

PART C – Decision under Appeal

The decision under appeal is the ministry's Reconsideration Decision of 31 January 2012 that the appellant was not eligible for a leg Air Cast because the ministry determined that the item is not listed as a medical equipment or device – orthoses, under section 3.10 of Schedule C of the Employment and Assistance for Persons with Disabilities Regulation. Further, the ministry determined that she is not eligible for the item under any of the medical equipment and devices as set out in sections 3.1 to 3.11 of Schedule C as the leg Air Cast is not one of the medical equipment and devices listed and the information provided does not establish the other legislative criteria, set out in the sections for each of these health supplements, have been met.

In addition, the ministry determined that the appellant is not eligible for the Air Cast as a medical supply under section 2(1)(a) of Schedule C, or elsewhere as an eligible health supplement under Schedule C. The ministry also determined she is not eligible for the Air Cast under the legislated criteria as a life threatening health need as a person not otherwise eligible for a health supplement under section 69 of the Regulation.

PART D – Relevant Legislation

Employment and Assistance for Persons with Disabilities Regulation (EAPWDR), Schedule C.

PART E – Summary of Facts

The evidence before the ministry at reconsideration indicated the following:

- The appellant has PWD designation and is in receipt of monthly disability assistance
- The appellant had surgery to repair a ruptured Achilles tendon. On discharge from the hospital on 14 December, a medical practitioner prescribed, and she was provided with, crutches, heel wedges and a leg Air Cast, at a billing cost of \$231.00.
- On 09 January 2012 the ministry approved the appellant's request to cover the cost of the crutches and heel wedges, but denied the request for \$170.00 for the Air Cast.
- On discharge from the hospital, the appellant was given an appointment for a follow-up at the hospital's cast clinic for 10 January 2012. Following that appointment, the medical practitioner who saw her reported in a Progress Note of the same date that she had been fitted with an Air Cast with heel wedges, her wound had healed well and that they were going to start decreasing the heel wedges then, with the goal of her being flat within 1 month. He went on to write:

"Incidentally, I gather there was some question about the necessity for an Air Cast in terms of social services. I would consider an Air Cast a necessary way of treating this problem. First of all, one needs an Air Cast so that one can take it off to look at the wounds and, secondly, the multiple heel wedges would not be practical any other way. I, therefore, suggest that with a complicated Achilles problem like this, there is really no other way of treating it properly."

In her Notice of Appeal date 08 February 2012 the appellant stated:

"I am on fixed income of \$906 per month and cannot pay. I need the Air Cast so that the level of my foot can be raised or lowered. Constant recasting would have been costly and impossible. These are doctor's orders and necessary for proper healing."

At the hearing, the appellant described the air cast as an air-filled rubber cushion, surrounding her ankle, the air pressure controlled by a pump, to compensate for changes in the wedges. The device is encased in plastic, so it looks something like a ski boot.

The appellant read from a note dated 23 February 2012 prepared by the same physician who wrote the Progress Note cited above. He wrote: "An Air Cast is a type of ankle foot orthosis (sec 1e) and is necessary for postop care under sec 2c(ii)." A copy of this note was sent to the panel. The appellant confirmed that the section references are to subsections of section 3.1 of EAPWDR Schedule C. The ministry had no objection to the admissibility of this evidence, noting only that it was not before the ministry at reconsideration

The panel finds that the new information provided by the physician is in support of the information and records that were before the ministry at the time of reconsideration. The physician's comments clarify the nature and purpose of the Air Cast, consistent with his remarks in the above Progress Note. The panel therefore admits the new information as evidence pursuant to section 22(4) of the Employment and Assistance Act.

The ministry stood by its position at reconsideration.

The panel finds as fact that:

- The Air Cast is an essential element of the treatment strategy aimed at restoring the appellant's walking functionality compromised by a ruptured Achilles heel.
- The Air Cast is required for her post-operative treatment, assisting in the healing process following surgery.
- The Air Cast is not:
 - (a) a prosthetic and related supplies;
 - (b) a plaster or fiberglass cast (it is not a rigid covering placed next to the skin, made from those materials; though plastic (= fiberglass) is used for the outside cover, the support is provided by an inflatable, shaped, rubber cushion);
 - (c) a hernia support;
 - (d) an abdominal support;
 - (e) a walking boot for a fracture (as no fracture is involved).

PART F – Reasons for Panel Decision

The issue under appeal is whether the ministry reasonably determined that the appellant was not eligible for a leg Air Cast because the item is not listed as a medical equipment or device – orthoses, under section 3.10 of Schedule C of the Employment and Assistance for Persons with Disabilities Regulation, and that she is not eligible for the item under any of the medical equipment and devices under sections 3.1 to 3.11 of Schedule C, as the leg Air Cast is not one of the medical equipment and devices listed, and the information provided does not establish the other legislative criteria set out in the sections, for each of these health supplements, have been met.

The panel notes that the ministry also determined that the appellant is not eligible for the Air Cast as a medical supply under section 2(1)(a) of Schedule C, or elsewhere as an eligible health supplement under Schedule C. The ministry also determined she is not eligible for the Air Cast under the legislated criteria as a life threatening health need as a person not otherwise eligible for a health supplement under section 69 of the Regulation. However, no argument was made or evidence presented by the appellant that her eligibility relied on these legislated provisions. The panel therefore finds that the ministry reasonably determined that she was not eligible on these grounds.

With respect to the appellant's eligibility for the Air Cast under section 3.10 of Schedule C of the EAPWDR, the relevant parts of the legislation are set out below:

Medical equipment and devices – orthoses

3.10 (1) In this section:

"off-the-shelf", in relation to an orthosis, means a prefabricated, mass-produced orthosis that is not unique to a particular person;

"orthosis" means

- (a) a custom-made or off-the-shelf foot orthotic;
- (b) custom-made footwear;
- (c) a permanent modification to footwear;
- (d) off-the-shelf footwear required for the purpose set out in subsection (4.1) (a);
- (e) off-the-shelf orthopaedic footwear;
- (f) an ankle brace;
- (g) an ankle-foot orthosis;
- (h) a knee-ankle-foot orthosis;
- (i) a knee brace;
- (j) a hip brace;
- (k) an upper extremity brace;
- (l) a cranial helmet used for the purposes set out in subsection (7);
- (m) a torso or spine brace.

(2) Subject to subsections (3) to (11) of this section, an orthosis is a health supplement for the purposes of section 3 of this Schedule if

- (a) the orthosis is prescribed by a medical practitioner or a nurse practitioner,
- (b) the minister is satisfied that the orthosis is medically essential to achieve or maintain basic functionality,
- (c) the minister is satisfied that the orthosis is required for one or more of the following purposes:
 - (i) to prevent surgery;
 - (ii) for post-surgical care;
 - (iii) to assist in physical healing from surgery, injury or disease;
 - (iv) to improve physical functioning that has been impaired by a neuro-musculo-skeletal condition,

- (11) The following items are not health supplements for the purposes of section 3 of this Schedule:
- (a) a prosthetic and related supplies;
 - (b) a plaster or fiberglass cast;
 - (c) a hernia support;
 - (d) an abdominal support;
 - (e) a walking boot for a fracture;

The position of the ministry is that, while noting that the leg Air Cast was prescribed by a medical practitioner, the item is not any of the items listed as orthoses in section 3.10 or elsewhere in sections 3.1 to 3.11 of Schedule C. In addition, the ministry found that the information provided did not establish the other legislative criteria for each of these health supplements have been met. The panel notes that the ministry did not specify which of these other criteria had not been met.

The position of the appellant is that, as stated by the physician, the Air Cast is a type of ankle-foot orthosis, it was prescribed by a medical practitioner, and it is needed for post-operative care. On this basis, she contends that she is eligible for the item.

The panel notes that an ankle-foot orthosis is one of the items listed under section 3.10 of EAPWDR Schedule C. The panel notes that the ministry did not give a reason why the Air Cast did not fit this category. The panel considers "ankle-foot orthosis" to be a generic term describing a device that is medically prescribed to provide support and alignment to the ankle-foot area in cases of damage/abnormality/weakness to that area. The panel, considering the physician's note, finds that the Air Cast is one such type of device. The panel therefore finds that the ministry was not reasonable in considering the Air Cast not to be an ankle-foot orthosis.

As to the other the related eligibility criteria under section 3.10 of Schedule C, the panel notes that the ministry did find that the Air Cast was prescribed by a medical professional. The ministry did not specifically address any of the other criteria. The panel finds that, based on the findings of fact, the ministry was not reasonable in determining that the Air Cast is not medically essential to achieve or maintain basic functionality, in this case, the ability to walk properly (Schedule C section 3.10 (2)(b). Similarly the panel also finds that the ministry was not reasonable in determining that the Air Cast is not required for post-surgical care or to assist in physical healing from surgery (section 3.10 (2) (c) (ii and iii). Further, the panel finds that the ministry was not reasonable in determining that the Air Cast falls into any of the categories listed under section 3.10 (11), for reasons set out in the findings of fact above. The panel thus finds that the ministry was not reasonable in determining that the information provided did not establish the other legislative criteria for this type of health supplement have been met.

The panel therefore finds that the ministry decision that the appellant was not eligible for a leg Air Cast was not reasonably supported by the evidence or a reasonable application of the legislation in the circumstances of the appellant. The panel therefore rescinds, or overturns, the ministry decision in favour of the appellant.