

Part C – Decision Under Appeal

The decision under appeal is the decision of the Ministry of Social Development and Poverty Reduction (the “**Ministry**”) reconsideration decision, dated November 15, 2022 (the “**Reconsideration Decision**”), in which the Ministry found the Appellant not eligible to receive funding for a health supplement for a person facing a direct and imminent life-threatening health need pursuant to section 76 *Employment and Assistance Regulation* (the “**Regulation**”). More specifically, the Ministry denied the Appellant’s request for a CPAP trial and mask as the information did not establish that he requires a CPAP machine due to a direct and imminent life-threatening need as required by section 76(1)(a) and (b) of the *Regulation*.

Part D – Relevant Legislation

Employment and Assistance Regulation (the “**Regulation**”) sections 67 and 76, and sections 3 and 3.9 of Schedule C

Part E – Summary of Facts

(a) The Reconsideration Decision

The evidence before the Ministry at the Reconsideration Decision consisted of:

- The Appellant has not been designated as a person with disabilities (“**PWD**”), nor is he in receipt of income, hardship or disability assistance.
- On September 21, 2022, the Ministry determined that the Appellant met asset and income thresholds to be assessed for medical equipment on the basis of a life-threatening need.
- On September 23, 2022, the Ministry received the Appellant’s request for a CPAP trial and mask from CPAP provider (the “**Initial Request**”), which included the following information:
 - a pre-authorization request for a two (2) month CPAP rental (\$500.00) and a full mask for PAP therapy (\$299.00);
 - a Breathing Device Request and Justification form signed by the Appellant’s registered respiratory therapist, dated September 22, 2022, wherein the Appellant is said to require a CPAP machine to treat his moderate obstructive sleep apnea (“**OSA**”);
 - a treatment prescription for an “... *Auto CPAP... Based upon testing results, I am prescribing the above marked therapy for the medical treatment of sleep apnea. Treatment is expected to be life long...*” signed by a locum who was standing in for the Appellant’s doctor (the “**Doctor**”);
 - a prescription, dated September 9, 2022, signed by the Doctor wherein they write, “... *[the Appellant] has OSA and this presents a threat to life. He requires the machine, filters, headgear, hose and face mask. Treating CPAP is important as it helps to treat and prevent other conditions in addition to the OSA...*”
 - a diagnostic report, dated April 12, 2022, which confirms that (i) the Appellant has a history of hypertension and depression, (ii) a diagnosis of moderate OSA, and (iii) the potential need for further respiratory investigation.
- On October 25, 2022, the Ministry denied the Initial Request noting, amongst other things, that:

“The Diagnostic Report completed on April 12, 2022, shows the applicant's Apnea/Hypopnea index as 24.1, which is consistent with moderate Obstructive Sleep apnea. Ranges for this test value are 0-5 normal, 5-15 mild, 15-30 moderate and 30+ severe, as per the current consensus of the American Academy of Sleep Medicine.

CPAP therapy is medically indicated for and funded by the ministry for clients who are eligible for Schedule C benefits for moderate to severe sleep apnea.

The client is not eligible under Section 67 of the Employment and Assistance Regulations, Schedule C benefits. Hence, they were being assessed under Life Threatening Health Needs.

Under Section 76 of the Employment and Assistance Regulations the minister is satisfied that the applicant has not submitted any medical information that would indicate that the applicant faces a direct and imminent life-threatening health need. Therefore, the request for a 2 month trial of a CPAP machine and the purchase of a CPAP mask has been denied."

- On November 2, 2022, the Ministry received the Appellant's Request for Reconsideration (the "**Reconsideration Request**") which enclosed a three (3) page written statement. The Appellant explained:
 - while neither he nor his spouse qualify for income, hardship or disability assistance, they are both pensioners who lack the financial resources to purchase a CPAP machine; and
 - that he required the CPAP machine based on a life-threatening health need (i) as his spouse was waking up more frequently upon hearing his breathing stop, (ii) he felt very fatigued due to inadequate sleep arising from his OSA, and (iii) based on oxygen measurements taken by his stepdaughter after he awakes from a nap. In addition, the Appellant reiterated his Doctor's finding that he has "... OSA and this presents a threat to life..."
- On November 15, 2022, the Ministry issued the Reconsideration Decision wherein it denied the Reconsideration Request. In doing so, the Ministry noted:

"... The ministry finds:

 - *You are not eligible for health supplements under section 67, as discussed above, and therefore, do not meet the requirements of section 3(1)(a) of Schedule C; for this reason, your request is being assessed under section 76.*
 - *Your request meets the requirements of Section 76[1](d); section 3(1)(b) and 3.9: A respiratory therapist has assessed you have moderate sleep apnea and would benefit from a CPAP trial, as prescribed by a medical practitioner. You are requesting pre-authorization of the ministry and have no resources to meet your need for the trial and mask, which is established to be the least expensive appropriate equipment to treat moderate to severe OSA. Therefore, your request meets section 3(1)(b) and 3.9 of Schedule C, EA Regulation as required under section 76[1](d)(ii).*
 - *You have met the financial requirements to be assessed under life*

threatening health need, as required by section 76[1](c)

- *You do not have resources to meet your need for a CPAP trial and mask.*
- *However, the information provided does not establish that you require a CPAP machine due to a direct and imminent life threatening need as required by section 76(1)(a) and (b). The letter from [the Doctor] states that you have OSA which presents a threat to life. However, [the Doctor] does not present any further information to confirm you have an imminent life threatening need, nor how CPAP treatment is required to meet an imminent life threatening need.*

As a direct and imminent life threatening health need has not been established, you are not eligible for the requested funding of a CPAP trial and mask under section 76 of the EA Regulation..."

(b) The Appeal Notice

On November 22, 2022, the Appellant filed a Notice of Appeal (the "**Appeal Notice**"). In his three (3) page written submission, the Appellant restates many of the submissions found in the Reconsideration Request, namely those pertaining to a lack of financial resources, the personal impacts arising from his OSA, and the Doctor's note which states that his OSA "*...presents a threat to life...*"

The Appellant (i) notes that the Canada Revenue Agency has approved him to receive a Disability Tax Credit, and (ii) questions why his spouse was approved for a CPAP machine while he was denied. The Appellant concludes his statement by providing further insight on his OSA related symptoms.

Insofar as documents are concerned, the Appellant provided:

- a copy of a February 4, 2021 letter from the Canada Revenue Agency confirming the Appellant's entitlement to a Disability Tax Credit;
- a copy of a November 3, 2022 letter from Pacific Blue Cross to Connect Hearing regarding the Appellant's hearing aids; and
- a copy of his spouse's November 9, 2022 purchase order related to her CPAP machine.

On December 12, 2022, the Appeal hearing was conducted by videoconference.

(c) Late Evidence

On December 7, 2022, the Appellant submitted further evidence in support of the Appeal (the "**Late Evidence**"). The 19-page Late Evidence package consists of:

- general information regarding "CPAP Masks for Beards" from the CPAP and Sleep Apnea Education Center;

- an August 15, 2019 respiratory diagnostic report from Island Health in which indicates:

"Reason for Exam

... Has been a smoker for about 40 years. Had a possible COPD exacerbation... Also has sleep apnea...

Report

*... Query COPD exacerbation on a background of sleep apnea...
Normal flow volume curve.*

Comparison: 12/09/2018: FVC 3.89 down to 3.67; FEV1 3.09 down to 2.80 suggestive of some deterioration.

Impression: Normal spirometry with some loss in flow compared to previous study. No significant response to bronchodilator."

- a September 6, 2022 letter from a Health Authority wherein an outpatient social worker describes her efforts to help the Appellant obtain a CPAP machine;
- a September 6, 2022 counselling report from the same Health Authority wherein it is noted that the Appellant and his family are more concerned about financial struggles than diabetes management;
- an undated "Assessment of Care Needs for Seniors" in which it is noted that the Appellant has not been diagnosed with COPD;
- a September 9, 2022 note from the Appellant's ear, nose and throat specialist (the "ENT") arising from the Appellant's ear related issues and investigations as they pertain to tinnitus. The ENT notes that the Appellant has OSA and recommends "... a CPAP machine for this patient to address his OSA in conjunction with trying to lose weight...";
- an October 2022 medically reviewed article by Kingman P. Strohl titled, "Obstructive Sleep Apnea (OSA)", which provides general information on OSA and its symptomology; and
- a six (6) page written statement from the Appellant restating the information found in his prior written submissions and explaining how the above noted late evidence supports his Appeal.

The Ministry had no objection to the Late Evidence. The Panel determined that the Late Evidence was admissible as additional evidence pursuant to section 22(4) of the *Employment and Assistance Act* as it was reasonably required for a full and fair disclosure of

all matters related to the decision under Appeal. More specifically, the Late Evidence contributes to the Panel's understanding of the circumstances surrounding the Appellant's request for a CPAP trial and mask.

(d) Oral Submissions

During the hearing of the Appeal, the Appellant called two (2) witnesses to provide oral evidence in support of the Appeal. His first witness, his spouse, provided evidence regarding the Appellant's OSA related symptomology noting that a CPAP machine could possibly save his life. His second witness (who also acted as his advocate), his stepdaughter, provided evidence regarding what she described as the Appellant's deteriorating health arising from his inability to maintain a restful sleep which was a direct result of the Appellant's OSA. In all, the Appellant's witnesses evidenced that the Appellant experienced significant issues with his sleep arising from his OSA which impacted his functionality.

The Appellant orally restated much of the information found the Initial Request, the Reconsideration Request, his Appeal Notice and the Late Evidence. Further, he questioned why the Ministry granted his spouse a CPAP machine, but not him. The Appellant asserted that he felt mistreated and that he had a life-threatening need for a CPAP machine. Upon questioning, the Appellant described his OSA related symptoms which impacted his ability to obtain/maintain a restful sleep. The Appellant further confirmed that, while he would follow up with his doctor, he had yet to be formally diagnosed with COPD. When asked about whether his OSA gave rise to an imminent life-threatening need, the Appellant explained that none of his doctors ever described an imminent life-threatening need; however, he emphasized that his OSA presented as a threat to his life, whether today or two (2) years from now.

In response, the Ministry referred to and relied upon the Appeal Record. After obtaining consent from the Appellant's spouse, the Ministry explained that she received Ministry funding for a CPAP machine given that her records pertaining her medical condition(s) evidenced an imminent life-threatening need. Further, the Ministry confirmed that the Appellant's financial circumstances were not a factor in its Reconsideration Decision as the Ministry found that the Appellant met all elements of section 76 of the *Regulation*, save and expect for those elements pertaining to a life-threatening need. For clarity, the Ministry explained that a life-threatening need must be imminent, meaning something that will likely happen if a health supplement is not provided. To that end, the Ministry noted that the Doctor's September 9th prescription pad note fell short of establishing that the Appellant had an imminent life-threatening need for a CPAP machine.

During the course of oral submissions, it was confirmed that the Appellant is not a recipient of income, hardship or disability assistance.

Part F – Reasons for Panel Decision

The issue under appeal is the reasonableness of the Ministry's Reconsideration Decision in which the Ministry found the Appellant not eligible to receive funding for a health supplement for a person facing a direct and imminent life-threatening health need pursuant to section 76 of the *Regulation*.

(a) Appellant's Position

The Appellant argues he should be eligible for a CPAP machine as provided for by section 76 of the *Regulation* given that his OSA presents as a threat to his life.

(b) Ministry's Position

The Ministry maintains that the Appellant does not qualify for a health supplement as provided for by section 76 of the *Regulation* for the same reasons as stated in the Reconsideration Decision.

(c) Panel Decision

Briefly, section 67 of the *Regulation* sets out who may be eligible for health supplements. The Ministry may provide medical equipment and devices set out in Schedule C to a person who is in receipt of income assistance if they are a qualifying person. They may also provide the same to a continued person who is deemed to have access to medical services only or to transitional health services. For clarity, section 66.1 of the *Regulation* defines a "qualifying person" as one who (a) has persistent multiple barriers to employment, or (b) is a recipient of income assistance. Further, 66.1 defines a "continued person" as (a) a main continued person under section 66.3 (1) or 66.4 (1) of the *Regulation* or (b) a dependent continued person under section 66.3 (2) or 66.4 (2) of the *Regulation*.

Section 3(1)(b) of Schedule C sets out that the Ministry may provide a medical device described in section 3.9 to a person eligible under section 67 of the *Regulation* if the person has received the pre-authorization of the Ministry, if there are no resources available to person to pay for it, and if the medical device is the least expensive appropriate one.

Section 3.9 of Schedule C sets out that a positive airway pressure device, an accessory that is required to operate a positive airway pressure device, or a supply that is required to operate a positive airway pressure device item must be:

- prescribed by a medical practitioner or nurse practitioner;
- a respiratory therapist has performed an assessment that confirms the medical need for the item; and

- the Ministry is satisfied that the item is medically essential for the treatment of moderate to severe sleep apnea.

Section 76 of the *Regulation* sets out that the Ministry may provide medical equipment and devices listed in Schedule C if it is provided to a person who is otherwise not eligible for it under the *Regulation* (including someone who does not meet the requirements of section 67), and if the Ministry is satisfied that:

1. the person faces a direct and imminent life-threatening need and there are no resources available to the person with which to meet that need;
2. the health supplement is necessary to meet that need;
3. the person's family unit has an annual adjusted net income of \$42,000 or less; and
4. the requirements specified in section 3.9 are met.

With respect to the first two (2) above noted factors, the requesting person should be able to provide the Ministry with information that (i) identifies what the direct and imminent threat to their life is, and (ii) how the requested supplement will prevent that direct and imminent threat to their life.

(i) Eligibility under section 67 of the *Regulation*

After considering all the evidence, the Panel finds that the Ministry reasonably assessed the Appellant under section 67 of the *Regulation*.

The Panel finds, and the Appellant does not dispute, that neither he nor his family unit is a recipient of income, hardship or disability assistance; as a result, the Appellant did not qualify for any benefits provided pursuant to section 67 of the *Regulation*. For greater clarity, the Panel finds that the Appellant is not a "*qualifying person*" as he is neither (a) designated as a person persistent multiple barriers to employment, nor (b) is he a recipient of income, hardship or disability assistance.

Further, the Panel finds that the Appellant is not a "*continued person*" as defined by section 66.1 of the *Regulation*.

As a result, it was reasonable for the Ministry to assess the Appellant's request for a CPAP machine pursuant to section 76 of the *Regulation*.

(ii) Eligibility under section 76 of the *Regulation*

Insofar as section 76 of the *Regulation* is concerned, the Ministry confirmed that the Appellant satisfied all elements of the section save and except for section 76(1)(a) and (b) which required the Appellant to provide information establishing that he required a CPAP machine due to a direct and imminent life-threatening need.

While the Appellant's evidence confirms that the Appellant (i) has moderate OSA, (ii) suffers from interrupted sleep and breathing issues due to his OSA, (iii) the OSA presents as a threat to the Appellant's life, and (iv) he would benefit from a CPAP machine, the

Appellant's evidence does not establish that he requires a CPAP machine due to a direct and imminent life-threatening need. While the Panel appreciates that the Appellant's OSA may present as a threat to the Appellant's life, the Panel finds that the Appellant did not provide sufficient evidence, medical or otherwise, establishing that his OSA presents as a direct and imminent life-threatening health need as required by section 76 of the *Regulation*.

As a result, the Panel finds that the Ministry's decision to deny the Appellant a health supplement as provided for by section 76 of the *Regulation*, namely a CPAP trial and mask, was a reasonable application of the legislation in the circumstance.

(d) Conclusion

The Panel finds that the Ministry's decision to deny the Appellant a health supplement as provided for by section 76 of the *Regulation*, namely a CPAP trial and mask, was a reasonable application of the legislation in the circumstance.

While the Appellant is not successful in this Appeal, the doors to a health supplement are not closed to him. Should the Appellant reapply for a CPAP machine, he is encouraged to provide the Ministry with detailed medical information explaining how his OSA presents as direct and imminent threat to his life thereby justifying a need for a CPAP trial and mask. For example, the Ministry's policy provides non-exhaustive examples of what may be considered a direct and imminent life-threatening health need including, "*A person with a severe sleep apnea and a serious heart condition requests a continuous positive airway pressure device. Without the device, the person will likely suffer heart failure during sleep.*"

(e) Legislation

Employment and Assistance Regulation

General health supplements

67(1) 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 income assistance, if
 - (i) the family unit includes a qualifying person, or
 - (ii) the health supplement is provided to or for a person in the family unit who is under 19 years of age,
- (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

- (i) is a continued person under section 66.3 (1) or (2) [access to medical services only], or
- (ii) is a continued person under section 66.4 (1) [access to transitional health services] and was, on the person's continuation date, a qualifying person or part of a family unit that then included a qualifying person, or
- (iii) is a continued person under section 66.4 (2).

Health supplement 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).

**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 67 [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.

...

(2.1) 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.

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.

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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)

Section 24(2)(a) or Section 24(2)(b)

Part H – Signatures

Print Name

Anil Aggarwal

Signature of Chair

Date (Year/Month/Day)

2022/12/12

Print Name

Maryam Majedi

Signature of Member

Date (Year/Month/Day)

2022/12/12

Print Name

Jane Nielsen

Signature of Member

Date (Year/Month/Day)

2022/12/12