAPWDR Schedule C, section 2(1)(a) and 2(1)(a.1) list the disposable or reusable medical or surgical supplies that may be provided if the listed requirements are met. The appellant's request is not for disposable or reusable medical or surgical supplies; therefore the panel finds the ministry reasonably determined that the provisions of these sections were not met.

EAPWDR Schedule C, section 2(1)(a.2) lists consumable medical supplies that may be provided. As the appellant's request is not for consumable medical supplies, the panel finds that the ministry reasonable determined that the requirements of this section were not met.

Other sections of EAPWDR, Schedule C:

The appellant's request is not for therapy, optical supplements, eye examination supplements, canes, crutches or walkers, wheelchairs, wheelchair seating systems, scooters, bathing and toileting aids, hospital bed, pressure relief mattress, floor or ceiling lift devices, orthoses, hearing instruments, glucose meters or any dental supplement, diet or nutritional supplement or natal or infant formula. (See Schedule C, sections 3.1 to 3.12 which are not included for brevity.)The panel finds that the ministry reasonably determined that the appellant's request is not any of those items and that the request for a ventilator does not meet the criteria for approval under the remaining health supplements.

Life-threatening health need:

Section 69, EAPWDR permits the minister to provide any health supplement set out in sections 2(1)(a) and (f) and 3 of Schedule C if the health supplement is provided to or for a person in the family unit who is not otherwise eligible for the health supplement under the Regulation, subject to the requirements listed. The appellant is eligible to receive health supplements under EAPWDR Schedule C, but a ventilator is specifically excluded as a health supplement as a health supplement under section 3 of Schedule C and it is not listed as a health supplement under section 2(1)(a) and (f) of Schedule C. Therefore the panel finds that the ministry reasonable determined that the appellant is not eligible for a ventilator under section 69, EAPWDR.

Other considerations:

The appellant requested the panel to consider relief under section 8 of the *Interpretation Act*, which requires that every enactment be construed as remedial and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects. The legislation in this instance is clear that ventilators are excluded from coverage as a health supplement; as such, there is no room for “fair, large and liberal construction and interpretation” available. The panel is keenly aware of the appellant’s condition and need for the requested equipment, however when the legislation specifically excludes a health supplement within the category in which it would logically appear, the panel finds that the ministry reasonably concluded that it cannot be provided.

The panel is very sympathetic to the appellant’s case; however we conclude that the ministry reasonably determined that the appellant is not eligible for the provision of a ventilator under the legislated criteria, The panel confirms the ministry decision.

The appeal is not successful.

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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	
Reece Wrightman	
SIGNATURE OF CHAIR	DATE (YEAR/MONTH/DAY) 2020 May 11

PRINT NAME	
Jeanne Byron	
SIGNATURE OF MEMBER	DATE (YEAR/MONTH/DAY) 2020 May 11
PRINT NAME	
Diane O'Connor	
SIGNATURE OF MEMBER	DATE (YEAR/MONTH/DAY) 2020 May 11