



PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (“ministry”), reconsideration decision dated November 4, 2013 wherein the ministry determined that the appellant’s request for an Ossur knee brace did not meet the eligibility requirements set out in Employment and Assistance for Persons with Disabilities Regulation. In particular, the minister was not satisfied that the:

1. information provided by the appellant established that the appellant had no other resources available to pay for the cost of or obtain the knee brace, as set out in Schedule C, subsection 3(1)(b)(ii);
2. item requested is the least expensive appropriate medical equipment to meet the needs of the appellant, as set out in EAPWD Regulation, Schedule C, subsection 3(1)(b)(iii);
3. orthosis requested is medically essential to achieve or maintain basic functionality, as set out in EAPWD Regulation, Schedule C, subsection 3.10(2)(b);
4. orthosis requested is required for one or more of the purposes, as set out in EAPWD Regulation, Schedule C, subsection 3.10(2)(c); and
5. orthosis requested will be fitted by an orthotist, pedorthist, occupational therapist, physical therapist or podiatrist, as set out in EAPWD Regulation, Schedule C, subsection 3.10(2)(d)(i).

PART D – Relevant Legislation

- Employment and Assistance Persons with Disabilities Regulation (EAPWDR) -section 62
- Employment and Assistance Persons with Disabilities Regulation -Schedule C, sections 3 and 3.10



PART E – Summary of Facts

The relevant evidence before the ministry at the time of the reconsideration decision included the following:

1. A Orthoses Request and Justification dated July 10, 2013 ("ORJ") completed as follows:
 - Section 1 of the ORJ completed by a ministry worker, which among other things, respectively states in Paragraphs 1 and 2 that the appellant is eligible to access medical equipment under Employment and Assistance Regulation or EAPWDR and that the appellant has no other resources available to provide the requested Orthoses;
 - Section 2 of the ORJ completed by a medical practitioner, which states that the appellant has severe osteoarthritis and a complete ACL tear of the right knee, and that the said diagnosis is confirmed by an MRI; and recommends a right knee stabilization brace for the appellant;
 - Paragraphs 1 and 2 of Section 3 of the ORJ completed by the same medical practitioner, which state that the prescribed item (a "*custom ACL brace with unloading to stabilize knee and decrease pain caused by ACL*") will delay/prevent surgery, stabilize the appellant's knee, prevent falls, and increase mobility. It further notes that the brace is required for prevention of surgery;
 - Paragraph 3 of Section 3 (required to be completed by "*orthotist, pedorthist, podiatrist, occupational therapist or physical therapist*") completed by a "*bracing specialist*" (the "Bracing Specialist"), which specifies in an answer to question in Paragraph 3 that: (a) the brace is required for prevention of surgery; (b) that it is *not* required for post surgical treatment, or to assist in physical healing from surgery, injury or diseases, or to improve physical functioning that has been impaired by neuro-musculo-skeletal condition. It also states the brace will allow the appellant to function without an ACL;
2. A referral dated July 18, 2013 from the same medical practitioner recommending that the appellant go to a specific clinic for an assessment for a brace;
3. A quote dated July 10, 2013 from a equipment supplier, signed by the Bracing Specialist, in her capacity as "CAT" i.e. a "*certified athletic therapist*" and "*Hons Kin*" i.e. a "*kinesiologist*", which describes the brace recommended by her as "*performance Orthotics/Ossur Canada clinics*" at a cost of \$1695.00;
4. A letter dated September 30th, 2013 from the ministry to the appellant confirming that the appellant's request for health supplement was denied by the ministry as the ministry had determined that the appellant did not meet the eligibility criteria for the relevant health supplement (the knee brace);
5. Request for reconsideration dated October 21, 2013 from the appellant, which among other matters state that (a) MSDSI did not review the appellant's file and medical history, which show deterioration of the appellant's knees and wrist (b) the appellant's doctor had provided new information which included items described in paragraphs 7, 8, 9 and 10 below;

- [REDACTED]
6. A Consultation Report dated May 23rd from a radiology department of a hospital confirming that the appellant has severe instability in his right knee with features of moderate to severe osteoarthritis and a complete ACL tear;
 7. An x-ray report dated March 19, 2012 supporting a diagnosis of severe osteoarthritis;
 8. An OsteoArthritis Service Integration System (OASIS) Assessment Report dated July 22, 2013 from an osteoarthritis clinic providing the following information:
 - Knee Joint History: The appellant: (a) was referred to urgent surgery on his right knee; (b) has followed up with physiotherapist who has made arrangements for bracing of some description; (c) has chronic knee pain and numerous injuries affecting his knee for over 20 years;
 - Function: (a) bikes for activity and can get around or take the bus; (b) is able to manage biking and is able to bike in a park, but is limited with static standing and twisting on the knee; (e) has a walking tolerance of 8-10 blocks; and (f) has limitations in climbing stairs and pivoting on the knee;
 - Physical Assessment: Gait: Intermittent limping while walking; stair climbing bothersome; unstable pivoting on the right knee; slight swelling patellofemoral joint right knee; Trendelenberg Sign: Positive [a finding associated with various hip abnormalities (associated with abduction muscle weakness or hip pain congenital dislocation, hip rheumatic arthritis, osteoarthritis) in which pelvis sags on the side opposite the affected side during single leg stance on the affected side during gait, compensation occurs by leaning the torso towards the involved side during stance phase on the affected extremity];
 - Radiology: right knee x-ray and MRI: moderate to severe Osteoarthritis (OA) medial and lateral compartment. Complete ACL tear. Severe degenerative tear of medial meniscus. Lateral meniscus: Loss of normal hoop stress and posterior horn diminutive with some blunting on the free edge;
 - Impression: moderate to severe OA changes affecting the medial and lateral compartments. Chronic ACL noted on MRI. Appellant has excellent range of motion and strength, can manage biking for exercise, is in the process of getting a stabilizing brace to reduce the pain with knee rotation;
 - Recommended Actions:
 - Primary Care Provider: No recommendations;
 - OASIS: No recommendations;
 - Patient: Application of ice/heat; Medication Option: apply voltarine;
 - Bracing/Splinting: If the prescribed brace does not materialize, the appellant should return to OASIS for help with bracing for knee comfort;
 - Exercise: continue biking as it is the best form of activity for the knee;
 - Complementary Therapy: Try a course of acupuncture for knee pain as it is a good choice for reducing swelling in the team
 9. A letter dated October 11, 2013 from the same medical practitioner as the one who partially completed the OJR, which among other matters states that (a) the appellant has been her patient for over two years; (b) the appellant has severe pain and limited function because of

derangement of the appellant's right knee; (c) an MRI done in May 2012 has shown "moderate to severe osteoarthritis involving the medial and lateral compartments associated with meniscal derangement...", complete ACL tear.

10. A Notice of Appeal dated November 12, 2013 in which the appellant states that his request was denied by the ministry based on the qualification of the technician who did the assessment of his need and that his doctor recommended the relevant technician.

Subsequent to the Notice of Appeal, the appellant submitted additional medical reports dated 19th March, 2012, May 23, 2013 and July 18, 2013. The first two of the said three medical reports were before the ministry at the time when the reconsideration decision being appealed was made and are respectively referred to in paragraph numbered 8 and paragraph numbered 7 above. The third report is a new radiology report dated July 18, 2013, which describes the findings of an x-ray. Among other things, it states that (a) no joint effusion is identified and no chondrocalcinosis is evident; (b) there is moderate narrowing of the medial compartment with associated para-articular osteophytes; (c) there is also a little narrowing of the lateral femoral tibial compartment although with associated para-articular osteophytes. The ministry did not object to admission of the copy of this radiology report. The panel admitted the copy of the radiology report as additional evidence submitted by the appellant under Section 22(4)(b) of the Employment and Assistance Act in support of the information and records that were before the ministry when the reconsideration decision being appealed was made.

At the hearing the ministry requested the presence of an observer. The appellant and his advocate did not object to the presence of the observer and he sat through the appeal hearing without making any submissions on behalf of the ministry.

The appellant and his advocate made the following statements, among others, at the hearing of the appeal: (a) the knee brace is important for the appellant, as without it his movements outside of his house are significantly restricted from a physical as well as an emotional (mental) point of view; (b) he is no longer able ride his bike for exercise or take a ride in the park or take a bus due to his deteriorating medical condition (c) he has provided to the ministry all the medical reports that he has received from his medical practitioner and followed all the recommendations of his medical practitioner; (d) he was not aware that he had an option to go back to OASIS for help with bracing for knee comfort if the brace that was prescribed did not materialize; (e) he was also not aware that he had to provide several quotes for the knee brace to establish that the requested brace (Ossur brace) was the least expensive brace for him nor did he know that he had to be assessed and fitted by a prescribed health professional; (g) he was assessed by a "physical therapist", and she is specifically named in the OASIS Assessment report dated July 22, 2013, but he did not receive a separate assessment report from her; (h) he did consult a surgeon in August 2013 about a potential surgery on his knee and was advised against the proposed surgery because of his young age. The recommendation of the surgeon was submitted to the appellant's medical practitioner, but not to the ministry.

The ministry relied upon the contents of the reconsideration decision and contended that the ministry was a funder of last resort for the brace and, in this context, the appellant did have the option to go back to OASIS for bracing for knee comfort, as more particularly described in the OASIS Assessment report dated July 22, 2013. There was only one quote for the Ossur knee brace (\$1695.00) and the

ministry was not satisfied that it was the least expensive brace available for the appellant. The medical practitioner of the appellant had indicated in the Orthoses Request and Justification form that the knee brace was prescribed for the appellant as it could "delay/prevent" surgery. This assessment was different from the said OASIS Assessment Report, which indicated that the appellant had been referred for "urgent surgery" on the right knee and there was no additional evidence before the ministry as to the outcome of such consultation. The health professional that assessed the appellant for a knee brace was a "Bracing Therapist" and not any one of the specific health professionals described in Section 3 of the Orthoses Request and Justification form and Section 3.10(2)(d)(ii) i.e. an orthotist, pedorthist, occupational therapist, physical therapist or podiatrist.

Based on the foregoing and the contents of the reconsideration decision, the panel makes the following findings of fact:

1. The appellant has other resources (OASIS) available to him to pay for the cost of or obtain the medical equipment (i.e. the knee brace) for bracing for knee comfort;
2. There is no evidence to establish that the medical equipment (the Ossur knee brace) is the least expensive appropriate medical equipment for the appellant; and
3. The orthosis (the brace) requested by the appellant is not assessed or fitted by an orthotist, pedorthist, occupational therapist, physical therapist or podiatrist.

PART F – Reasons for Panel Decision

The issue under appeal is the reasonableness of the ministry's reconsideration decision dated November 4, 2013, which determined that the appellant's request for a knee brace did not meet the eligibility requirements set out in EAPWD as the minister was not satisfied that the:

1. information provided by the appellant established that the appellant had no other resources available to pay for the cost of or obtain the knee brace, as set out in Schedule C, subsection 3(1)(b)(ii);
2. item requested is the least expensive appropriate medical equipment to meet the needs of the appellant, as set out in EAPWD Regulation, Schedule C, subsection 3(1)(b)(iii);
3. orthosis requested is medically essential to achieve or maintain basic functionality, as set out in EAPWD Regulation, Schedule C, subsection 3.10(2)(b);
4. orthosis requested is required for one or more of the purposes, as set out in EAPWD Regulation, Schedule C, subsection 3.10(2)(c); and
5. an orthotist, pedorthist, occupational therapist, physical therapist or podiatrist, as set out in EAPWD Regulation, Schedule C, subsection 3.10(2) (d), will fit orthosis requested.

The relevant applicable legislation is as follows:

Employment and Assistance for Persons with Disability Regulation

General health supplements

62 (1) Subject to subsections (1.1) and (1.2), 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 family unit if the health supplement is provided to or for a person in the family unit who is (B.C. Reg. 67/2010) (B.C. Reg. 114/2010)

(a) a recipient of disability assistance,

(c) a person who was a recipient of disability assistance on the day he or she became 65

(2) A person referred to in subsection (1) (b) or (f) and his or her dependants and a person referred to in subsection (1) (c) cease to be eligible for any supplement under this division if the person's family unit takes up residence outside British Columbia. (B.C. Reg. 170/2008)

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 (B.C. Reg. 197/2012)

(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: □(B.C. Reg. 197/2012)

(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. (B.C. Reg. 197/2012)

(3) Subject to subsection (6), the minister may provide as a health supplement a replacement of medical equipment or 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. (B.C. Reg. 197/2012)

(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.C. Reg. 197/2012)

(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.

(B.C. Reg. 61/2010)

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;
 - (n) a foot abduction orthosis; (B.C. Reg. 197/2012)
 - (o) a toe orthosis. (B.C. Reg. 197/2012)
- (B.C. Reg. 144/2011)

(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, and

(d) the orthosis is off-the-shelf unless (B.C. Reg. 144/2011)

(i) a medical practitioner or nurse practitioner confirms that a custom-made orthosis is medically required, and

(ii) the custom-made orthosis is fitted by an orthotist, pedorthist, occupational therapist, physical therapist or podiatrist.

Sections 3 and 3.10 of Schedule C of EAPWDR prescribe various criteria that the appellant must meet to be approved for the knee brace requested by him. Amongst them, the following five specific criteria arise under this appeal, all of which must be met by the appellant to be eligible for the knee brace requested by him. Each of these five criteria are discussed below by the panel in detail:

The first criterion is whether the appellant has met the criterion prescribed under section 3(1)(b)(ii), which requires that there are *"no resources available"* to the appellant to pay for the cost of or obtain the medical equipment or device. The OASIS Assessment Report dated July 22, 2013 states that if the brace that the therapist has prescribed for the appellant does not materialize, he could come back to OASIS for help with bracing for knee comfort. The panel is not aware whether OASIS has resources to pay for a brace required by the appellant, but it could recommend some alternate action plan for the needs of the appellant. It is, however, an available alternate source for support before the ministry becomes the last resort funder for the brace, as is envisaged under the relevant legislation. Specifically, the legislation states that the minister may provide assistance only when there are *"no resources available to ... obtain the medical equipment or device"*. As OASIS is a resource that is available to the appellant, and has, indeed, offered to assist the appellant, the panel finds the ministry reasonably determined that the criterion prescribed under section 3(1)(b)(ii) has not been met.

The second criterion is whether the appellant has met the criterion prescribed under section 3.1(b)(iii), which requires that the medical equipment or device requested is the *"least expensive"* appropriate medical equipment. The evidence before the ministry at the time of reconsideration included a letter dated July 10, 2013 from an equipment supplier, which describes only one option for the brace i.e. an Ossur knee brace, the cost of which is stated to be \$1695.00. There was no other quote for the brace before the ministry at the time of reconsideration to compare the cost of the brace with other options, nor did the appellant submit any other quote for the brace at the hearing of the appeal. It is therefore not established that the Ossur knee brace is the *"least expensive"* brace appropriate for the appellant. Therefore, the panel finds the ministry reasonably determined that the criteria prescribed section 3.10(b)(iii) has not been met.

The third criterion is whether, the appellant has met the criterion prescribed under section 3.10(2)(b), which requires that the medical equipment or device requested by the appellant (the knee brace) is *"medically essential to achieve or maintain basic functionality"*. The OASIS Assessment Report dated July 22, 2013 states that: (a) the appellant's walking tolerance is 8-10 blocks and that he is able to bike around the park, and get around or take a bus; (b) the appellant has excellent range of motion and strength, and can manage biking for exercise; and (c) the appellant's functional limitations include stair climbing, which is *"bothersome"* and pivoting on the knee. At the hearing, the appellant

stated that the medical condition of his knee had deteriorated since the date of the OASIS Assessment report in July 2013 and substantially reiterated his current medical condition as being as described in the new medical report dated October 11, 2013 from the appellant's medical practitioner, which among other things states that the appellant: (a) has stopped riding his bike; (b) walks less; (c) has difficulty getting dressed, leaving the house, and cleaning his apartment. Having regard to all the medical reports submitted by the appellant, including the medical practitioner's report dated October 11, 2013 and the additional oral evidence of the appellant at the hearing of the appeal, the panel finds the ministry unreasonably determined that the knee brace requested by the appellant is not medically essential to achieve or maintain his basic functionality as required under subsection 3.10(2)(b).

The fourth criterion is whether the appellant has met the criterion prescribed under section 3.10(2)(c), which states that an Orthosis is a health supplement for the purposes of section 3 of Schedule C only if the minister is satisfied that it 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 panel finds that paragraph (i) above applies to the case of the appellant and that the evidence in this respect before the ministry at the time of the reconsideration decision was contradictory. In the Orthoses Request and Justification Form dated July 11, 2013, the appellant's physician states that the brace is prescribed for the appellant to "delay/prevent" surgery. However, the OASIS Assessment Report dated July 22, 2013 states that the appellant has been referred for "urgent surgery" and that the appellant had a scheduled consultation with another medical practitioner in August 2013. At the hearing, the appellant stated that his surgeon recommend a delay in surgery on his knee because of his young age, but written confirmation of this recommendation from the surgeon has not been submitted by the appellant to the ministry. The panel therefore finds the ministry reasonably determined that it has not established that the Orthosis requested by the appellant is for one or more of the purposes set out in subsection 3.10(2)(c).

The fifth and the last criterion under this appeal is whether, the appellant has met the criterion prescribed under section 3.10(2)(d)(ii), which requires that unless the orthosis is off-the-shelf, it is fitted by an "orthotist, pedorthist, occupational therapist, physical therapist or podiatrist". In this context, the quote dated July 10, 2013 from the equipment supplier, which was before the ministry at the time of the reconsideration decision, states that the total cost of the Ossur knee brace "to cast and fit" is \$1695.00. This quote is signed by a person who is described as a "Bracing Specialist" with the designation of "CAT" i.e. "Certified Athletic Therapist". The ministry had contacted the equipment supplier prior to the reconsideration decision and had obtained a confirmation that the relevant "Bracing Specialist" who had assessed the brace for the appellant was an "athletic therapist" and not a health professional i.e. an "orthotist, pedorthist, occupational therapist, physical therapist or podiatrist", specifically prescribed under subsection 3.10(2)(d)(ii). The panel notes that the OASIS Assessment Report states that a named "PT" ("Physical Therapist") performed an assessment for bracing on the date of the assessment i.e. July 22, 2013. However, the actual assessment of the said physical therapist was not before the minister at the time of the reconsideration decision, nor was it provided to the panel at the time of the hearing of the appeal. The panel therefore finds the ministry



reasonably determined that the criteria prescribed under subsection 3.10(2)(d)(ii) has not been met.

Based on the foregoing findings, the panel finds that the ministry reasonably determined that the appellant has not met at least four of the five criteria described above, all of which are essential requirements under sections 3 and 3.10 of Schedule C of EAPWDR for the appellant to meet to be eligible for the knee brace.

Therefore the panel finds that ministry's reconsideration decision was reasonably supported by the evidence and was a reasonable application of the relevant enactment in the circumstances of the appellant. The panel confirms the reconsideration decision of the ministry.