

APPEAL NUMBER
2020-000172

PART C – DECISION UNDER APPEAL

The decision under appeal is the Ministry of Social Development and Poverty Reduction (ministry) Reconsideration Decision dated June 18, 2020 which denied the appellant's request for health supplements, disposable masks for caregivers. The ministry found that the appellant's request does not meet the legislated requirements for medical supplies, as set out in section 2(1)(a) of Schedule C, Employment and Assistance for Persons with Disabilities Regulation.

PART D – RELEVANT LEGISLATION

Employment and Assistance for Persons with Disabilities Regulation (EAPWDR) section 62; Schedule C, section 2(1)(a)

PART E – SUMMARY OF FACTS

Information before the minister at reconsideration included:

- A letter to the ministry from the appellant's physician dated May 7, 2020 stating that the appellant is quadriplegic, wheelchair and ventilator dependent with a tracheostomy tube and has to be catheterized for bladder function several times a day, and that there is a large risk of aerosol secretions that would be of great danger to her caregivers.
- A letter from the ministry to the appellant dated April 28, 2020 advising that the request has been denied.
- A physician's note dated April 23, 2020 stating that the appellant requires over ear masks and gel.
- A letter from the appellant's physician dated May 7, 2020 restating the request of April 28, 2020.
- The appellant's Request for Reconsideration signed May 26, 2020.

The appellant submitted a note to the Tribunal with the Notice of Appeal stating that disposable masks are necessary for several of the eligible procedures: wound care, stoma care, catheterization and bowel care, and masks are required to make these procedures sterile. The appellant argued that the ministry provides the other supplies needed for these procedures. The appellant argued that providing masks is a financial burden and there are difficulties obtaining them through retail channels.

The Panel accepted the appellant's submission as argument.

The ministry, in the Reconsideration Decision, found that face masks are reusable or disposable medical supplies, they have been prescribed by a physician and they are the least expensive appropriate supply for the purpose and therefore the request meets the requirements of EAPWDR, Schedule C, section 2(1)(a)(ii)(A) and (B), but insufficient information has been provided to confirm face masks are necessary to avoid imminent and substantial danger to *the appellant's* health. The physician identified that these items are required for the health of the caregivers only. Therefore, the request has not met the requirements under section 2(1)(a)(ii)(C). The ministry found that insufficient information has been provided to establish that the appellant's caregivers do not have resources to obtain these supplies. Therefore, the ministry was unable to establish that the appellant's request meets the requirements of Schedule C section 2(1)(a)(iii).

PART F – REASONS FOR PANEL DECISION

The issue under appeal is the reasonableness of the ministry decision 2020 which denied the appellant's request for health supplements, disposable masks for caregivers. The ministry found that the appellant's request does not meet the legislated requirements for medical supplies, as set out in section 2(1)(a) of Schedule C, Employment and Assistance for Persons with Disabilities Regulation.

The applicable legislation is below:

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.

Schedule C

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;

Majority Reasons

The appellant's position is that the request meets the legislative requirements for provision of disposable medical or surgical supplies because they are required for one or more of the eligible purposes listed, providing them would cause a financial burden, they are prescribed by a physician and they are required to prevent imminent and substantial danger to health.

The ministry position is that the appellant's request meets some of the requirements of section 2(1) of Schedule C, EAPWDR, not all of the requirements of that section have been met. Specifically, the ministry found that insufficient information was provided to establish an imminent and substantial danger to the appellant's health, referring to that of the caregivers, whether the caregivers have the resources necessary to obtain them, whether the masks are required for the care provided and face masks are not considered "tracheostomy supplies" for which allowance is made in section 2(1)(a.1) of Schedule C, EAPWDR.

In light of the associated risks to the caregiver, identified by the appellant's physician, the caregiver may, without the masks, decline to provide the cleaning and maintenance services the appellant needs. This will result in the imminent danger to the health of the appellant. The appellant's tracheostomy and ventilator dependency make cleaning and maintenance services "necessary to avoid an imminent and substantial danger to health" (of both the appellant and the caregiver); s. 2(1)(a)(ii)(C) of Schedule C, EAPWDR. The legislation does not mandate that it is only the appellant's health that may be considered.

The Majority Panel Members note that section 2(1)(ii)(C) refers to "an imminent and substantial danger to health" without specifying the health of a member of the family unit as in other sections of this Schedule, and might be considered to extend to the appellant's caregivers or any other person. Regardless of this ambiguity, the Majority Panel Members take into consideration the appellant's disability and the fact that this is a physical situation where it is more likely that a virus would be transmitted to a patient by a visiting caregiver than the other way around. The Majority Panel Members find that the ministry's determination that an imminent and substantial danger to health has not been established is not reasonable.

In addition, the appellant's wound care, ongoing bowel care, and catheterization are listed in section 2(1)(i)(A),(B) and (C) as purposes for which disposable medical or surgical supplies may be provided. The Majority Panel Members find that the ministry's determination that face masks are not required for these procedures is not reasonable.

With respect to the requirement of section 2(1)(c)(iii) that there are no resources available to pay for the requested supplies, the Majority Panel Members accept the appellant's assertion that provision of the masks would cause a financial burden. The ministry's determination that the appellant's request does not meet this requirement is not reasonable.

In the letter dated May 7, 2020, the appellant's physician wrote as follows:

"...[the appellant is] ventilator dependent for [...]breathing. [The appellant] has a tracheostomy tube for breathing. [The appellant] also has to be catheterized for [the] bladder several times per day.

The Majority Panel Members find that the masks are ventilator supplies required for the essential operation or sterilization of a ventilator and tracheostomy supplies; s. 2(1)(a.1)(iii) and (iv) of Schedule C, EAPWDR.

The Majority Panel Members also find that the masks are necessary in order for the appellant to receive wound care (cleaning the skin around the stoma), ongoing bowel care and catheterization (which includes suctioning the appellant's throat and trachea): s. 2(1)(a)(i)(A), (B), and (C) of Schedule C, EAPWDR.

The Majority Panel Members also find that the legislation does not require an express finding that the caregivers do not or are unable to provide the masks and, therefore, to impose such a requirement is not reasonable.

In summary, the Majority Panel Members have taken into consideration the appellant's disability and the fact that this is a situation of a quadriplegic who has no movement below the neck and requires 24 hour care. The fact that teams of caregivers are required to attend to wound care, bowel care and catheterization, all of which are eligible procedures under section 2(1)(1) of Schedule C, EAPWDR and that it is reasonable to expect that steps must be taken to prevent transmission of the Covid-19 virus at this time leads the Majority Panel Members to rescind the ministry's decision on the basis that it is not reasonable in the circumstances of the appellant.

The Majority Panel Members accept that the masks are required by the caregivers to provide the required medical care for the appellant. If the caregivers refuse treatment to the appellant, the appellant's health would be in imminent danger.

It is also our view that the masks are required by the caregivers when they suction the throat and trachea for "accumulated respiratory secretions". The masks are treatment supplies just as gauze, cleaner, gloves, and instruments are treatment supplies.

The ministry decision is rescinded. The appeal is successful.

Dissenting Reasons

I accept the summary of facts as written. I would find as follows:

I note that section 2(1)(a)(ii)(C) refers to "an imminent and substantial danger to health" without specifying the health of a member of the family unit as in other sections of this Schedule, and might be considered to extend to the appellant's caregivers or any other person. That said, the appellant's physician specified in his letter that there is great danger to the caregivers. I would find that the ministry's determination that an imminent and substantial danger to health has not been established is not reasonable.

The purposes for which disposable medical or surgical supplies may be provided are set out in EAPWD, Schedule C, section 2(1)(a)(i)(A) to (F): wound care, ongoing bowel care due to loss of muscle function, catheterization, incontinence, skin parasite care and limb circulation care. The appellant's physician specified that the requested masks are for suctioning of the throat and trachea, not for any of the purposes listed. I would find that the ministry's determination that the requested supplies are not considered tracheostomy supplies under section 2(1)(a.1) of Schedule C is reasonable. I would find that

the ministry's determination that face masks are not required for any of the listed procedures is reasonable.

With respect to the requirement of section 2(1)(c)(iii) that there are no resources available to pay for the requested supplies, I acknowledge the appellant's assertion that provision of the masks would cause a financial burden, however there is no information provided about the caregivers' ability to pay, and as noted above, the physician specified the danger to the caregivers' health. Because the appellant's request is to provide face masks for the caregivers, this information is needed. I would find that the ministry's determination that the appellant's request does not meet this requirement is reasonable.

I have taken into consideration the appellant's disability and the fact that this is a situation of a quadriplegic who has no movement below the neck and requires 24 hour care, however, there is insufficient information provided to enable the ministry to determine that the appellant's request meets the requirements of Schedule C, section 2(1)(a)(i)(A) to (F) or that there are no resources available to pay the cost of the supplies as required under section 2(a)(iii) of Schedule C, EAPWDR.

I would confirm the ministry's decision.

APPEAL NUMBER
2020-000172

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

Nancy Eidsvik

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2020 August 31

PRINT NAME

Edward Wong

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2020 August 31

PRINT NAME - DISSENTING

Reece Wrightman

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2020 August 31