

## PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation's (the ministry) reconsideration decision dated January 14, 2014 which denied the appellant's request for the cost of an assessment and labour associated with his off the shelf orthopedic footwear and footwear lift modification. In particular, the ministry determined that the appellant was eligible for off the shelf orthopedic footwear up to the maximum amount of \$250 and was eligible for \$75 for the cost of the 1 ½ inch footwear lift, but that he was not eligible for the cost of the assessment (\$75) or the labour (\$275) as those items exceed the maximum legislated amount set out in *Employment and Assistance for Persons with Disabilities Regulation (EAPWDR)* section 62 and Schedule C, section 3 and 3.10(4.2) for off the shelf orthopedic footwear.

## PART D – Relevant Legislation

*Employment and Assistance for Persons With Disabilities Regulation (EAPWDR)* Section 62 & Schedule C, sections 3 and 3.10

## PART E – Summary of Facts

The evidence before the ministry at the time of reconsideration consisted of:

- 1) The appellant's Request for Reconsideration (RFR) dated December 31, 2013 in which the appellant states that this issue has been decided at tribunal over and over. The appellant states that money should be saved by not fighting a case that has been won over and over and that "*tribunal will use previous decisions to show lunacy of fighting this*". The appellant states that the \$250 pays only for construction of the lift for his boots but not all the building materials including boots for modification that have been paid for repeatedly in the past through tribunal victories at ministry cost. The appellant states that without the orthopedic boots he falls and get injured resulting in pain and suffering and tremendous cost to taxpayers. The appellant also states that he has size 13 feet and requires a high top boot to protect his ankles from sprains. He states that proper boots are expensive and that cheap boots cannot be fitted with a lift and do not last causing further waste to taxpayer and frequent replacement. The appellant states that he needs seasonal boots, spring and winter as diabetic requirements need warm dry boots and that failure to provide these will cost further cost to taxpayer due to medical costs and possible surgeries for amputation. He states that without proper tread he falls and in the past has sustained injuries such as broken ribs and injured knees and ankles. The appellant also states that "denial conflicts ministries vision statement of fiscal responsibility", that he has done his part by finding donor boots that last longer which equals savings to taxpayer. The appellant states that the "*public will want you, the ministry, to do the same by standing by previously decided decisions at tribunal. Failure to comply will upset taxpayer due to failure of ministry to learn from the past*";
- 2) Letter from the ministry to the appellant dated November 22, 2010 stating that in their decision dated September 30, 2010 the Employment and Assistance Appeal Tribunal found that the appellant was approved for two (2) pair of off the shelf orthopedic shoes with permanent modifications to each left shoe – 1 ½ inch raises.
- 3) Letters from the ministry to the appellant dated November 22, 2010 approving the appellant's request for 2 permanent modifications to off the shelf shoes: 1.5 inch lift at a cost of \$100 each, not to exceed \$200 and two (2) pairs of off the shelf orthopedic boots at an estimated cost of \$250 each, for a total not to exceed \$500.
- 4) Quote from a medical equipment provider, undated, stating that the appellant has leg length discrepancy and arthritis due to fractures and that he requires orthopedic footwear and external shoe raise modification of 1.5 inches at a cost of \$675 based on an assessment (\$75), labour (\$275) and materials, shoe raise and footwear (\$325);
- 5) Purchase Authorization dated November 28, 2013 to a medical equipment provide for \$250 for the cost of the appellant's off the shelf orthopedic footwear with modifications;
- 6) Orthoses Request and Justification (the "2013 Orthoses Request") in which the appellant's section, dated June 28, 2013 explains that two previous tribunals regarded the inclusion of the cost of "boots" as a component of custom orthosis. The physician section dated July 2, 2013 indicates that the appellant has leg length discrepancy and arthritis secondary to fractures that occurred in 1983 and recommending a custom-made orthosis to correct gait and leg length/alignment. Section 3 was completed by a certified orthotist dated July 10, 2013 specifying that the appellant requires orthopedic footwear with external shoe raise of 1 ½ inches. The orthotist states that the orthopedic footwear

must have extra depth toe box and modifiable sole required to provide adequate support and alignment to feet/ankles, particularly on the left, which is compromised by previous fractures, now resulting in arthritis. The orthotist states that external shoe raise is required to equalize leg length and keep patient safely mobile, and that without the raise the appellant may have injuries/damage to his knees, hip or back. The orthotist states that the item is required for prevention of surgery and that without the shoe raise the appellant risks further damage/injuries from falls, ambulation with 4 cm leg length difference. In answer to question 4, the orthotist states that the orthosis is a custom-made foot orthotic that will be made from a hand cast mold but does not provide any further explanation;

7) Prescription from the appellant's physician dated July 9, 2013 stating that the appellant requires off shelf orthopedic footwear with external shoe raise to equalize leg length 1.5 inches; and

8) Ministry note regarding the appellant's request for orthopedic footwear with external raise indicating that the appellant had previous orthosis in 2010 and 2011 and that the decision was made on November 28, 2013 to approve \$250 for the program maximum for orthopedic shoes.

In his Notice of Appeal dated February 10, 2014 the appellant states that this decision has been made before at tribunal and the ministry's *"refusal to acknowledge defeat again is completely illogical and costly to taxpayer"*.

At the hearing the appellant submitted additional documentation as follows:

- 1) Letter from a medical equipment provider dated March 10, 2014 stating that the appellant is a patient and has been seen and assessed with respect to orthopedic footwear on July 8, 2013. The provider states that it has been part of her job to secure funding through third parties on behalf of patients such as the appellant. The provider states that quotes must be broken down to include an assessment cost, a materials cost and a labour cost and that she has submitted orthotist's quotes to the ministry in this manner for the past many years. The provider states that she has never experienced a request after the fact for a quote that doesn't include an assessment fee, nor has the orthotist she worked for ever received payment for anything less than the full approved quote submitted, including the assessment fee. The provider also states that she has firsthand knowledge that the appellant was previously seen and assessed by another medical equipment provider in the past but that medical equipment provider that has since closed;
- 2) Quote for custom bilateral foot orthotics dated April 29, 2011 in the amount of \$450 and quote for custom footwear in the amount of \$2,200 dated September 10, 2010;
- 3) A prescription from the appellant's physician for orthotic inserts dated April 12, 2011;
- 4) Orthoses Request and Justification dated March 17, 2011 (the "2011 Orthoses Request") indicating that the appellant requires a custom made foot orthotic indicating and that hand cast plaster molds of the appellant's feet will be used;
- 5) Letter from the appellant's previous medical equipment provider dated September 28, 2010 indicating that the appellant has been a patient since October 28, 2000 with respect to his foot/ankle and has a significant leg length discrepancy (left shorter than right). The letter explains that in order to modify his footwear and add the external lift, several things need to be

done to the existing sole. The required amount of lift, or height, is "sandwiched" between the cut away sole and the shoe and glued into place, adding the original sole back to the bottom, including the original tread. The letter states that the appellant's footwear averages 12-18 months, typically at a cost of \$175 to \$225 before modifications. The letter also states that custom footwear would also provide the appellant with the same benefits, at a cost of \$2,000 and upward, per pair;

- 6) A pedorthic assessment for gait and foot assessment dated February 21, 2011 with a form indicating the requirements to the appellant's footwear modifications; and
- 7) Hospital emergency care forms dated August 19, 2010 and September 4, 2010 indicating that the appellant has a history of chronic foot pain and was referred to a foot specialist.

The ministry did not object to the admission of the appellant's additional documentation.

The panel has admitted the appellant's documentation into evidence as it is in support of information and records that were before the ministry at the time of reconsideration, in accordance with section 22(4) of the *Employment and Assistance Act*. In particular, the new information relates to the appellant's ongoing left foot pain and leg length discrepancy and previous orthopedic footwear.

At the hearing the appellant's evidence was that this issue has been decided by the tribunal before and that the ministry's refusal to pay for the cost of the assessment and labour required for the modifications to his footwear is not consistent with the ministry's vision statement or mission statement. The appellant states that because the tribunal previously approved this request before the ministry should be approving it now and that to deny his request is a "huge waste of money". The appellant's evidence is that the footwear that he requires is not "off the shelf" footwear as the ministry states but is custom footwear as the boot must have the sole cut away and the lift inserted and glued into place and the original sole added back to the bottom of the boot. He states that the shoe is just one component of the construction. He states that a cast was used previously in order to make the insert but that a new cast is not required every time he needs new footwear as the cast is used again. The appellant's evidence is that he does not have the funds or resources to pay for the custom footwear.

The ministry relied on its reconsideration decision. The ministry representative also stated that previous ministry and/or tribunal decisions are not relied on as each new request is reviewed and a new decision made as there can be changes to the request and changes to legislation since the last decision was made. The ministry representative stated that in the ministry's view the appellant's request is for off the shelf orthopedic footwear not custom-made footwear.

## PART F – Reasons for Panel Decision

The issue under appeal is whether the ministry's reconsideration decision which denied the appellant's request for the cost of the assessment (\$75) and labour (\$275) associated with his off the shelf orthopedic footwear and permanent modifications to footwear on the basis that it exceeded the maximum legislated amount set out in *Employment and Assistance for Persons with Disabilities Regulation* (EAPWDR) section 62 and Schedule C, section 3 and 3.10 was reasonable.

The relevant sections of the legislation are as follows:

### EAPWDR

EAPWDR, Schedule C

### 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.

### 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.

**(3) For an orthosis that is a custom-made foot orthotic, in addition to the requirements in subsection (2) of this section, all of the following requirements must be met:**

- (a) a medical practitioner or nurse practitioner confirms that a custom-made foot orthotic is medically required;
- (b) the custom-made foot orthotic is fitted by an orthotist, pedorthist, occupational therapist, physical therapist or podiatrist;
- (c) Repealed (B.C. Reg. 144/2011)
- (d) the custom-made foot orthotic must be made from a hand-cast mold;
- (e) the cost of one pair of custom-made foot orthotics, including the assessment fee, must not exceed \$450. (B.C. Reg. 144/2011)

**(4) For an orthosis that is custom-made footwear, in addition to the requirements in subsection (2) of this section, the cost of the custom-made footwear, including the assessment fee, must not exceed \$1 650.**

**(4.2) For an orthosis that is off-the-shelf orthopaedic footwear, in addition to the requirements in subsection (2) of this section, the cost of the footwear must not exceed \$250. (B.C. Reg. 144/2011)**

### **Basic Eligibility**

The ministry held that as a Person with Disabilities designation, the appellant is eligible for the health supplements set out in EAPWDR Schedule C provided his request meets all the eligibility criteria. The ministry approved the appellant's request for off the shelf orthopedic footwear in the amount of \$250 and \$75 for the cost of the lift to modify his footwear. The items that are at issue in this appeal are the assessment cost of \$75 and the footwear modification labour costs of \$275 for a total of \$350.

### *Position of the parties*

The ministry's position is that the appellant meets the criteria set out in Schedule C, section 3.10(2) which requires that for an orthosis that is off the shelf orthopedic footwear, it must be prescribed by a medical practitioner or nurse practitioner, and the minister must be satisfied that the orthosis is medically essential to achieve or maintain basic functionality and is required for one or more of the following purposes: to prevent surgery, for post-surgical care, to assist in physical healing from surgery, injury or disease; or to improve physical functioning that has been impaired by a neuro-musculo-skeletal condition. The ministry's position is that because the appellant met the legislated criteria, they approved his request for the maximum allowable cost of the off the shelf orthopedic footwear of \$250 as set out in EAPWDR Schedule C, section 3.10(4.2).

The ministry's position was that the appellant also met the eligibility criteria for the 1 ½" lift as it met

the definition of orthosis set out in EAPWDR Schedule C, section 3.10(1)(c) as a permanent modification to footwear. The ministry provided a purchase authorization for \$75 for the cost of the footwear modifications.

The ministry's position is that the ministry has no legislated authority to approve funds above the legislated amount, so the ministry has no legislated authority to fund the assessment fee of \$75 and labour costs of \$275, so the appellant's request for the additional \$350 is denied.

The appellant's position is that his request is not for off the shelf orthopedic footwear but for a custom made foot orthotic under EAPWDR Schedule C, section 3.10(3) or custom made footwear under EAPWDR Schedule C section 3.10(4) and that the assessment and labour costs should be paid in full.

The appellant states that as identified in the letter from the orthopedic equipment provider previously provided in support of his previous request for custom made footwear, the boot must have the sole cut away and the lift inserted and glued into place and the original sole added back to the bottom of the boot. The appellant's position is that because of the modifications that must take place, the orthosis is not off the shelf footwear as the boot is just one component of the construction. The appellant's position is that as the 2011 Orthosis Request confirms that a hand cast plaster mold of the foot was used and nothing has changed since that time, the hand cast plaster mold will be used again. The appellant states that the process is essentially unchanged with respect to the custom work needed to produce his footwear. His position is that although a new cast is not required every time he needs new footwear as the cast is used again, the orthosis is still custom footwear not off the shelf orthopedic footwear. The appellant points out that the information from the orthotist on the 2013 Orthosis Request confirms that the orthosis is a custom made foot orthotic made from a hand cast mold.

#### *Panel Decision*

The panel appreciates that the appellant is frustrated at what he feels is a waste of time in having to appeal this matter to the tribunal as there have been similar prior requests to the ministry that went to appeal and were found in favor of the appellant. However, while there may have been information and tribunal decisions before the ministry regarding the appellant's prior requests, the ministry must look at the current request and current documentation supporting the request to determine what health supplements are being recommended and whether those health supplements meet the legislated criteria in place at the time of reconsideration.

On the 2013 Orthoses Request the appellant's physician confirms that a custom made orthosis is recommended and the orthotist confirms that the appellant requires a custom made foot orthotic that is fitted by an orthotist. Despite using the word custom made orthosis on the Orthoses Request the subsequent prescription indicates that the physician is prescribing an "*offshelf orthopaedic footwear with external shoe raise to equalize leg length 1.5 inches*". The prescription meets the definition of "orthosis" as set out in EAPWDR Schedule C, section 3.10(1)(c) and (e) for permanent modification to footwear and off the shelf orthopedic footwear.

EAPWDR Schedule C section 3.10(3) states that for an orthosis that is a custom-made foot orthotic, a medical practitioner or nurse practitioner must confirm that a custom-made foot orthotic is medically required, it must be fitted by an orthotist, pedorthist, occupational therapist, physical therapist or



podiatrist, it must be made from a hand-cast mold and the cost of one pair of custom-made foot orthotics, including the assessment fee, must not exceed \$450. As the appellant's physician prescribes off the shelf orthopedic footwear not a custom made foot orthotic the panel finds that the requested items do not fit the legislated criteria of a custom made foot orthotic under EAPWDR section 3.10(3).

While the panel understands that the modifications made to the appellant's footwear require the sole to be cut away, the lift inserted between the cut away sole and the shoe and glued into place and then the original sole put back on the bottom of the shoe, the physician's prescription states that the orthosis prescribed is off the shelf orthopedic footwear with permanent modifications and not custom footwear, so despite the modifications that must be made to the appellant's footwear, the panel finds that the requested items do not meet the legislated criteria of custom footwear under EAPWDR Schedule C, section 3.10(4). The appellant's own evidence that the boot itself is purchased off the shelf and then permanently modified supports the panel's findings in this regard.

As the appellant's physician prescribes off the shelf orthopedic footwear with external shoe raise, the panel finds that the ministry was reasonable in determining that the appellant was eligible for the maximum legislated amount of \$250 for off the shelf orthopedic footwear provided by EAPWDR Schedule C, section 3.10(4.2) and for the permanent modification to footwear as an orthosis under EAPWDR section 3.10(1)(c) and confirms this part of the ministry decision.

Having made that determination however, the ministry did not cite the legislative criteria used to determine that the appellant was only eligible for the \$75 cost for the materials of the footwear lift and not the associated assessment cost of \$75 or labour costs of \$275. The ministry refers to the legislated maximum amount of \$250 for the cost of the off the shelf orthopedic footwear set out in EAPWDR Schedule C, section 3.10(4.2) but this section of the legislation deals only with the maximum cost that can be provided for the off the shelf orthopedic footwear, not the cost of the permanent modification to the footwear or other costs associated with the permanent modification to the footwear.

As the ministry does not cite the legislative criteria to support the decision that the permanent modification to footwear should be limited to the cost of the materials and not the associated assessment and labour costs, the panel finds that this part of the ministry's reconsideration decision is not a reasonable application of the legislation in the circumstances of the appellant.

Therefore, the panel rescinds the ministry's reconsideration decision.