

### PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the “ministry”) reconsideration decision of July 24<sup>th</sup>, 2014 wherein the ministry denied the appellant a health supplement, an orthoses (upper extremity brace - metal finger splints) as set out in Schedule C, section 3.10 of the Employment and Assistance for Persons with Disabilities Regulation (EAPWDR) because the orthoses, the metal finger splints, are not the least expensive appropriate device as required by Schedule C, section 3.1(1)(b)(iii) EAPWDR.

### PART D – Relevant Legislation

EAPWDR – Schedule C, section 3(1) and 3.10

## PART E – Summary of Facts

The evidence before the ministry at the time of reconsideration:

- Orthoses Request and Justification Form signed by a medical practitioner March 18<sup>th</sup>, 2014 and signed by an occupational therapist on March 20<sup>th</sup>, 2014;
- Request for Reconsideration dated July 10<sup>th</sup>, 2014.

On March 27<sup>th</sup>, 2014 the appellant submitted a Request and Justification for an orthoses – upper extremity brace - to the ministry. Her doctor prescribed an orthoses (metal anti-swan finger splints) as the appellant suffers from polyarthritis and the occupational therapist (OT) completed the assessment. The OT recommended metal anti-swan finger splints as the orthoses required to best meet the appellant's needs. The OT stated that due to inflammatory arthritis the appellant has swan neck deformities in her fingers which are "locking." The splints will prevent the hyperextension at the PIP joints, allowing flexion for grasping and other hand function and improve physical functioning that has been impaired by her condition. The ministry, in consultation with the HAB physiotherapist consultant, is not satisfied that the metal anti-swan finger splints recommended by the OT are the least expensive appropriate medical device as set out in section 3(1)(b)(iii) of Schedule C EAPWDR.

On the appellant's Request for Reconsideration the OT wrote, "In the many years I have worked at the arthritis centre very very few clients with swan neck deformities can be adequate controlled by the cheaper Oval 8 splints, so I prefer to use the better controlling metal splints, which also fit better. However, with this client, we have tried the Oval 8's today and she is one of the rare cases who may be able to use the plastic splints (unless the SN's worsen)".

In the Notice of Appeal dated July 31<sup>st</sup>, 2014 under the heading of "Tell us why you disagree with the ministry's decision", the appellant wrote, "I have now tried the less expensive Oval 8 SNS's for 21 days. I cannot adjust them in accord with the fluctuating swelling in my joints – so they are either too tight or not correcting. I can readily adjust the metal splints."

Attached to the Notice of Appeal was a letter from the OT who stated that the appellant has undergone a 3 week trial of the Oval 8 splints. The OT stated that due to the fluctuating swelling in the appellant's PIP joints the Oval 8 splints do not work for her, except for a few hours of the day, that they are either tight in the morning and loose and ineffective in the afternoon or vice versa. The OT stated that the Oval 8 splints are only adjustable by a trained therapist with a heat gun whereas the custom made metal anti-swan finger splints can be adjusted by clients (the appellant). The OT stated that the appellant is able to do these minor adjustments.

The ministry did not object to the panel receiving the letter from the OT for consideration as new evidence.

The panel finds that since the ministry was not aware of the trial period for the Oval 8 plastic splints at the time of reconsideration, the letter from the OT dated July 31<sup>st</sup>, 2014 and the statements in the appellant's Notice of Appeal that relate to this trial period can't be said to be "in support" of information and records that were before the ministry at the time of reconsideration, and therefore are not admissible.

At the hearing the appellant stated that when the ministry initially turned down her request for the metal finger splints she had not tried the plastic splints so the OT put the plastic splints on the appellant's fingers and the splints appeared to fit quite work quite well on the appellant's fingers. The appellant and the OT learned the Oval 8 plastic splints only provided support for 3 or 4 hours because if the fingers were swollen in the morning when the plastic splints were fitted by the afternoon the swelling had subsided and the splints were loose and would not provide the proper support. The appellant added that if the splints do not provide support for the full day then the disease will only extend the middle knuckle as the tendons and ligaments are already overstretched. The appellant stated that a special heat gun is needed to soften the plastic finger splints for

fitting and you must know what you are doing when you do the adjustment. The appellant stated that she does not have the knowledge and skill to perform this adjustment and it usually takes two weeks to get an appointment with the OT. The appellant stated that the inflammation is always present and she needs the metal splints because she can adjust the metal anti-swan finger splints herself to meet her needs.

The panel finds the appellant's oral testimony, except her remarks regarding the trial period of testing the Oval 8 plastic finger splints, does contain information that is in support of the information and record that was before the ministry at the time the reconsideration decision was made and is admissible as evidence in accordance with section 22(4) EAA.

The ministry relied on its reconsideration decision and provided no additional information

The panel makes the following findings of fact:

1. The appellant is a recipient of disability assistance and eligible to receive a health supplement set out in Schedule C EAPWDR.
2. The ministry agreed to fund the least expensive appropriate medical device – orthoses – finger splints;
3. The appellant does not have the resources to pay the cost of the orthoses;
4. The ministry had provided the appellant with Oval 8 plastic splints;

## PART F – Reasons for Panel Decision

The issue under appeal is the reasonableness of the ministry's reconsideration wherein the ministry determined the health supplement, the metal finger splints, as set out in Schedule C, section 3.10 of the EAPWDR are not the least expensive appropriate medical device as required by Schedule C, section 3(1)(b)(iii) EAPWDR.

The legislation considered: EAPWDR

### Medical equipment and devices

#### Section 3

(1) Subject to subsections (2) to (5) of this section, the medical equipment and devices described in sections 3.1 to 3.11 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

(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 ...

(4) For an orthotic that is custom-made footwear ...

(5) For an orthosis that is a knee brace ...

(6) For an orthosis that is an upper extremity brace, in addition to the requirements in subsection (2) of this section, the upper extremity brace must be intended to provide hand, finger, wrist, elbow or shoulder support.

(7) For an orthosis that is a cranial helmet ...

(8) For an orthosis that is a torso or spine brace, in addition to the requirements in subsection (2) of this section, the brace must be intended to provide pelvic, lumbar, lumbar-sacral, thoracic-lumbar-sacral, cervical-thoracic-lumbar-sacral, or cervical spine support.

(9) Subject to section 3 of this Schedule, the limit on the number of orthoses that may be provided for the use of a person as a health supplement for the purposes of section 3 of this Schedule is the number set out in Column 2 of Table 1 opposite the description of the applicable orthosis in Column 1.

(10) The period of time referred to in section 3 (3) (b) of this Schedule with respect to replacement of an orthosis is the number of years from the date on which the minister provided the orthosis being replaced that is set out in Column 2 of Table 2 opposite the description of the applicable orthosis in Column 1.

Health supplement for persons facing direct and imminent life threatening health need

#### Section 69

The minister may provide to a family unit any health supplement set out in sections 2 (1) (a) and (f) [*general health supplements*] and 3 [*medical equipment and devices*] of Schedule C, if the health supplement is provided to or for a person in the family unit who is otherwise not eligible for the health supplement under this regulation, and if the minister is satisfied that

- (a) the person faces a direct and imminent life threatening need and there are no resources available to the person's family unit with which to meet that need,
- (b) the health supplement is necessary to meet that need,
- (c) the person's family unit is receiving premium assistance under the *Medicare Protection Act*, and
- (d) the requirements specified in the following provisions of Schedule C, as applicable, are met:
  - (i) paragraph (a) or (f) of section (2) (1);
  - (ii) sections 3 to 3.12, other than paragraph (a) of section 3 (1). (B.C. Reg. 61/2010) (B.C. Reg. 197/2012)

The ministry argued that the appellant did not meet all the criteria set out in Schedule C, section 3(1)(b)(iii) EAPWDR, that the medical equipment or device requested, the metal finger splints, are not the least expensive appropriate medical equipment or device. The ministry argued that in the Request for Reconsideration the OT wrote "that very few clients with swan neck deformities can be adequately controlled with the cheaper Oval 8 splints, however, you are (the appellant) the rare case where the plastic splints may work", which supports the ministry's decision. The ministry stated that they do recognize that new information was received by the ministry as part of the appeal package after the reconsideration decision was made, but at

the time, the reconsideration decision was a reasonable application of the legislation based on the information before them.

While the appellant argued that the metal anti-swan finger splints are the only finger splints that will provide her with the proper support that she needs, the panel cannot consider this argument because the evidence relating to the trial period for the Oval 8 plastic finger splints is not admissible. The appellant argued that neither she nor the OT knew how the plastic splints would work so they tried them and they seemed to fit quite well the day they tried them but they soon discovered the splint loosened and didn't provide the necessary support.

The evidence before the panel is that the appellant is eligible to receive a health supplement – orthoses and had met all the legislated criteria except that the metal anti-swan finger splint (orthoses) was not, in the ministry's opinion, the least expensive appropriate medical equipment or device available; that an Oval 8 plastic splint was appropriate. On the appellant's Request for Reconsideration form the OT supported the ministry's position by stating that the appellant is one of the rare cases where the Oval 8 plastic splints may work. The appellant's doctor had prescribed the metal anti-swan finger splint but there was no evidence before the ministry at reconsideration, nor is there any evidence before the panel to determine that at the time of reconsideration, the less expensive Oval 8 plastic splints are not the appropriate medical equipment or device to meet the appellant's needs.

Therefore, the panel finds the ministry reasonably determined that the Oval 8 plastic finger splints were the appropriate medical equipment or device and the ministry's decision to deny the appellant's request for anti-swan finger splints was reasonable.

In reference to section 69 EAPWDR, a health supplement for persons facing direct and imminent life threatening health need, there is no evidence before the panel that the appellant faces a direct and imminent life threatening need for the orthoses. Therefore, the ministry's decision not to provide the appellant a health supplement, an orthoses, because she was facing a direct and imminent life threatening health need was reasonable.

The panel finds the ministry's decision is a reasonable application of the legislation based on the information at the time of the decision and confirms the ministry's decision in accordance with section 24(1)(b) and section 24(2)(a) EAA.