

### PART C – Decision under Appeal

The decision under appeal is the Ministry's reconsideration decision dated March 12, 2013, finding the Appellant does not qualify to have knee braces paid for by the Ministry as he does not meet the following legislative criteria set out in section 3 of Schedule C to the Employment and Assistance for Persons with Disabilities Regulation (EAPWDR):

- (1) section 3(1)(b)(ii): the Appellant has no resources available to cover the cost of the knee braces;
- (2) section 3.10(2) (b): the minister is not satisfied that the knee braces are medically essential to achieve or maintain basic functionality or; and
- (3) section 3.10(2)(c): the minister is not satisfied that the knee braces are required: (i) to prevent surgery, (ii) for post-surgical care, (iii) to assist in physical healing from surgery, injury or disease, or (iv) to improve physical functioning that has been impaired by a neuro-musculo-skeletal condition.

### PART D – Relevant Legislation

The relevant legislation is sections 3(1)(b)(ii) and 3.10(2)(b) and (c) of Schedule C to the EAPWDR.

## PART E – Summary of Facts

The Appellant is in receipt of disability assistance as a person with a disability. In May 2008 he was struck by a car and suffered damage to his knees. On December 28, 2012 he attended at his physician's office and was prescribed two knee braces. The prescription reads:

*"[The Appellant] requires the following knee braces for medical reasons:*

*L knee – P3 L3 SU knee Genutrain*

*R knee – P3 R3 SU knee Genutrain*

*He needs to wear both knee braces for at least 6 hours daily"*

The Appellant then obtained a quote of \$419.98 for both knee braces and submitted this quote to the Ministry for approval. The Ministry denied the application on the mistaken assumption that he was applying for reimbursement for a rigid knee brace which he had purchased earlier in 2012.

Upon reconsideration the Ministry acknowledged this mistake but denied the Appellant on the basis that his request did not meet certain of the legislated criteria.

## PART F – Reasons for Panel Decision

The decision under appeal is the Ministry's reconsideration decision finding the Appellant does not qualify to have knee braces paid for by the Ministry as he does not meet certain of the legislative criteria set out in the EAPWDR.

The relevant legislation is sections 3(1)(b)(ii) and 3.10(2)(b) and (c) of Schedule C to the EAPWDR:

### 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.

### Medical equipment and devices – orthoses

#### 3.10

(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, ...

The Appellant submitted new evidence in this matter at the appeal hearing. This evidence consisted of a letter written by the Appellant's advocate to the Appellant's physician asking the physician the following three questions based on the legislative criteria cited by the Ministry in denying the Appellant payment for the knee braces:

- 1) "Are the recommended bilateral knee braces medically essential to achieve or maintain basic functionality?" To which the physician answer "Yes ..."
- 2) "Is the custom rigid left knee brace (Osser Unloader XT) which was obtained in the summer of 2012, sufficient for him to achieve or maintain basic functionality?" To which the physician answered "No ..."
- 3) "Does your patient require bilateral knee braces for any of the following reasons:
  - To prevent surgery

- *For post surgical care*
- *To assist in physical healing from surgery, injury or disease or*
- *To improve physical function that has been impaired by a neuro-musculo-skeletal condition"*

The physician placed a check mark beside the first, third and fourth bullets.

The panel considered the admissibility of this evidence under section 22(4)(b) of the Employment and Assistance Act. Under that section in order for evidence that was not before the Ministry at the time of the reconsideration decision to be admissible it must be in support of the evidence that was before the Ministry at the time of the reconsideration decision. The panel finds that the new evidence is not novel, but rather explains in more detail the Appellant's physician's assessment of the Appellant in the terms of the legislation. Accordingly, the panel finds that the new evidence is in support of the evidence that was before the Ministry at the time of the reconsideration decision and so is admissible.

Given this evidence it is clear that the Appellant does meet the legislative criteria in sections 3.10(2)(b) and (c) in that the physician has confirmed that:

- 1) the orthosis is medically essential to achieve or maintain basic functionality, and
- 2) the orthosis is required to prevent surgery, to assist in physical healing from surgery, injury or disease, and to improve physical functioning that has been impaired by a neuro-musculo-skeletal condition.

At the hearing, the ministry did not argue that these criteria were not met. The panel finds that the Appellant's request satisfies the legislative requirements in sections 3.10(2)(b) and (c).

In regards to the Ministry's position that the Appellant has other resources available to him to pay for the knee braces in the form of a trust fund, the Appellant's advocate directed the panel's attention to the following policy statement under the EAPWDR which appears on the Ministry's website and in its literature:

***"Can the ministry make me use money from my trust to pay for something that would usually be paid for by the ministry? For example, can the ministry ask me to pay for a health expense out of my trust that the ministry usually pays for under Schedule C of the BCEA legislation?"***

*No. Ministry policy says that a person will not be disqualified from receiving disability assistance just because the person has a trust. The amount the person can spend on disability costs from a trust is meant to pay for things that are not covered by the ministry or for fees for services that are covered but which exceed the maximum allowable amount."*

Although the Ministry is not bound by its policy in this case, given that it is the Ministry's policy that it does not require recipients of income assistance as a person with a disability to use trust fund money to pay for items which would otherwise be paid for by the Ministry, the Ministry must refer to the policy and explain why it is not following it in this case. As the Ministry did neither, it was bound to follow the policy. Therefore the Appellant does not have other resources available to him to cover the cost of the knee braces.

Accordingly, the Panel finds that the Ministry's decision is not a reasonable application of the relevant legislation and that the appeal should be allowed. The ministry's decision is rescinded.