

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the ministry) reconsideration decision dated August 21, 2014 which denied the appellant's request for a supplement to cover the cost of custom-made foot orthotics because:

- the requisite period of time (3 years) had not passed to permit the replacement of custom-made foot orthotics, pursuant to Sections 3(3)(b) and 3.10(10) of Schedule C of the *Employment and Assistance for Persons With Disabilities Regulation* (EAPWDR).

PART D – Relevant Legislation

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

PART E – Summary of Facts

The ministry did not attend the hearing. After confirming that the ministry was notified, the hearing proceeded pursuant to Section 86(b) of the *Employment and Assistance Regulation*.

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

- 1) Ministry Orthoses Request- Tracking Sheet with entries over the period April 23 to May 24, 2012;
- 2) Fax sent May 16, 2012 from an orthotic supply company to the ministry requesting authorization for 2 pairs of different size shoes (\$500) and bilateral custom foot orthotics (\$450);
- 3) Letter dated May 23, 2012 from the ministry to the appellant approving his request for 1 pair of custom-made foot orthotics (described as “custom foot orthotics”) and 1 pair of off-the-shelf orthopedic footwear (described as “orthopedic shoes- two pairs”);
- 4) Purchase Authorization dated May 23, 2012 for an orthotic supply company to provide 1 pair of custom-made foot orthotics (described as “custom foot orthotics”) and 1 pair of off-the-shelf orthopedic footwear (described as “orthopedic shoes- two pairs”) for a total cost of \$950;
- 5) Purchase Authorization dated May 1, 2013 for an orthotic supply company to provide 1 pair of custom made footwear (described as “custom orthopedic shoes”) at a total cost of \$1,650;
- 6) Fax dated March 19, 2014 from an orthotic supply company to the ministry requesting authorization for bilateral custom foot orthotics at a total cost of \$450;
- 7) Orthoses Request and Justification dated March 19, 2014 in which the appellant's medical condition is described as "developmental disability with right sided weakness; right lower extremity significantly smaller than left; sensory loss right L.G. [leg]", orthosis recommended is: bilateral custom semi-soft foot orthotics. For other information, the orthotist wrote: “old foot orthotics worn out and no longer repairable;”
- 8) Letter dated July 30, 2014 ‘To whom it may concern’ from a community living program for people with special needs stating in part that the appellant attends a day program that requires him to walk both within the program as well as out in the community. He needs to have supportive foot wear. The appellant has custom built shoes that need to be replaced. He also has orthotic inserts for regular runners which provide him no support and can cause him to break his ankle as the foot turns onto his ankle when walking. They cannot have the appellant wear the runners in the program for his safety and the fear of him breaking his ankle;
- 9) Photographs described as “inside of his shoe where the ankle rubs”, “his two fabulous feet; two very different sizes”; “walking: note the right foot;” and,
- 10) Request for Reconsideration- Reasons dated August 13, 2014.

In his Request for Reconsideration, the appellant wrote:

- He has right hemi-parisis which affects his right foot.
- He has had 5 surgeries to try to correct it and the last one was bone fusion.
- Each time after the operations, his foot continued to curl in and be difficult to walk on.
- The inserts provide him with support so he can go for walks with his family and continue to have social outings.
- His inserts have worn out and are providing him with no or little support. The new ones that he is asking for will be made of a different material so they should not wear out as quickly.
- The photographs show his current inserts and how worn down they are. He has also enclosed

pictures of the inside of his shoes- his ankle rubs against it, and it hurts. There are also pictures of his feet (of different sizes) and what it looks like when he walks.

- The reason he is showing his feet is because that is why he has custom shoes. His feet are separated by 2 sizes. He still needs the inserts. The shoes do not do the job.

In his Notice of Appeal dated September 1, 2014, the appellant indicated that he disagrees with the ministry's reconsideration decision. The appellant wrote that:

- To not replace the orthotics which are wearing away on the outside section will cause his foot and ankle to roll over. This will hamper his stability as he walks and possibly cause injury to his foot and ankle.
- It is causing increasing wear on his custom-built shoes that he received from the ministry.
- His orthotist has looked at the orthotics and said he would have to make new ones out of stronger material.
- He would like to show the condition of his orthotics.

At the hearing, the appellant's representatives, his parents, stated that:

- They have requested the orthotics for their son (the appellant) because the orthotics that they were provided were not made out of the appropriate material and they broke down so quickly. The orthotics are made out of "some kind of foam material," which was shown to the panel.
- The appellant has special shoes and when he walks his feet go over without proper orthotics and this affects his knees and his hips. If he were to fall over and break his hip, it could be life threatening for him.
- The appellant needs the orthotics badly because it is affecting his ability to walk. He received his current custom orthotics about a year ago.
- The appellant's current orthotics are worn out on the outside. This is putting more wear on his custom-made shoes. The custom-made shoes are not working to prevent the appellant's foot from coming over. There is a wedge on the outside of the shoe but it is not enough.
- The other two pairs of orthopedic shoes that the appellant also received looked like ordinary runners and they did not work at all for the appellant since there was no support. The appellant had to take them off right away and wear his old shoes. They returned both pairs to the orthotist in the hopes that they might be useful for someone else. They do not know if the orthotist returned the funds he received for the shoes to the ministry.
- The appellant has been going to the same orthotist for about 15 years to get the inserts for his shoes because the orthotist will come to their house.
- The orthotist has said that the orthotics will need to be built out of a stronger material. He came to their house to have a look at the orthotics. He did not offer to replace the orthotics that were made out of the wrong material.
- The appellant has had numerous operations on his feet but there is nothing more they can do to fix them.
- The appellant attends a community program and they go on outings in the community. They are afraid that the appellant might suffer a broken ankle. His foot is already turning over and if there is a slope in the terrain he could fall down.

The appellant showed the panel that his feet are two different sizes and that he walks on the outside of his smaller foot and puts more pressure on this part of his foot.

Admissibility of New Information

The representatives for the appellant provided additional information regarding his need for orthotics and the panel admitted this additional information as being in support of information and records that were before the ministry at the time of reconsideration, in accordance with Section 22(4)(b) of the *Employment and Assistance Act*. The panel did not admit the information in support of a claim that the appellant faces a life-threatening need for orthotics as this was not before the ministry at reconsideration.

The ministry relied on the reconsideration decision. The ministry stated in the decision that custom foot orthotics had been provided by the ministry to the appellant on two different dates, both on December 9, 2011 and also on May 23, 2012. As the letter from the ministry and the purchase authorization are both dated May 23, 2012 and the appellant's parents stated that the orthotics were received in May 2012, the panel accepted the May 23, 2012 as the relevant date on this appeal.

PART F – Reasons for Panel Decision

The issue on the appeal is whether the ministry's reconsideration decision, which denied the appellant's request for a supplement to cover the cost of custom-made foot orthotics because the requisite period of time (3 years) had not passed to permit the replacement of custom-made foot orthotics, was reasonably supported by the evidence or a reasonable application of the applicable enactment in the circumstances of the appellant.

Under Section 62 of the *Employment and Assistance for Persons with Disabilities Regulation* (EAPWDR), in order to be eligible for health supplements in Section 2 or 3 of Schedule C, the person must be a recipient of disability assistance, be a person with disabilities, or be a dependent of a person with disabilities as detailed in the section. If that condition is met, Schedule C of the EAPWDR specifies additional criteria that the person's family unit must meet in order to qualify for specified medical equipment and devices.

Section 3 of Schedule C of the EAPWDR provides as follows:

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.
- (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:
- (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. . .
- (3) Subject to subsection (6), the minister may provide as a health supplement a replacement of medical equipment or a 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.
- (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) 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.

Section 3.10 of Schedule C of the EAPWDR provides as follows:

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;
- (o) a toe orthosis.

- (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

- (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, Sch. 2.]
- (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. . . .

(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.

Table 1

Item	Column 1 Orthosis	Column 2 Limit
1	custom-made foot orthotic	1 or 1 pair

(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.

Table 2

Item	Column 1 Orthosis	Column 2 Time period
1	custom-made foot orthotic	3 years

. . .

Ministry's position

The ministry's position is that the appellant, as a recipient of disability assistance, is eligible to receive health supplements under Section 62 of the EAPWDR, but that the appellant's request for a supplement to cover the cost of custom-made foot orthotics does not meet all of the legislative criteria set out in Schedule C. The ministry pointed out that, pursuant to Section 3(3)(b) of Schedule C of the EAPWDR, the ministry may provide a replacement of orthotics previously provided by the ministry that is damaged, worn out or not functioning if the applicable period of time has passed. The ministry stated that Section 3.10(10) of Schedule C further provides that the applicable period of time for replacement of custom-made foot orthotics is 3 years from the date on which the ministry provided the orthosis being replaced. The ministry argued that the appellant was provided with custom foot orthotics on May 23, 2012 and he, therefore, will not be eligible for replacement of the custom foot orthotics until 3 years from that date, or May 23, 2015.

Appellant's position

The appellant's position is that his current custom-made foot orthotics are worn out and to not replace the orthotics which are wearing away on the outside section will cause his foot and ankle to roll over. The appellant's representatives argued that this will hamper the appellant's stability as he walks and possibly cause injury to his foot and ankle. The representatives argued that the lack of proper custom orthotics is causing increasing wear on the appellant's custom-built shoes that he received from the ministry. The representatives argued that the orthotist has looked at the orthotics and said he would have to make new ones out of stronger material. The representatives argued that the appellant needs the custom-made foot orthotics to avoid risk of injury and to be able to participate in his community programs.

Panel decision

The panel finds that it is not disputed that the appellant, as a recipient of disability assistance, is eligible to receive health supplements under Section 62 of the EAPWDR. With respect to the additional criteria for the health supplements in Schedule C, Section 3(3)(b) stipulates that the ministry may provide replacement of custom-made foot orthotics previously provided by the ministry and that are "damaged, worn out or not functioning" if the period of time set out in section 3.12 of this Schedule has passed. The panel finds that the ministry does not dispute the current condition of the appellant's custom-made foot orthotics and the panel finds that they are worn out, as described and demonstrated by the appellant's parents. In the Orthoses Request and Justification dated March 19, 2014 the orthotist wrote: "old foot orthotics worn out and no longer repairable" and the appellant's parents stated that the orthotist acknowledged that the orthotics need to be made from a stronger material as the orthotics made out of "some kind of foam material" were completely worn out. The appellant's parents stated that they have been going to the same orthotist for about 15 years and that he had not offered to replace the orthotics that had worn out so quickly.

Section 3.10(10) of Schedule C of the EAPWDR sets out that the period of time referred to in section 3 (3) (b) to allow for replacement of custom-made foot orthotics is 3 years from the date on which the ministry provided the orthosis being replaced. While the ministry caused some confusion by quoting two dates in the reconsideration decision that it provided the appellant's current custom-made foot orthotics to him, both December 9, 2011 and May 23, 2012, the panel finds that the consistent evidence is that the appellant was provided with his custom-made foot orthotics on May 23, 2012, and this was agreed to by the appellant's parents at the hearing. As the appellant's request for replacement of his current custom-made foot orthotics is dated March 19, 2014, the panel finds that the ministry reasonably concluded that this request has been made prior to the 3-year period of time having passed from May 23, 2012, as required by Sections 3(3)(b) and 3.10(10) of Schedule C. Although the appellant's parents stated at the hearing that the appellant's custom-made footwear has also worn out, a request for replacement of the custom-made footwear was not made to the ministry and was not before the panel on this appeal.

Conclusion

The panel finds that the ministry's decision, which denied the appellant's request for a supplement to cover the cost of custom-made foot orthotics because the requisite period of time had not passed to permit the replacement, was reasonably supported by the evidence and the panel, therefore, confirms the ministry's reconsideration decision.