

APPEAL NUMBER
2021-0096

PART C – DECISION UNDER APPEAL

The decision under appeal is the Reconsideration Decision of the Ministry of Social Development and Poverty Reduction (the “Ministry”) dated 30 April 2021, in which the ministry:

- a) denied the Appellant funding for bilateral hearing aids in excess of \$2000 per hearing aid;
- b) denied the Appellant funding for a Phonak Roger select transmitter because it was not a “hearing instrument” as defined in the Employment and Assistance for Persons with Disabilities Regulation (EAPWDR) and therefore was not a health supplement that the ministry could provide under the EAPWDR; and
- c) decided that the Appellant was not eligible for additional funding for the hearing aids or for the Phonak Roger select transmitter as a health supplement to meet a direct and imminent life-threatening need under s. 69 of the EAPWDR.

PART D – RELEVANT LEGISLATION

EAPWDR Schedule C, section 1, definition of “hearing instrument”

EAPWDR Schedule C, sections 3 (1) and 3.11

EAPWDR Schedule C, sections 62 and 69

Health Professions Act, Speech and Hearing Health Professionals Regulation section 1, definition of “hearing instrument”

PART E – SUMMARY OF FACTS

The Appellant attended the hearing with legal counsel.

The tribunal granted 2 adjournments from the original hearing date of 31 May 2021, first to 7 June and then to 17 June 2021, at the Appellant's request.

Evidence before the ministry at reconsideration:

The Appellant is an individual receiving disability assistance and is eligible to receive health supplements under section 62 and Schedule C of the EAPWDR provided other eligibility requirements are met.

Evidence before the Ministry at reconsideration included the following documents:

1. Audiologic Report from the audiologist, undated, provided before Pacific Blue Cross Predetermination (later resubmitted and dated January 5, 2021): The audiologist states that the Appellant was seen for an audiologic assessment and hearing aid evaluation at the hearing centre on 29 October 2019 and 23 June 2020. The test results indicate that the Appellant has severe hearing loss and cannot hear normal conversational speech clearly. The Appellant is studying part-time so that he can return to employment similar to work he has done in the past, which would involve communicating with co-workers and the public in a noisy environment.

The audiologist says that the Appellant needs the Phonak Roger digital microphone system, which includes the FM system, so that he can hear in classroom, workplace and public places with background noise. The audiologist says that the Appellant "needs the best technology" to participate in video conferencing and in-person meetings, especially now when meeting participants must have more distance between them. The Phonak system is also "extremely vital in hearing in public places with background noise" in the Appellant's daily activities.

The Appellant has had chronic intermittency issues with his current hearing aids, which were almost 5 years old when the report was written. Moisture from perspiration gets into the hearing aids and causes them to cut out, and he has not been able to solve this problem despite trying many methods. The manufacturer of the hearing aids cannot suggest a solution other than upgrading the Appellant to the newest moisture resistant hearing aids. The Phonak hearing aids are moisture resistant and have a lower incidence of moisture-related repairs.

The audiologist recommends a pair of Phonak Naida M90-SP behind-the-ear hearing aids, even though the cost is "beyond the normal allowance for hearing aids" because they are "very necessary for [the Appellant's] hearing needs." The cost is stated to be \$8,850, or \$4,250 for each ear.

2. Pacific Blue Cross ("PBC") Predetermination Summary, dated 8 December 2020: Approval was requested for left and right hearing aids at a cost of \$3,150 each, and an FM system at a cost of \$2,550. PBC approved the 'eligible amount' of \$2,000.00 for each hearing aid, stating "We considered this expense up to the maximum amount allowed under your plan." With respect to the FM system, PBC stated, "We are unable to provide reimbursement for this expense. It is not a covered benefit under your plan." The total approved in the predetermination was \$4,000, with the notation "Payable Amount reduced due to payable dollar maximum rule."
3. Document titled "Report from Audiologist", unsigned, dated 14 April 2021: Even with amplification, the Appellant can have difficulty understanding speech, particularly if the speaker is around a corner, behind a barrier or in another room, or if there is background noise. The Phonak Roger system is a digital microphone system that allows the user to hear voices better if there is background noise. It must be coupled with hearing aids to work properly. It consists of a microphone transmitter and receivers that are attached or integrated into the hearing aids. If there is background noise, the person wearing hearing aids will hear the voice of someone speaking directly into the microphone much more clearly. This feature could be vital for the Appellant's health and safety in an emergency situation.

4. PBC Predetermination Summary dated 8 December 2020 (document 2) and Audiologist Report with handwritten changes and notes added: The cost of the hearing aids has been crossed out and changed from \$3,150 each to \$3,125 each, and the FM system from \$2,550 to \$2,000, making the total submitted amount \$8,250. Handwritten calculations indicate that the Appellant would receive \$2,300 from WorkSafe BC, leaving a balance of \$1,950 that the Appellant needs in order to pay for the “Roger XFM system”.
5. Quote from the hearing centre, “To whom it may concern”, signed by the audiologist, dated February 23, 2021, with handwritten notes: Quote for Phonak Naida P90-UP behind-the-ear hearing aids, \$3,150 each, and the “Roger System” consisting of Phonak Roger Select Transmitter and 2 Phonak Roger X receivers, printed amounts crossed out and “\$2,000” written in as total cost.
6. Emails between the Ministry and an advocate for the Appellant, various dates: The Ministry states that with respect to the Predetermination Decision, the criterion that was not met was Schedule C section 3(1)(b)(iii), and that while there is no fee schedule for hearing instruments, there is Ministry policy that specifies the maximum amounts referred to in the PBC Predetermination Summary.
7. BC Employment & Assistance Policy & Procedure Manual (“policy manual”): Policy manual states under “Coverage Guidelines” that hearing instruments are covered up to \$2,000 per aid.

Additional Evidence:

The Appellant provided the following additional evidence:

1. Audiologic Report from the audiologist at the hearing centre, dated May 20, 2021: This report is identical to the 5 January 2021 audiologic report (document 1, above) except that it adds a paragraph stating that the Phonak hearing aid and Phonak Roger system are “absolutely the best system for the lowest price to meet [the Appellant’s] hearing and communication needs. The Roger system, specifically, is the only item that will work together with his hearing aids to meet his complex hearing and communication needs.” The audiologist says it should be noted that the Appellant has had a previous Employment and Assistance Appeal Tribunal decision on 19 April 2007 that ruled in his favour to cover the full costs of prescribed hearing assistance equipment.
2. Email from the audiology trainer and manager at the supplier, to the audiologist, dated 3 June 2021: States that the main purpose of the Roger FM system is to increase the signal to noise ratio, not to provide amplification for the loss of audibility. However, the system does affect the sound pressure level because “there is a small amount of gain provided to the speech signal. And due to the adaptive nature of Roger, the gain of the Roger receiver will go up when the noise level increases in order to ensure the voice is above the room noise.”
3. Letter from the audiologist at the hearing centre, to counsel for the Appellant, undated: The audiologist states that “the direct audio input accessories, batteries and accessories that are attached to the Phonak Naida P90-UP are intended to affect the sound pressure level at the eardrum. The sound pressure level at the eardrum will be increased by the direct audio input accessories, batteries and the accessories attachable to the Phonak Naida P90-UP.” The audiologist states that “the Phonak Naida P90-UP is the least expensive appropriate medical equipment to meet the basic needs of [the Appellant’s] unique communication needs. There are no other products on the market that would meet [the Appellant’s] basic hearing needs that are less expensive than the Phonak Naida P90-UP.”
4. Letter from the audiology trainer and manager of the supplier to counsel for the Appellant, dated June 15, 2021: States that “the primary purpose of the Roger system is to improve communication in noise and over distance. It accomplishes this by the use of a wireless microphone that transmits the talker’s voice to a receiver that is either physically attached to the hearing instrument or installed directly into certain models of hearing aids....the use of adaptive gain further enhances the signal to noise ratio. If the room noise exceeds 57 dB [sound pressure level], then a command is sent from the Roger microphone to increase the

receiver gain. According to the attached specification sheet, up to 20 dB of additional gain is attached to the talker's voice. Therefore, the Roger system is intended to affect the sound pressure level at the ear drum."

5. Submissions from Counsel for the Appellant: Counsel for the Appellant filed written submissions to assist the panel.

At the hearing, the Appellant gave further explanation of the intermittency issues due to moisture from perspiration entering the hearing aids, described in the audiologist report of 5 January 2021. He said that his hearing aids stop working every 1 to 3 months, and when that happens, he has to send them back to Ontario to be repaired. While they are being repaired he has no hearing aids and is unable to hear until they are returned. The Phonak hearing aids would be water- and humidity-resistant, sealed, and guaranteed.

The Ministry did not object to any of the additional evidence submitted by the Appellant.

The Panel determined that the additional oral and documentary evidence was admissible under s. 22(4) of the EAA because it is reasonably required for the full and fair disclosure of all matters relating to the decision. Submissions from Appellant's counsel are argument and will be addressed in the panel decision.

PART F – REASONS FOR PANEL DECISION

The issues to be decided are:

1. Is the Ministry reasonable in its decision that the Phonak Naida P90-UP is not the least expensive appropriate medical equipment or device to meet the Appellant's basic hearing needs?
2. Is it reasonable for the Ministry to apply a \$2,000 limit on the amount it will provide for purchase of a hearing instrument for the Appellant?
3. Is the Ministry decision that the Rogers FM system is not a "hearing instrument" as defined under the EAPWDR a reasonable application of the legislation?

Legislation:

The Ministry is authorized under EAPWDR Schedule C s. 3(1) to provide health supplements to an eligible individual as follows:

- 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 maybe 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.

EAPWDR Schedule C section 1 states that "hearing instrument" has the same meaning as in the Speech and Hearing Health Professionals Regulations, B.C. Reg. 413/2008. The Speech and Hearing Health Professionals Regulations section 1 defines "hearing instrument" as follows:

- "hearing instrument" means an appliance or a device designed or offered for a hearing condition,
- (a) Including any ear molds, boots or other acoustic couplers and any parts or accessories for the appliance or device intended to affect the sound pressure level at the eardrum, and
 - (b) Excluding direct audio input accessories, batteries and any accessories that are attachable to the appliance or device by the wearer and not intended to affect the sound pressure level at the eardrum.

Appellant's Position:

Least Expensive Medical Equipment or Device:

The Appellant says that the evidence of the audiologist establishes that the Phonak Naida P90-UP is the least expensive appropriate medical equipment or device.

The Appellant argues that the onus of establishing that there is a less expensive appropriate device should rest with the Ministry. He points out a power imbalance between the Ministry and the Appellant, where the Ministry has "vast resources at its disposal", while the Appellant is ill, vulnerable and dependent on Ministry benefits. He states that the Ministry has not provided any evidence that the Phonak Naida P90-UP is not the least expensive appropriate device.

The audiologist who has assessed the Appellant disagrees with the Ministry's conclusion that the Phonak Naida P90-UP is not the least expensive appropriate hearing aids to meet the Appellant's basic hearing needs. The audiologist, in the 7 June 2021 letter, states: "I must respectfully disagree with the Ministry. The Phonak Naida P90-UP is the least expensive appropriate medical equipment to meet the basic needs of [the Appellant's] unique communication needs. There are no other products on the market that would meet [the Appellant's] basic hearing needs that are less expensive than the Phonak Naida P90-UP."

The audiologist is a recognized expert in the field; there is no indication of the source of the Ministry's statement about the availability of other less expensive and appropriate hearing aids. The Appellant says that it is not sufficient for the Ministry to make the bare assertion that there are other options, without any details or specifics of what those appropriate options might be. Further, the Appellant argues that the panel ought not to rely upon a statement from an unknown source. No one can know if the general statement about other available hearing aids comes from a qualified expert or from a Ministry employee who does not have the necessary qualifications to advance an opinion on appropriate hearing devices.

\$2000 Cap on Funding:

The Appellant points out that the funding cap of \$2,000 per hearing aid, found in the policy manual, is not a legislated funding limit. The Appellant maintains that policies must be founded upon the Act or the Regulations, and in making a decision about the reasonableness of the Ministry decision on the amount of funding, the panel should look at the legal requirements in the Act and Regulations, not Ministry policy.

The Appellant says that the 2007 decision that the audiologist refers to in the 5 January 2021 report would not be relevant to this appeal and does not ask the panel to consider that decision in this appeal.

The Rogers System:

The Appellant maintains that the Rogers system that attaches to the Phonak Naida P90-UP hearing aids is a "hearing instrument" as defined in Schedule C of the EAPWDR. While he agrees that the Rogers system is a "direct audio input accessory", he says that the phrase "not intended to affect the sound pressure level at the eardrum" modifies all of the words in the sub-section that come before it. Therefore, sub-section (b) must be interpreted as excluding only those accessories, including direct audio input accessories, that are "not intended to affect the sound pressure level at the eardrum."

The Appellant refers to the evidence of the audiologist, in the letter of 7 June 2021, which states: "The direct audio input accessories, batteries and accessories that are attached to the Phonak Naida p90-UP [sic] are intended to affect the sound pressure level at the eardrum. The sound pressure level at the eardrum will be increased by the direct audio input accessories, batteries and the accessories attachable to the Phonak Naida P90-UP." The Appellant also relies on the evidence of the audiology trainer and manager from the supplier, who states that "the Rogers system is intended to affect the sound pressure level at the eardrum."

Therefore, the Appellant maintains that the Rogers system is not an excluded item under sub-section (b) of the definition of "hearing instrument" and is eligible for funding as a health supplement under Schedule C of the EAPWDR.

Ministry Position:

Least Expensive Medical Equipment or Device:

In its Reconsideration Decision, the Ministry said that it was not clear that the Phonak Naida P90-UP hearing aids were the least expensive appropriate medical equipment or device as required under EAPWDR Schedule C subsection (b)(1)(b)(iii). The Ministry pointed out that these hearing aids included additional features such as noise cancelling, speech enhancement and Bluetooth connectivity, which might enhance the Appellant's ability to hear, but were not necessarily the least expensive appropriate for his basic hearing needs.

The Ministry stated that the coverage limit of \$2,000 set out in Ministry policy "enables clients to access a range of hearing aids appropriate to meet their basic hearing needs." The Ministry said that there had not been an assessment discussing how the Appellant's hearing needs might, or might not, be met by less expensive hearing aids.

Therefore, the Ministry maintained that the request for full funding of the Phonak Naida P90-UP hearing aids did not meet the requirements of EAPWDR Schedule C subsection 3 (1)(b)(iii).

\$2000 Cap on Funding:

The Ministry relies on the \$2,000 coverage limit per hearing aid set out in the policy manual, which it says “enables clients to access a range of hearing aids appropriate to meet their basic hearing needs.” At the hearing the Ministry also said that approval of the full cost of the Phonak Naida P90-UP hearing aids is beyond the authority of the Ministry, even if those hearing aids were the least expensive appropriate device.

The Ministry stated that, other than relying on the coverage limit, and the assertion that the Rogers system is an excluded device, it did not dispute the balance of Appellant’s submissions.

The Rogers System:

In its Reconsideration Decision, the Ministry stated that the Rogers System is a direct audio input accessory and therefore is not a hearing instrument as defined in the EAPWDR. It stated: “The Roger Select transmitter is strategically placed to directly transmit audio input. It bypasses the microphone of a hearing aid and feeds into the speakers of a hearing aid directly. The ministry finds this item is a direct audio input accessory attached to the hearing aid via Bluetooth technology, and therefore specifically excluded from the definition of hearing instrument as set out in schedule C.”

In addition, while the Ministry acknowledged that the Rogers system might improve the Appellant’s hearing in specific situations, the Ministry was not satisfied that the Rogers system was the least expensive appropriate equipment to meet the Appellant’s basic hearing needs as required by EAPWDR Schedule C subsection 3(1)(b)(iii).

Life-Threatening Health Need:

The Ministry determined that the Appellant was not eligible to receive additional funding of hearing aids and the Roger system under EAPWDR section 69 as a health supplement for a person facing a direct and imminent life-threatening health need.

Section 69 sets out that the Ministry may provide a health supplement for an individual who is otherwise not eligible for that supplement, if the person faces a direct and imminent life-threatening need, and the health supplement is necessary to meet that need. The Appellant is eligible to receive health supplements under EAPWDR Schedule C, and therefore would not be eligible for additional funding for hearing aids provided under Schedule C.

The audiologist states in the 14 April 2021 report that hearing someone speaking directly into the Roger system microphone might be “vital for [the Appellant’s] safety if the information he is receiving in an emergency or urgent situation could protect him.” However, there is no evidence to suggest that there is an imminent risk or that the Roger system could prevent a life-threatening health need.

Panel Decision:

Least Expensive Medical Equipment or Device:

At the time of the Reconsideration Decision, the report from the audiologist did not address the question of whether there was a less expensive hearing aid that would be appropriate for the Appellant’s hearing needs. The Ministry relied on its own general information that a range of hearing aids are available for less than \$2,000 each. However, the additional evidence filed by the Appellant includes the clear opinion of the audiologist that the Phonak Naida P90-UP, at a cost of \$3,250 per hearing aid, is the least expensive appropriate medical equipment to meet the Appellant’s basic hearing needs. The audiologist states specifically that “there are no other products on the market that would meet the Appellant’s basic hearing needs that are less expensive than the Phonak Naida P90-UP” which indicates that a range of other products have been considered.

In addition, the panel notes that one of the reasons the audiologist gives for recommending these hearing aids is that the appellant’s current hearing aids frequently stop working because of moisture from perspiration that gets into the hearing aids. As a result, the hearing aids need to be repaired every 1 to 3 months, and during that time the

appellant has no hearing aids, and his basic hearing needs are not met at all. The appellant has tried many remedies, all of which may work for others, but have been unsuccessful for him. The audiologist states that the only option left is the up-to-date moisture resistant hearing aids that have been recommended as the least expensive appropriate devices.

The panel accepts the evidence of the audiologist and finds that the Phonak Naida P90-UP is the least expensive appropriate hearing aid for the Appellant. In light of the additional evidence of the audiologist, the panel finds that the Ministry decision that the Phonak Naida P90-UP is not the least expensive appropriate medical device is not reasonably supported by the evidence.

\$2000 Cap on Funding:

The Ministry refused funding for the Phonak Naida P90-UP hearing aids in excess of \$2,000 per hearing aid. At the hearing, the Ministry referred to the \$2,000 coverage limit for hearing instruments as a “legislated requirement”. However, the panel finds that the \$2,000 coverage limit per hearing aid is not a “legislated requirement”, but a Ministry policy that is found in the policy manual, not in the Employment and Assistance for Persons with Disabilities Act (EAPWDA) or EAPWDR. The legislation, and not the policy manual, determines funding obligations and limitations for medical equipment and devices. The panel may consider Ministry policy when determining whether a Ministry decision is a reasonable application of the legislation in the Appellant’s circumstances, but the panel is not bound by Ministry policy.

The panel finds that the only criteria in the legislation that addresses the cost of hearing instruments is whether the device is “the least expensive appropriate medical equipment or device.”

In its Reconsideration Decision, the Ministry suggests that the Appellant “consider alternative equipment the ministry is authorized to provide to meet your needs.” However, the Ministry’s authority comes from the EAPWDA and EAPWDR, which authorize the Ministry to provide “the medical equipment that is the least expensive appropriate medical equipment or device” (EAPWDR Schedule C section 3(1)(b)(iii)), and which does not set out a funding limit for hearing aids.

Therefore, the panel finds that it is not reasonable for the Ministry to apply a blanket coverage limit of \$2,000 per hearing aid if the evidence is that the least expensive appropriate hearing aid for the Appellant’s hearing needs costs more than \$2,000.

The Rogers System:

At issue is the interpretation of sub-paragraph (b) in the definition of “hearing instrument” found in the Speech and Hearing Health Professionals Regulations. This definition is incorporated into the EAPWDR under the Schedule C section 1 definition for “hearing instrument”. The definition lists included and excluded devices as follows:

- “hearing instrument” means an appliance or a device designed or offered for a hearing condition,
- (a) Including any ear molds, boots or other acoustic couplers and any parts or accessories for the appliance or device intended to affect the sound pressure level at the eardrum, and
 - (b) Excluding direct audio input accessories, batteries and any accessories that are attachable to the appliance or device by the wearer and not intended to affect the sound pressure level at the eardrum.

The Appellant and the Ministry agree that the Rogers system is a “direct audio input device”. The question is whether the final phrase “and not intended to affect the sound pressure level at the eardrum” modifies “direct audio input accessories, batteries and any accessories that are attachable to the appliance or device by the wearer,” so that a direct audio input accessory that was intended to affect the sound pressure level at the eardrum would be an included device and thus eligible for funding by the Ministry. This is the Appellant’s position.

The Ministry has interpreted the legislation as specifically excluding direct audio input accessories.

The panel finds that the Ministry’s interpretation of the legislation, as excluding any direct audio input device, is reasonable. On a plain reading of the legislation, there are 3 types of accessories that are excluded from the

definition of “hearing instrument.” The 3 types are:

- 1) direct audio input accessories;
- 2) batteries; and
- 3) any accessories that are attachable to the appliance or device by the wearer and not intended to affect the sound pressure level at the eardrum.

The words “and not intended to affect the sound pressure level at the eardrum” are part of the final phrase, which is the last and general category of “any accessories that are attachable to the appliance or device by the wearer and not intended to affect the sound pressure level at the eardrum.”

While the panel recognizes that the Rogers system would be a significant benefit to the Appellant, the panel finds that the ministry was reasonable in its determination that the Rogers system was an excluded device under Schedule C of the EAPWDR, and therefore not eligible for funding as a health supplement.

Life-Threatening Health Need:

The panel finds that the Ministry was reasonable in determining that full funding of the hearing aids was not available to the Appellant under section 69 of the EAPWDR. That section provides for health supplements to meet a direct and imminent life-threatening need for a person who is otherwise not eligible for a health supplement. The Appellant is eligible to receive hearing instruments as a health supplements under Schedule C of the EAPWDR – the issue with respect to the hearing aids is the amount of funding the Ministry will provide, not whether the Appellant is eligible to receive hearing aids as a health supplement.

The panel finds that the Ministry was reasonable in determining that the Appellant was not eligible to receive the funding for the Roger system under section 69 of the EAPWDR, as a health supplement that is necessary to meet a direct and imminent life-threatening health need. There is no evidence that the Appellant faces a direct and imminent life-threatening health need, or that a Roger system would meet such a need. The audiologist’s statement about the importance of hearing vital information through the Roger system if the Appellant was in an emergency situation where hearing aids alone were not sufficient is speculation about a future possibility and does not meet the threshold of a direct, imminent and life-threatening need.

Conclusion:

The panel finds that the Ministry’s decision not to fully fund the Appellant’s Phonak Naida P90-UP hearing aids as the least expensive appropriate medical device under s. 3(1)(b)(iii) of the EAPWDR is not reasonable in light of the additional evidence provided by the Appellant. The panel rescinds the Reconsideration Decision about the Phonak hearing aids.

The panel finds that the Ministry’s decision that the Rogers system is not an eligible health supplement is reasonable and the panel affirms the Reconsideration Decision about the Rogers system.

The Appellant is partly successful in the appeal.

APPEAL NUMBER
2021-0096

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

Susan Ferguson

SIGNATURE OF CHAIR

DATE (YEAR/MONTH/DAY)

2021/06/21

PRINT NAME

Joan Cotie

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2021/06/21

PRINT NAME

Carman Thompson

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2021/06/21