

Part C – Decision Under Appeal

The decision under appeal is the Reconsideration Decision of the Ministry of Social Development and Poverty Reduction (“Ministry”) dated June 14, 2024, in which the Ministry denied a health supplement for a Pilot 24 Lite backup battery pack. The Ministry was not satisfied that the battery pack was the least expensive appropriate medical equipment or device.

Part D – Relevant Legislation

Employment and Assistance for Persons with Disabilities Regulation (“Regulation”), section 62 and Schedule C, sections 3 and 3.9

Employment and Assistance Act (“Act”), section 22(4)

Employment and Assistance Regulation, section 86(b)

Part E – Summary of Facts

The hearing took place on July 16, 2024, with the Ministry attending by telephone. The Appellant did not attend the hearing. An interpreter attended, as the Appellant requested in his Notice of Appeal.

Request for Adjournment:

The Appellant sent an email to the Tribunal on Saturday, July 13, 2024, asking for an adjournment of the hearing. The Tribunal received the email on the next business day, Monday, July 15, 2024, which was the day before the hearing,

Under s. 20(2) of the Act, the Tribunal Chair may establish practices and procedures for the Tribunal that are not inconsistent with the Regulations Under the Tribunal Practices and Procedures, if a party requests an adjournment within one business day of the hearing, the party must make the request to the Panel at the hearing, either by telephone or in person. The Appellant did not attend the hearing by telephone or in person to make the request. Nevertheless, the Panel considered the Appellant's request.

The Appellant's email states:

Bonjour, hi,

I did not receive a confirmation that eaat received my adjournment request.

Le samedi 13 juillet 2024 à 16 h 19 min 59 s HAE, [Appellant's name and email address] a écrit :

Bonjour, hi,

See attached files.

I have to submit more details about my adjournment request but I am not able to add

more info on this form.

I dont undestand why I did not receive file 2024-0244.

I disputed at least 4 sr- decisions so there should be 4 files generated by eaat tribunal. I want all the files to be generated before the next hearing.

I have 2 others court cases the same week (week of july 15th).

I can provide details later about my other courts cases.

I will try to give a quick call to the tribunal using their total free number on monday if I

can find a public phone.

I dont have an active cell phone and I am only able to receive voicemail messages.

I wrote on the form:

I am not in [Municipality] on July 15-16th. I did not receive any notification about the court date before July 13th less than 2 business days before the hearing.

I did not receive a reconsideration decision yet in file [Reconsideration Service Number]. I want to receive a reconsideration decision before the hearing.

I did not have time to send all the documents and evidence I want to add in every appeal file.

The ministry did not generate a decision yet about my request to receive shelter benefits from Sept 2021 to Jan 2023 (see Gmail document) since my last interaction with bands.

At the hearing, the Ministry took no position on the Appellant's request for an adjournment.

Appellant's Communication with the Tribunal:

On the Notice of Appeal, the Appellant answered "No" to the question "Do you consent to communicating with the Tribunal by email?"

The Panel Chair contacted the Tribunal and was told by an Appeal Coordinator:

- The Appellant phoned the Tribunal on the Friday before the hearing and spoke to an Appeal Coordinator. He asked the Appeal Coordinator to email him the Appeal Records in this appeal and three others. The Appellant sends emails to the Tribunal, but this request is the only time the Appellant has consented to accept email communications from the Tribunal.
- The Appellant phoned the Tribunal and spoke to an Appeal Coordinator on the morning of the hearing, several hours before the hearing began, about his request for an adjournment of this hearing and another set for earlier the same day. The Appeal Coordinator said that they told the Appellant he would have to attend the hearing in person or by phone to ask for an adjournment. They tried to give the Appellant the teleconference numbers so that he could join the hearing by telephone, but the Appellant interrupted them repeatedly and would not let them give him the information.
- The Appeal Coordinator said that the Appellant was communicating with them clearly in English and appeared to understand what the Appeal Coordinator was saying to him.

The Panel addresses the Appellant's stated reasons for requesting an adjournment as follows:

Notice of Hearing Date, Time and Place:

Under s. 85(2) of the Employment and Assistance Regulation, the Tribunal Chair must notify the parties of the date, time and place of an appeal hearing at least two business days before the hearing. Under the Tribunal Practices and Procedures, Paragraph 2.3, every appellant must provide an address for delivery on the Notice of Appeal, and information delivered by the Tribunal to the appellant's address for delivery will be treated as having been delivered to the appellant. Under Paragraph 4.2, the Tribunal provides notice of the hearing to the appellant's address for delivery. The Appellant did not consent to receive communications from the Tribunal by email. Therefore, the Tribunal mailed the Notice of Hearing by Express Post to the mailing address provided by the Appellant in his Notice of Appeal (Address #1).

According to the Canada Post Delivery Notice, on July 9, 2024, Canada Post attempted delivery and, as the Express Post envelope apparently could not be left at Address #1, Canada Post left a notice saying where and when to pick up the item at a post office nearby. The Panel has considered whether attempted delivery and a pick up notice left at the address for delivery is "delivered to the appellant". The Appellant gave Address #1 as his mailing address, which is his address for delivery of documents from the Tribunal. The Panel recognizes that a person who is unhoused might have challenges providing an effective address for delivery of mail. However, the Panel notes that, while the Appellant sends emails to the Tribunal, he has refused to receive email communications from the Tribunal. The only way the Tribunal can deliver the Notice of Hearing to the Appellant is by mail to the address the Appellant provided. There is no indication that the Appellant picked up the Express Post mail from the post office, but the Panel finds that it is the Appellant's responsibility to provide an address for delivery and then keep a reasonable watch for delivery of documents from the Tribunal. Alternatively, the Appellant could have consented to receive emails from the Tribunal and received the Notice of Hearing electronically.

The Panel finds that, by mailing the Notice of Hearing to the mailing address that the Appellant provided in his Notice of Appeal, with confirmation that Canada Post left a pick up notice at the address on July 9, 2024, the Tribunal Chair notified the Appellant of the date, time and place of the hearing, more than two business days before the hearing on July 16, 2024.

Additional Evidence:

The Appellant says that he did not have time to submit all the documents and evidence he wanted to submit in all his appeals.

Under Paragraph 5.2(h)(i) of the Tribunal Practices and Procedures, if a party wants to provide the Tribunal with additional documentation not included in the Appeal Record, they should provide it to the Tribunal at least three business days before the hearing, so the Tribunal can distribute it to the parties and the panel. If they cannot provide the additional documentation at least three days before the hearing, they may provide it at the hearing.

The Appellant did not provide additional information at least three days before the hearing, and he did not attend the hearing. He says he has at least four appeals ongoing, and the Panel cannot determine what additional information, if any, the Appellant wants to submit in this appeal, or if that information would be likely to be relevant and admissible, so as to warrant an adjournment.

As the Appellant has not provided any detail about what sort of evidence he wants to provide, or for which appeals, the Panel declines to adjourn the hearing to give the Appellant more time to possibly provide further unspecified evidence.

Other Appeals and Ministry Decisions:

The Appellant says that, when he asked the Tribunal to send him copies of appeal records on July 12, 2024, he did not receive one of the appeal records for another appeal. He says he wants "all the files to be generated before the next hearing."

The Appellant also says that he is waiting for the Ministry to give a reconsideration decision in another matter, and he wants that decision "before the hearing". The Panel has no information to indicate that other appeals, Ministry decisions or reconsideration decisions are relevant to deciding this Appeal, about eligibility for a health supplement for a battery pack.. The Panel declines to adjourn the hearing to give the Appellant more time to receive an appeal record in another appeal or to wait for the Ministry to give a decision or reconsideration decision on another matter.

Ability to Attend the Hearing:

The Appellant said that on the day of the hearing he is not in the community where the hearing is held. The Appellant did not explain where he is or why he was not able to be in the community where he lives and where the hearing was being held. The Appellant also said that he does not have an “active” cell phone to do more than receive voice messages. However, the Panel notes that the Appellant was able to telephone the Tribunal on the day of the hearing. The Panel also notes that the Appellant would not let the Tribunal give him the information that would have let him try to join the hearing by telephone. It appears from his written request to adjourn that he wants to delay this and other appeals until the Ministry gives a reconsideration decision about shelter allowance between September 2021 and January 2023, which is not relevant to the issues in this appeal. The Panel has considered the Appellant’s assertion that he is absent from the community where the hearing is held and declines to give an adjournment on that ground.

Conclusion re Adjournment:

In summary, the Appellant sent a request for an adjournment within one business day of the hearing. The Panel finds that the Appellant was aware that he would have to make the request at the hearing, either in person or by telephone, but he did not attend the hearing. Nevertheless, the Panel considered the reasons for the request that are set out in the Appellant’s email. Based on the information in the Appellant’s emailed request, and the additional information from the Tribunal about the Appellant’s communication with the Tribunal, the Panel declines to adjourn the hearing.

The Panel confirmed that the Appellant had been notified of the hearing date more than two business days before the hearing. The Panel heard the appeal in the absence of the Appellant, under s. 86(b) of the Employment and Assistance Regulation.

Evidence Before the Ministry at Reconsideration:

The Appellant is a recipient of disability assistance.

The Appellant requested a two month trial of a CPAP machine, with a Pilot 24 Lite backup battery (“Pilot 24”). The request stated that the Appellant needed the Pilot 24 because he does not always have access to electricity, and he would need access to a battery “to show proper compliance”. The Appellant provided a quote from a sleep apnea clinic for the Pilot 24 at a cost of \$435.

The Ministry approved a health supplement for the trial of the CPAP machine but denied a health supplement for the Pilot 24. The Ministry said that a backup battery was not eligible as a health supplement.

In the Request for Reconsideration, the Appellant stated:

- The sleep apnea clinic had told him that the Ministry had approved funding for backup batteries in the past.
- He does not have stable access to electricity, and when he does have access to electricity, there is no electrical outlet beside his bed.
- When he is camping in the summer, he cannot access electricity.
- The Ministry should contact the Appellant's family doctor or the respiratory therapist for more information.
- He was not able to use the CPAP machine for the 60 day trial that was approved, because he did not have the battery pack.

At Reconsideration, the Ministry determined that a backup battery was an eligible item for a health supplement but said that it was unable to determine that the Pilot 24 was the least expensive CPAP backup battery appropriate to the Appellant's needs. The Ministry said that the Pilot 24 is able to charge devices other than a CPAP machine, and the online information does not list any specific adaptations that a CPAP machine requires. The Ministry was not satisfied that the CPAP machine could not operate with a less expensive backup battery.

Additional Evidence:

At the hearing, the Ministry representative stated:

- The Pilot 24 is branded for use with a CPAP machine specifically, but from what the Ministry representative could see online, it is no different from a typical battery pack or power bank used for travel.
- Other generic battery packs cost half the price of the Pilot 24.

In answer to questions from the Panel, the Ministry representative stated:

- They are not aware of the Ministry funding requests for battery packs for CPAP machines previously.
- They did a search on Google, which they maintain shows that the Pilot 24 is no different from any other battery pack, it is not a special medical battery pack, it has just been branded as such to hike up the price.
- They have not checked with the sleep apnea clinic or anyone else to see if another battery pack would be adequate for the Appellant's purposes.

- They have spoken to the person who wrote the Reconsideration Decision and have been told that the reconsideration decision-maker did research about the Pilot 24 and other battery packs, but the details are not included in the decision.

Ministry:

The additional oral evidence from the Ministry provides further information about the Pilot 24 and whether there are less expensive options. The Panel finds that the additional evidence is reasonably necessary to determine the issues in the appeal. The Panel finds that the additional evidence is admissible under s. 22(4) of the *Employment and Assistance Act*.

Part F – Reasons for Panel Decision

The issue on appeal is whether the Ministry's Reconsideration Decision, in which the Ministry denied a health supplement for a Pilot 24 Lite backup battery pack, was reasonably supported by the evidence, or was a reasonable application of the legislation in the Appellant's circumstances. The Ministry was not satisfied that the battery pack was the least expensive appropriate medical equipment or device.

Appellant's Position:

In his Request for Reconsideration, the Appellant says that the Ministry has funded battery packs for CPAP machines in the past, and he needs the Pilot 24 to be able to use the CPAP machine for the two month trial that the respiratory therapist recommends. The Appellant says that he does not have stable access to electricity. In the summer, when he is camping, he does not have access to electricity, and when he has access to electricity there is no electrical outlet by his bed.

Ministry's Position:

The Ministry says that a battery pack for a CPAP can be an eligible item for a health supplement. The Ministry says that the Appellant's request for the Pilot 24 meets all the criteria for a health supplement for medical equipment except that the Ministry is not satisfied that the Pilot 24 is the least expensive appropriate medical equipment or device.

Panel Decision:

In the original decision, the Ministry denied the Appellant's request for a Pilot 24 because the Ministry said that a battery pack was not an eligible item for a health supplement. At Reconsideration, the Ministry determined that a battery pack is an eligible item but maintained that the Pilot 24 was not the least expensive appropriate medical equipment or device.

The Ministry determined that the Appellant's request met all the other criteria in Schedule C, sections 3(1), 3(2.1), 3.9(1)(a) and 3.9(2) of the Regulation, for a health supplement for medical equipment. The Ministry was satisfied that:

- The Appellant is eligible to receive health supplements under Schedule C, section 3 of the Regulation.
- The Appellant does not have resources available to pay the cost of or obtain the medical equipment.
- The Appellant was requesting pre-authorization from the Ministry.

- The equipment was prescribed by a medical practitioner.
- The Appellant submitted an assessment from a respiratory therapist confirming the need for the equipment.
- A battery pack is required to operate the CPAP machine because the Appellant does not have regular access to electricity.
- The Ministry is satisfied that the CPAP machine is medically essential for the treatment of moderate to severe sleep apnea.

At Reconsideration, the Ministry said that it was unable to determine if the Pilot 24 was the least expensive appropriate device. The Ministry said that a review of the Pilot 24 online showed that it is able to charge devices other than a CPAP machine, and “it does not list any specific adaptations that a CPAP machine requires to run.” The Ministry said that it could not establish that the CPAP machine needed a certain type of backup battery, and therefore the Ministry was not satisfied that the Appellant could not use a less expensive battery pack.

At the hearing, the Ministry representative said that they had spoken to the person who prepared the Reconsideration Decision, and that person had researched other, less expensive battery packs. The Ministry conceded that the details of that research are not included in the Reconsideration Decision. The Ministry representative said that they had done a Google search in preparing for this appeal and determined that the Pilot 24 was no different from a generic battery pack or power bank such as people use for other devices when they travel. They suggested that the Appellant could use a generic battery pack that would cost half the price of the Pilot 24.

While the Panel appreciates that the Ministry representative has tried to provide information that was missing from the Reconsideration Decision, the Panel places little weight on that evidence. In fact, the additional evidence from the Ministry highlights the inadequacy of the reasons in the Reconsideration Decision. The Ministry has not asked a respiratory therapist, a doctor, the sleep apnea clinic, or any other resource that would have specialized knowledge about the kind of battery pack that is needed to safely operate a CPAP machine for the time it is required to run during the night. The Panel notes that the CPAP machine is a medical device that has to operate overnight, and it would be particularly important that whatever battery pack is provided is able to power the CPAP reliably for an extended period. The only information from a source with that specialized knowledge is the pre-authorization request from the sleep apnea clinic, which specifies the Pilot 24. While the Ministry may have done some investigation that is not included in the Reconsideration Decision, in providing additional information at the hearing the

Ministry appears to acknowledge that additional information should have been included in the Reconsideration Decision.

The Panel is not making a finding that the Pilot 24 is the least expensive appropriate device. Rather the Panel finds that the Ministry has not provided sufficient reasons for its conclusion that the Pilot 24 is not the least expensive appropriate device.

Further, the Ministry originally denied the health supplement for a reason it later determined to be incorrect. The Panel finds that, in the Appellant's circumstances, having made that error, it was then unreasonable for the Ministry to deny the health supplement at Reconsideration without either confirming with a sleep clinic, respiratory therapist or other knowledgeable person, that there was a less expensive appropriate battery pack, or giving the Appellant the opportunity to ask the sleep apnea clinic about whether there was a less expensive battery pack that would work to operate the CPAP machine. In the meantime, as the Ministry is aware, without an appropriate battery pack, the Appellant cannot begin an approved trial of medical equipment to treat a moderate to severe medical issue.

Conclusion:

The Panel finds that the Ministry's Reconsideration Decision, in which it denied a health supplement for the Pilot 24, did not provide sufficient reasons for the decision, and was not a reasonable application of the legislation in the Appellant's circumstances. The Panel rescinds the decision. The Appellant is successful in the appeal.

Schedule of Legislation

Employment and Assistance for Persons with Disabilities Regulation

General health supplements

s. 62 The minister may provide any health supplement set out in section 2 [*general health supplements*] or 3 [*medical equipment and devices*] of Schedule C to or for

(a) a family unit in receipt of disability assistance,

(b) a family unit in receipt of hardship assistance, if the health supplement is provided to or for a person in the family unit who is under 19 years of age, or

(c) a family unit, if the health supplement is provided to or for a person in the family unit who is a continued person.

Medical equipment and devices

s. 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.

Employment and Assistance Act

s. 22 (4) A panel may consider evidence that is not part of the record as the panel considers is reasonably required for a full and fair disclosure of all matters related to the decision under appeal.

Employment and Assistance Regulation

Time period for scheduling and conducting hearing

s. 85 (1) A hearing must be held within 15 business days after the appeal form is delivered under section 84, unless the chair of the tribunal and the parties consent to a later date.

(2) The chair of the tribunal must notify the parties of the date, time and place of a hearing described in subsection (1) at least 2 business days before the hearing is to commence.

Procedures

s. 86 The practices and procedures of a panel include the following:

(b) the panel may hear an appeal in the absence of a party if the party was notified of the hearing;

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
Susan Ferguson

Signature of Chair

Date (Year/Month/Day)
2024/07/19

Print Name
Mimi Chang

Signature of Member

Date (Year/Month/Day)
2024/07/19

Print Name
David Handelman

Signature of Member

Date (Year/Month/Day)
2024/07/19