Appeal Number 2023-0222

Part C – Decision Under Appeal

The decision under appeal is the Reconsideration Decision of the Ministry of Social Development and Poverty Reduction ("Ministry") dated July 19, 2023, in which the Ministry determined that the Appellant was not eligible for funding for a 2-month trial of a CPAP machine.

The Ministry decided that the Appellant was ineligible for the benefit based on the Appellant not having evidence of moderate or severe obstructive sleep apnea. This was determined under Schedule C, Section 3 of the Employment and Assistance for Persons with Disabilities (EAPWD) Regulation.

Part D – Relevant Legislation

Employment and Assistance for Persons with Disabilities Regulation

- Sections 62 and 69
- Schedule C, Sections 3 and 3.9

Part E – Summary of Facts

Evidence Before the Ministry at Reconsideration:

The Appellant applied to the Ministry on April 12th, 2023, to request funding for a CPAP for a 2-month trial. The Ministry denied the request on May 18th and informed the Appellant that day. The Appellant submitted a request for reconsideration on June 14th, and on July 19th the Ministry completed its review, and advised the Appellant that their request was denied.

In their response, the Ministry noted that the Appellant had been designated as a Person with Disabilities and is receiving disability assistance.

In their initial submission to the Ministry on April 12th, the Appellant included a letter (February 2023) from a doctor who specializes in sleep disorders. The doctor stated that the Appellant has mild to moderate obstructive sleep apnea, noted that CPAP therapy had been accessed on a trial basis, and recommended continuing with CPAP treatment. Also included: a report from a June 2022 polysomnogram, which reported that the Appellant has mild obstructive sleep apnea. Another inclusion was a quote for a 2-month CPAP rental for $390; a Breathing Device Request and Justification form completed by a respiratory therapist, stating that the Appellant requires CPAP equipment to treat obstructive sleep apnea; a prescription from the doctor who specializes in sleep disorders, for an "auto-titrating CPAP device…".

On May 8, 2023, the Ministry received a revised quote for $350 for the CPAP device rental.

In their decision summary, the Ministry said that the Appellant's apnea hypopnea index (AHI) was shown as 12.2 events per hour, which is consistent with mild sleep apnea. The ranges are 0-5 normal; 5-15 mild; 15-30 moderate; and 30+ severe. Since the Appellant's index is in the mild range, and moderate or severe indices are required to qualify for funding the CPAP device, the request was denied.

The Appellant requested additional time to submit additional information. On July 13th, the Ministry received three items:

- A letter from the Appellant's parents, explaining the Appellant's medical conditions and sleep difficulties and noting the improvement in sleep, anxiety, and mental health with the use of the CPAP device.
- A letter from a doctor indicating that the Appellant was evaluated at a sleep disorders clinic and diagnosed with sleep apnea and restless leg syndrome. The doctor also noted that the Appellant responded well to using the CPAP device, and showed improvement not only with sleep issues, but also with management of significant other health issues (autism, cluster B personality disorder, and stress).
- Compliance reports detailing the Appellant's performance while using the CPAP device, from March through June 2023.

Additional Evidence:

Prior to the hearing, the Appellant sent a 2-page submission, which included an excerpt from a brochure that details Tuberous Sclerosis Complex (TSC), which the Appellant was recently diagnosed with, describes the condition, and outlines the symptoms, which can affect the lungs, brain, and other organs, and describes the treatment for it. The Appellant and her father also spoke about this diagnosis.

At the hearing, the Appellant confirmed that they are still using the CPAP machine they had on rental and will continue to do so until a decision is made as to whether they qualify for this benefit from the Ministry. Since the Appellant has already done what the Ministry would accept as a trial of the CPAP device, the Ministry was asked and confirmed that if the Appellant is successful in their appeal, they would be entitled to having the CPAP device purchased for them, and the trial would no longer be necessary.

Admissibility of Additional Evidence:

Neither party objected to the admissibility of any of the additional evidence.

The Panel finds that the additional evidence is reasonably necessary for the full and fair disclosure of all matters relating to the decision under appeal, and therefore is admissible under section 22(4) of the Employment and Assistance Act.

Part F – Reasons for Panel Decision

Panel Decision:

The Reconsideration Decision under appeal is the decision denying the Appellant's application for funding for a CPAP device.

The Regulations set out the criteria for providing breathing devices to applicants. Schedule C, 3.9 (Medical equipment and devices – breathing devices), (2)(c), says that one requirement is that "the minister is satisfied that the item is medically essential for the treatment of moderate to severe sleep apnea", which gives the Ministry a degree of discretion in determining the severity of the Appellant's condition. Based on the information from the testing done on the Appellant and also the legislation, the decision to deny the device was reasonable at the time it was made.

However, when the Ministry denied the application, they did not have the information and therefore did not consider that the Appellant suffers from Tuberous Sclerosis Complex, which is a serious physical condition that can affect many organs in the body, among them the lungs and brain. The Panel's opinion is that, given this new information, and the Ministry's consideration of comorbidities when assessing an Appellant's eligibility for funding for the device, the Ministry's decision to deny the funding was no longer reasonable.

Many issues affect the Appellant, some of which are physical, and some are mental. The Panel's opinion is that the Ministry should consider both mental and physical health in situations such as this one, and that some conditions are both mental and physical in their effects on sleep. If just the physical condition is considered in this case, the addition of Tuberous Sclerosis Complex to the comorbidities could make the Appellant's situation considered more severe. If the many mental issues the Appellant suffers from are added into the mix, the overall health situation is very challenging.

The Appellant's AHI score is 12.2, which is on the higher end of the "mild" range. The doctor (a specialist in sleep disorders) described, in a letter, "the polysomnogram identified "mild-to-moderate" severity of the sleep apnea" and that "there can be significant night-to-night variability" in AHI scores. Some of the medical evidence is also compelling- for example, the doctor's comment that "for many patients, this degree of sleep disordered breathing can contribute to significant symptoms and challenges", and the doctor's assessment that the Appellant is "a complex patient with significant sleep disorder". The doctor also stated in the letter "sleep disorders can affect domains of

cognition, mood, attention, and psychomotor functioning". While the Appellant's AHI, viewed in isolation of other factors, is within the "mild" range, when viewed together with other medical assessments, they paint a more comprehensive picture of the overall condition of the Appellant's sleep apnea.

For these reasons, the Panel finds that the Ministry was not reasonable to decide that the Appellant was not entitled to funding for a CPAP device.

Conclusion:

The Panel finds that the Ministry's reconsideration decision that the appellant is not eligible for a CPAP breathing device is a not reasonable application of the legislation in the Appellant's circumstances.

The Panel rescinds the Ministry's reconsideration decision. The Appellant is successful in their appeal.

Schedule of Legislation

EMPLOYMENT AND ASSISTANCE FOR PERSONS WITH DISABILITIES REGULATION
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 a dependent child, 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 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 person's family unit is receiving premium assistance under the Medicare Protection Act, 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 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.

APPEAL NUMBER 2023-0222

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 for Persons with Disabilities (EAPWD) Regulation Section 62
And
Schedule C, Sections 3 and 3.9

Part H – Signatures

Print Name Carla Gail Tibbo	
Signature of Chair	Date (Year/Month/Day) 2023/08/30

Print Name Linda Pierre	
Signature of Member	Date (Year/Month/Day) 2023/08/30
Print Name Mimi Chang	
Signature of Member	Date (Year/Month/Day) 2023/08/30