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PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the ministry) Reconsideration Decision dated October 30, 2014 which held that the appellant is not eligible for replacement custom-made foot orthotics as a health supplement as the criteria pursuant to subsections 3(3) and 3.10(10) of Schedule C, of the Employment and Assistance for Persons with Disabilities Regulation (EAPWDR), were not met.

The ministry determined that all the legislative criteria set out in the EAPWD Regulation, Schedule C, subsection 3(1) and 3.10 subsections (1)(2) and (3) had been met by the appellant with the exception of the criterion set out in subsection 3(3)(b). This legislation stipulates that the period of time with respect to replacement of an orthosis is three (3) years from the date on which the minister provided the orthosis being replaced. The ministry noted that the appellant was approved for custom-made orthotics on November 8, 2012 and therefore not eligible for a replacement until November 2015 and for this reason she is ineligible to receive the requested benefit.

PART D – Relevant Legislation

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

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PART E – Summary of Facts

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

- A completed Orthoses Request and Justification for the appellant dated June 28, 2014 and signed by the appellant's pedorthist.
- The appellant's Request for Reconsideration dated October 21, 2014 with the following attachments:
  - A copy of the appellant's CT Scan - CT Lumbar Spine non Contrast dated June 18, 2014 with the following Impression;
    1. Right L5-S1 disc protrusion affecting the right S1 nerve root.
    2. Moderate to severe spinal stenosis L4-5. There is also right foraminal narrowing at this level.
    3. Multiple sites of facet arthropathy are seen.
    4. Dextroscoliosis and right lateral subluxation of L4 upon L5.
  - A Biomechanical Assessment Report dated June 24, 2014 that noted Significant Clinical Observations as follows: the appellant presents with severe bilateral pes planus and rear foot valgus deformity; pain while weight bearing; pain in many areas of the lower body; only tolerates full soft orthotics which are prone to breakdown quicker because of soft nature of materials; and, previous orthotics are no longer providing corrective support and she requires a new set.
  - A quote for a custom orthotic – full soft EVA dated July 1, 2014 totaling $450.
  - A prescription for the appellant's custom made bilateral foot orthotics dated July 9, 2014.
  - A letter from the appellant's Orthopaedic Therapist dated October 16, 2014 which indicated that he assessed her on June 2, 2014 when she presented with chronic lower back pain and a limping gait. Her leg lengths measurement showed that her left leg was approximately ½ inch longer. It is strongly recommended that she be fitted for orthotics – right orthotic having 3/16" to 1/4" heel rise.
  - A letter from the appellant's Pedorthist dated October 20, 2014 which explained that there are two (2) main types of foot orthoses: the first are made using a rigid material such as polypropelene or suborthylene; while the second are full soft or full length EVA, used when the patient requires softness, cushioning, accommodative support. In the appellant's case there is a loss of soft tissue on the plantar surface of the foot, potential for osteoarthritis and lower back pain. For these reasons specifically he decided to manufacture a soft EVA-type foot orthoses to treat the appellant's discomfort. The soft EVA does not have the lifespan of the more traditional rigid bases orthoses and usually lasts for approximately 2 years depending on the usage. The Pedorthist opines that the appellant's previous foot orthoses were not providing her with adequate support.
  - A letter from the appellant dated October 2014 relating the history of her current need for orthotics;
    - She has needed orthotics since she was 5 years old, was diagnosed with osteoporosis at 45 years which was then followed by degenerative disc disease.
    - After falling twice in the snow in 2007 on her right side, she developed scoliosis.
    - About 2 years later a bone density scan confirmed damage in her lumbar which has resulted in sciatic pain.
    - With this new pain, she consulted an Orthopaedic Therapist who after measuring her leg lengths determined that her right leg was ½ inch shorter than her left which required her to get new orthotics with a raised right heel.

- She then saw her pedorthist who has recommended new shoes with a strong construction to help her heels to refrain from bending to the left or right, and with a firm sole to prevent rear foot pronation or supponation.
- She has borrowed money from friends to purchase new orthotics and new shoes.

On appeal the appellant wrote that she disagreed with the ministry's reconsideration decision because her need is to replace former orthotics and orthopaedic shoes due to limping from right leg being ½ inch shorter and from falls in 2007, and to alert the provincial government that soft orthotics are needed every two (2) years rather than three (3).

On appeal the appellant submitted 2 new documents as follows:

1. An incomplete Orthoses Request and Justification form dated November 6, 2014 signed by the appellant's Pedorthist.
2. A letter from a medical liaison person at a footwear store which states that orthotics and shoes work together and thus the need to be careful not to compromise the objective of orthoses with an inappropriate shoe.

At the hearing, the appellant indicated that the first new document, an Orthoses Request and Justification form dated November 6, 2014, is for her next request to the ministry and should therefore not be considered at this time. The appellant stated that the second new document was for information purposes only.

At the hearing, the appellant expressed her concern that the ministry had only stated in its decision that the required three years had not yet elapsed, and that in her opinion the ministry had not seemed to understand that her situation constituted an emergency. She cited the language in EAPWDR, Schedule C, subsection 3(3), which refers to "medical equipment or a medical device.....that is damaged, worn out or not functioning." She argued that the orthotics in question, which are made of a rigid material, meet that definition and are in fact impossible to repair. She also expressed concern for others who might find themselves in a similar situation.

The ministry stood by its decision, stating that the ministry had no discretion but to refuse to provide new orthotics. This is because the EAPWDR states that the legislated time period for replacement orthotics is three years, and the appellant had received approval for orthotics in November 8, 2012, and is therefore ineligible for replacements to be considered until November of 2015. The ministry agreed that all other conditions had been satisfied, apart from meeting the stipulated time frame.

The ministry had no objection to the appellant's second new document being submitted.

The panel finds that the second document from a medical liaison person at a footwear store provided by the appellant prior to the hearing does corroborate the appellant's need for orthotics and therefore admissible as evidence pursuant to section 22(4) of the Employment and Assistance Act.

Findings of Fact

The appellant was approved for custom-made orthotics on November 8, 2012.

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PART F – Reasons for Panel Decision

The issue in this appeal is whether the ministry's determination that the appellant is not eligible for replacement custom-made foot orthotics is a reasonable application of the legislation or reasonably supported by the evidence.

Specifically, the ministry determined that all the necessary legislative criteria set out in the EAPWD Regulation, Schedule C, had been met by the appellant with the exception of the criterion set out in subsection 3(3)(b). This legislation stipulates that the period of time with respect to replacement of an orthosis is three (3) years from the date on which the minister provided the orthosis being replaced.

Relevant Legislation EAR 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.
(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.
(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.

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;
(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 practitoner,
(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.
(4.1) For an orthosis that is off-the-shelf footwear, in addition to the requirements in subsection (2) of this section,
(a) the footwear is required to accommodate a custom-made orthosis, and
(b) the cost of the footwear must not exceed $125.
(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)
(5) For an orthosis that is a knee brace, in addition to the requirements in subsection (2) of this section, the medical practitioner or nurse practitioner who prescribed the knee brace must have recommended that the knee brace be worn at least 6 hours per day.
(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, in addition to the requirements in subsection (2) of this section, the cranial helmet must be a helmet prescribed by a medical practitioner or nurse practitioner and recommended for daily use in cases of self abusive behavior, seizure disorder, or to protect or facilitate healing of chronic wounds or cranial defects.
(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.

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. (B.C. Reg. 61/2010)

Table 2
Item Column 1 - Orthosis
Column 2 - Time Period - 1 custom-made foot orthotic, 3 years (B.C. Reg. 144/2011)

The ministry's position is that information was not submitted to establish that the appellant's current custom-made orthotics are damaged, worn out or not functioning; that it is more economical to replace than to repair the custom-made foot orthotics previously provided by the minister; or that the period of time set out in section 3.10 of Schedule C has passed. The ministry argues that although the Pedorthist submits that the appellant's required EVA- type foot orthoses have a shorter lifespan than the more traditional rigid based orthoses, and that usually a soft EVA orthotic only lasts for approximately 2 years depending on the usage, the legislation does not allow for this type of discretion. The replacement period is clearly outlined as 3 years for custom-made foot orthotics and this time has not passed.

The appellant's position is that in her opinion the ministry had not seemed to understand that her situation constituted an emergency. She cited the language in EAPWDR, Schedule C, subsection 3(3), which refers to "medical equipment or a medical device.....that is damaged, worn out or not functioning." She argued that the orthotics in question, which are made of a rigid material, meet that definition and are in fact impossible to repair. She also expressed concern for others who might find themselves in a similar situation.

The panel finds that although the appellant's Pedorthist reports that the appellant's previously government supplied orthotics were not functioning, the ministry has no discretion to authorize the appellant's requested replacement custom-made foot orthotics outside of the legislation as set out in subsections 3(3) and 3.10(10) of Schedule C, of the EAPWDR. Specifically, the appellant did not meet the program criteria as the replacement time period of 3 years has not yet passed since the ministry last funded custom-made foot orthotics. The panel finds that the ministry reasonably determined that the appellant would not be eligible for replacement foot orthotics for three (3) years from the date of the last issue of the requested item, November 8, 2012, pursuant to Schedule C Health Supplements sections 3 and 3.10 of the EAPWDR.

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