

APPEAL NUMBER  
2021-0083

**PART C – DECISION UNDER APPEAL**

The decision under appeal is the Ministry of Social Development and Poverty Reduction (ministry) reconsideration decision dated April 13, 2021 which held that the appellant was “not eligible for funding for a scooter.” That decision was based on the ministry’s determination that the appellant’s request for a scooter did “not meet the requirements under section 76 [of the EA Regulation] for a Life threatening health need”.

**PART D – RELEVANT LEGISLATION**

Employment and Assistance Regulation (EAR), ss. 66.1; 67; 76; Schedule C ss. 3 and 3.4

**PART E – SUMMARY OF FACTS**

The information before the ministry at reconsideration included:

1. The appellant was not designated as a Person with Disabilities (PWD);
2. The appellant was not in receipt of income, disability or hardship assistance;
3. The appellant's family unit had a monthly income of \$2,167.21;
4. The appellant was 77 years old, 6'6" tall and 145kg;
5. An Occupational Therapist had informed the ministry that the appellant had limited mobility of approximately 15 feet due to lower leg pain;
6. An Occupational Therapist had informed the ministry that the appellant had limited energy and was required to "pace his energy";
7. The appellant's address and the fact that the driveway and pathways to their residence had significant elevation changes;
8. The appellant did not have the physical health or endurance to walk from his residence to take a bus or perform chores in the community;
9. A medical doctor, on March 25, 2021, informed the ministry that the appellant had severe coronary heart disease and that "the effort required to propel a manual scooter up an incline for instance could create an imminent life-threatening and critical situation for [the appellant]";
10. An Occupational Therapist, on March 17, 2021, provided a letter to the ministry stating that the appellant "has a life threatening condition that would be greatly alleviated by the provision of a scooter for his basic mobility due to medical conditions and hilly terrain of his immediate environment" and "that a manual wheelchair is not recommended due to his cardiac conditions";
11. An Occupational Therapist, on February 8, 2021, provided the ministry with the appellant's diagnosis and medical conditions which included, Peripheral Vascular Disease; Hypertension; Congestive Heart Failure; Atrial Fibrillation; and Diabetic Retinopathy;
12. An Occupational Therapist, had confirmed that the appellant had trialed a Pegasus Pro 4-wheeled Scooter at his residence and in the surrounding neighbourhood and that it would meet the appellant's need for mobility;
13. A sales quote for a Pegasus Pro 4-wheel Scooter at a total cost of \$3,817.08;
14. A prescription, dated February 22, 2021 from a medial doctor for a "Pegasus Pro 4-wheeled Scooter to due multiple medical problems. Life threatening need." (sic);

At the hearing the appellant provided an additional collection of documents. These documents were already included in the Appeal Record.

## PART F – REASONS FOR PANEL DECISION

### ***Introduction***

The issue at appeal is whether the reconsideration decision dated April 13, 2021 which held that the appellant was “not eligible for funding for a scooter” was reasonably supported by the evidence or a reasonable application of the enactment in the appellant’s circumstance.

On appeal it was agreed that the appellant was not a PWD; not in receipt of income; disability or hardship assistance; was not qualified as a person with persistent barriers to employment; was not receiving special care under Schedule A of the EAR; and was not a dependent child. Consequently, it was agreed that the only applicable legislation is section 76 of the EAR that authorizes the ministry to provide medical equipment to a person not otherwise eligible for health supplements.

### ***Summary of The Relevant Legislation***

Section 76 of the EAR permits the ministry to provide specified health supplements to a family unit that is not otherwise eligible for a health supplement if 6 conditions are met:

1. The person faces a direct and imminent life threatening need;
2. A health supplement is necessary to meet that direct and imminent life threatening need;
3. The health supplement is specified in section 2 or section 3 of Schedule C of the EAR;
4. There are no resources available to the person’s family unit to provide the health supplement;
5. The adjusted net income of any person in the family unit does not exceed a prescribed amount; and
6. Specified provisions in Schedule C are met.

Section 3.4 of Schedule C of the EAR states that a scooter is a health supplement “for the purposes of section 3 of this schedule” if three conditions are met:

1. An assessment by an occupational therapist or physical therapist confirms that it is unlikely that the person for whom the scooter has been prescribed will have a medical need for a wheelchair in the next five years;
2. The total cost of the scooter does not exceed \$3,500; and
3. The minister is satisfied that the item is medically essential to achieve or maintain basic mobility.

### ***Extracts of The Relevant Legislation***

#### **EAR section 76: Health Supplements for Persons Facing Direct and Imminent Life Threatening Health Need.**

**76** (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.

#### **EAR Schedule C Section 3.4: Medical Equipment and Devices – Scooters**

**3.4** (1) In this section, "scooter" does not include a scooter with 2 wheels.

(2) Subject to subsection (5) of this section, the following items are health supplements for the purposes of section 3 of this Schedule if all of the requirements set out in subsection (3) of this section are met:

(a) a scooter;

(b) an upgraded component of a scooter;

(c) an accessory attached to a scooter.

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

(a) an assessment by an occupational therapist or a physical therapist has confirmed that it is unlikely that the person for whom the scooter has been prescribed will have a medical need for a wheelchair during the 5 years following the assessment;

(b) the total cost of the scooter and any accessories attached to the scooter does not exceed \$3 500 or, if subsection (3.1) applies, \$4 500;

(c) the minister is satisfied that the item is medically essential to achieve or maintain basic mobility.

(3.1) The maximum amount of \$4 500 under subsection (3) (b) applies if an assessment by an occupational therapist or a physical therapist has confirmed that the person for whom the scooter has been prescribed has a body weight that exceeds the weight capacity of a conventional scooter but can be accommodated by a bariatric scooter.

(4) The period of time referred to in section 3 (3) (b) of this Schedule with respect to replacement of an item described in subsection (2) of this section is 5 years after the minister provided the item being replaced.

(5) A scooter intended primarily for recreational or sports use is not a health supplement for

the purposes of section 3 of this Schedule.

### **The Appellant's Position**

The appellant explained to the panel his medical history, including that the MD that had prescribed him the Pegasus Pro 4-wheeled Scooter had been his physician for 25 years. He said that not having a motorized scooter was a "recipe for a heart attack" and the "recipe for a stroke."

The appellant further explained to the panel that any physical activity that he engages in is inherently dangerous and life threatening because of his health problems. He stated that he cannot use a manual wheelchair because the exertion required to use it makes it unsafe and that his spouse is not physically capable of pushing him in a manual wheelchair. He also stated that he could not use a power wheelchair because of his physical size.

The appellant affirmed that there were no resources available to his family unit to purchase a motorized scooter.

The core of the appellant's submission was that because of his multiple health conditions he was unable to participate in any daily living activities without creating a risk that he would suffer a life threatening injury. Although he did not require a scooter to simply stay alive (unlike the medical equipment he used because of his sleep apnea) any activity that he engaged in beyond being sedentary created a direct and imminent threat to his life. The appellant emphasized that the exertion required to move within his home also created a direct and imminent threat to his life, and the requirement for a scooter was more than a "basic mobility aid" or a device that would simply make things easier for him.

### **The Ministry's Position**

The ministry affirmed key aspects of the decision at reconsideration including:

1. The appellant did not have the resources available to purchase the requested scooter;
2. The requested scooter was the least expensive scooter to meet the appellant's needs;
3. The scooter has been prescribed by a medical practitioner; and
4. An Occupational Therapist has submitted an assessment confirming the medical need for the scooter.

The ministry also affirmed that the appellant did not meet requirement that an occupational therapist address "the possible need for a power wheelchair in the next five years" and that the appellant did not provide information "to confirm [he does] not have resources to meet [his] need for a scooter."

However, the focus of the ministry's position was that the scooter was a mobility aid and did not satisfy the requirement of being a medical device necessary to meet an imminent and life threatening need. The ministry stated that the scooter did not negate any imminent and life threatening risk to the appellant and it was properly considered as a device to assist in daily living activities and involvement in the community.

The ministry did acknowledge that it considered that the appellant has a genuine need for a scooter but stated that section 76 of the EAR did not authorize the ministry to provide a health supplement in the situation of the appellant.

### **The Panel's Decision**

#### Issue 1: Is a Scooter Necessary to Meet a Direct and Imminent Life Threatening Need

The panel understands the tension between considering a scooter as a mobility aid and as a scooter as a medical device that meets a direct and imminent life threatening need.

The panel considers that a scooter that was required as a mobility aid, or as a device to facilitate daily living activities or interaction with the community would not satisfy the legislative requirement to meet a direct and imminent life threatening need.

At the hearing, the ministry stated that it considered that a scooter could never satisfy the requirement of meeting a direct and life threatening need on the basis that a scooter “does not negate risk to life” and that a person’s ability to leave their home is important but not a life threatening need.

The panel finds that the legislation does support that a scooter can meet the requirement of satisfying a direct and life threatening need. The panel notes that section 3.4 of Schedule C specifically states that a scooter that is medically essential to achieve or maintain basic mobility is capable of being a health supplement for the purpose of section 3 of Schedule C as long as it does not only have 2 wheels or is “intended primarily for recreation or sports use.” The panel finds that a scooter is medically essential for the appellant to achieve basic mobility and is not excluded as being primarily for recreation use.

The panel, therefore, determines that the minister does have the authority to provide the scooter as a health supplement provided that the appellant faces a direct and imminent life threatening need without it.

The panel determined that the key issue was whether the appellant faced a direct and imminent life threatening risk. The panel considered the evidence of the risk the appellant faced of having a heart attack or a stroke if he engaged in even moderate exercise. The panel considered the prescription from the MD for a scooter because of “life threatening need” and the statement that “the effort required to propel a manual scooter up an incline for instance could create an imminent life-threatening and critical situation for [the appellant]”. It also considered the statement from the Occupational Therapist that the appellant had limited mobility of approximately 15 feet and reduced energy. The panel further considered the statement from the appellant that the scooter was required for basic mobility inside his residence and that if he exerted himself it was likely that he would suffer a heart attack or a stroke.

The panel also considered the minister’s statement that a continuous positive airway pressure (CPAP) machine that a person would require to avoid the risk of suffocation while sleeping would qualify under section 76 of the EAR.

In the result, the panel has determined that in the specific situation of the appellant, basic mobility creates an imminent and life threatening risk of heart attack or stroke and the appellant needs a scooter to avoid the risk of heart attack or stroke.

Consequently, the panel finds the ministry determination that a scooter is not necessary to meet a direct and imminent life threatening need is not a reasonable application of the enactment in the appellant’s circumstance.

#### Issue 2: The Possible Need for a Power Wheelchair in the Next Five Years

The ministry stated that it was not satisfied that Schedule C, section 3(a) – “an assessment by an occupational therapist or a physical therapist has confirmed that it is unlikely that the person for whom the scooter has been prescribed will have a medical need for a wheelchair during the 5 years following the assessment” was supported on the evidence. The ministry referred to a requirement for there to be an explicit statement.

On review of the material, the panel agrees that there is no explicit statement by the Occupational Therapist that a power wheelchair may not be required in the next 5 years. However, the panel notes that the section does not require an explicit statement and instead only requires “an assessment”. The panel reviewed the correspondence from the Occupational Therapist dated February 8, 2021 and March 17, 2021 requesting “Equipment Request – Life Threatening Need” and notes it was signed by an Occupational Therapist employed in the Community Health Services of one of the government funded health authorities. The panel considers the specific request for a scooter, signed by an occupational therapist employed by a government funded health authority, includes by implication an assessment that the appellant will not have a medical need for a wheelchair in the next five years.

The panel finds that the ministry’s determination that an occupational therapist had not done an assessment and confirmed that the appellant will not have a medical need for a wheelchair during the next five years is not supported by the evidence because it is implicit in the request submitted by the Occupational Therapist.

Consequently, the panel finds that the ministry's determination by the ministry is not reasonably supported by the evidence.

### Issue 3: Resources to Meet the Need for a Scooter

In the original decision the ministry stated "there was no information provided to verify that any alternative resources had been accessed, or attempted to access" but in the reconsideration decision the ministry provided two contradictory statements:

1. "Information has not been provided to confirm you do not have resources to meet your need for a scooter" and
2. "Upon review of the information provided by your Occupational Therapist in her assessments and the information at reconsideration, the ministry finds...You do not have resources available to pay the cost of or obtain the medical equipment [scooter]." [*emphasis added by panel*]

The panel also notes that during the hearing the ministry stated that it had completed a financial assessment and had performed an intake interview with the appellant that would have addressed financial information.

The panel has determined that the reconsideration decision is unclear what evidence was before the ministry and what determination the ministry made.

Consequently, the panel finds that the ministry's position that the appellant did not satisfy the requirement in Section 76(a) of the EAR – "there are no resources available to the person's family unit with which to meet that need" – was an unreasonable application of the enactment in the appellant's circumstance because the ministry's reconsideration decision stated that the appellant did "not have resources available to pay the cost of or obtain the medical equipment [scooter]."

### **Conclusion**

The panel rescinds the ministry decision.

APPEAL NUMBER  
2021-0083

**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

Trevor Morley

SIGNATURE OF CHAIR

DATE (YEAR/MONTH/DAY)

2021/05/31

PRINT NAME

Angie Blake

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2021/05/31

PRINT NAME

Jan Broocke

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2021/05/31