

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (ministry) reconsideration decision dated October 30, 2014, which denied the appellant's request for a supplement to cover the cost of a Walking Boot Cast. The ministry found that the item requested is not an eligible item in 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), Sections 62 and Schedule C, Section 3.10

PART E – Summary of Facts

With the oral consent of the appellant, a ministry observer attended but did not participate in the hearing.

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

- 1) Medical Equipment Request and Justification form dated August 18, 2014 in which a medical practitioner described the appellant's medical condition as metastatic breast cancer to bone. Lytic cancer lesions in left distal leg/ankle for which she recently received radiation treatment to affected area. The appellant has ongoing pain with mobilization and the medical practitioner prescribed a walking boot cast (air cast)
- 2) Medical Equipment Request and Justification letter dated September 9, 2014 to the ministry in which the physiotherapist reported that:
 - The appellant has metastatic breast cancer to bone, relapsing in 2009 from a prior 2007 early breast cancer, which was treated.
 - The appellant was recently found to have progressive disease with lytic changes to the distal left tibia.
 - She is currently mobilizing independently with a 4w/w [wheeled-walker]; she ambulates with greater weight bearing through her right lower extremity secondary to pain in the left foot/ankle.
 - The appellant requires a left air cast walker boot to provide protection and support when weight bearing and ambulating indoors/outdoors. This support is necessary to minimize the risk of a bone fracture to left foot/ankle given the spread of cancer to the distal tibia in left lower extremity.
 - The appellant trialed a left air cast walker boot from the hospital, which allowed her to ambulate safely with her walker while offering support and protection.
- 3) Letter of Estimate dated September 10, 2014 from a medical product supplier for a "Tall Aircast walker boot" at an estimated cost of \$180; and,
- 4) Request for Reconsideration dated October 3, 2014 and Reasons dated October 16, 2014 prepared by an advocate on behalf of the appellant and attaching:
 - Excerpts from a previous decision of the Employment and Assistance Appeal Tribunal which found that the ministry's decision dated November 10, 2008, which denied a supplement to cover the cost of a air cast boot , was not a reasonable application of Section 2 of Schedule C of the EAPWDR as it then was.
 - Prescription dated May 14, 2014 for an air cast for the appellant's left ankle in order to weight bear.
 - Prescription receipt dated May 15, 2014, which states that the prescription for an air cast ankle brace has not been filled and the quote is for \$80.
 - Prescription dated July 23, 2014 for a walking boot cast required for structural/anatomical support. This is required for a metastatic bone lesion that is painful with weight bearing.
 - Hospital Guidelines for patients using an Air Cast Boot which includes a description of the Air Cast Boot as a pneumatic walking brace used after surgery or injury to the lower leg or foot. The air cells in the brace are adjusted by the patient for a custom fit within a strong plastic shell. The support and stability offered by an Air Cast Boot allows patients to gradually increase weight-bearing activity on their injured leg as it heals. The boot provides support and stability as well as a custom fit throughout the healing process.

In the Request for Reconsideration, the appellant's advocate wrote:

- The appellant does not have a fracture. She has seriously impaired mobility issues and is at substantial risk for injury without this support.
- The appellant received recent radiation treatment to the affected area and is dealing with ongoing pain with mobility.
- As explained by the medical practitioner working with the appellant, the air cast is required for mobility support and balance, with cancer as the underlying medical condition.
- The appellant has very little strength in her ankle and she needs the cast to prevent injury and maintain stability. She is already required to use a walker in order to assist her in completing her daily living activities, but this support for basic mobility is not sufficient.
- According to the physiotherapist, the air cast is meant to provide "protection and support when weight bearing and ambulating indoors and outdoors" and the appellant is unable to pay for the cost of this device needed for basic mobility as she receives social assistance.
- As noted in the hospital Guidelines for patients using an Air Cast Boot, the air cast offers support and stability while allowing patients to "gradually increase weight-bearing activity on their injured leg as it heals" and is a device that a health care professional fits specific to the patient and their need.

Prior to the hearing, the appellant provided her Notice of Appeal dated November 4, 2014. In her Notice of Appeal, the appellant expressed her disagreement with the ministry's reconsideration decision and wrote:

- Section 3.10(11) of Schedule C of the EAPWDR was misapplied by the ministry.
- The appellant requires the walking boot for support and mobility as well as to lessen the possibility of any injury.
- The appellant does not need assistance for a fracture but, rather for support.
- The ministry interprets and limits the need for a "possible" fracture. The possible injury could be to another part of her body if she was to fall, and this should be considered.

At the hearing, the appellant's advocate stated that:

- The exclusion set out in legislation is limited to a walking boot "for a fracture" rather than a walking boot that is used to prevent a fracture.
- The appellant no longer wears the walking boot because her body is stronger and she can now manage her mobility with just her walker.
- Previously, the walker was not sufficient to allow for flexibility in the appellant's movements.
- The appellant required mobility even to get to the local ministry office to deal with her request.
- The appellant did not have a fracture in her leg/ankle but there was a weakness and a need to protect and support this area of the body.
- When the appellant made her request for the walking boot she was not given direction by the ministry or an explanation about the legislation, which would have been helpful and likely would have expedited the process.

At the hearing, the appellant stated that:

- She obtained a walking boot which she is paying for in installments and there is still an amount owing. She is paying this out of her own pocket and she seems to need many items to cope with her medical condition.
- The walking boot she obtained was "off the shelf" and not customized for her.
- She relies on her mobility as she has many doctor appointments that she needs to attend.

- Her bone was so weak that it was “close to a fracture” and could have broken. She needed the walking boot to stay safe.
- The walking boot made a great difference to her mobility because it gave her support and stopped her toes from rubbing. It gave a strong foundation for her foot.
- She has one pair of running shoes and no boots.
- She thinks she may have had a stroke because she finds that her speech and her walking have been impaired. Her eye sight is deteriorating.
- Her doctor described her cancer as “metastatic breast cancer to bone” which is a more serious form of cancer and shows the necessity of protecting the bone.

The ministry relied on its reconsideration decision as summarized at the hearing. At the hearing, the ministry stated that:

- There is an element of discretion given to the ministry when considering an item for a crisis supplement if the criteria are met, even though the item is not listed in the legislation, which is different from the health supplements in Schedule C.
- When the word “may” is used in legislation, the ministry is provided with discretion.
- The words “for a fracture” were included in the legislation as part of the description of the walking boot and was added for clarity only.
- If the walking boot was not specifically excluded as a health supplement, the walking boot could possibly be considered under one of the other sub-sections of Section 3.10.

PART F – Reasons for Panel Decision

The issue on the appeal is whether the ministry's decision, which denied the appellant's request for a supplement to cover the cost of a Walking Boot Cast because the item requested is not an eligible item in Schedule C of the *Employment and Assistance for Persons with Disabilities Regulation* (EAPWDR), is reasonably supported by the evidence or a reasonable application of the applicable enactment in the circumstances of the appellant.

Pursuant to Section 62 of the EAPWDR, the applicant must be a recipient of disability assistance, or be a dependent of a person in receipt of disability assistance in a variety of scenarios. If that condition is met, Schedule C of the EAPWDR specifies additional criteria that must be met in order to qualify for a health supplement for various items. In this case, the ministry has found that the requirement of Section 62 has been met in that the appellant has been approved as a recipient of disability assistance.

At issue is whether the requested Walking Boot Cast is an eligible item under Schedule C of the EAPWDR, including:

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. . . .

Section 3.1 provides that the following items are health supplements for the purposes of section 3 of the Schedule, if the other criteria of the section are met: a cane, a crutch, a walker, an accessory to a cane, a crutch or a walker.

Section 3.2 provides that the following items are health supplements for the purposes of section 3 if the other criteria of the section are met: a wheelchair, an upgraded component of a wheelchair, an accessory attached to a wheelchair.

Section 3.3 provides that the following items are health supplements for the purposes of section 3 of the Schedule, if the other criteria of the section are met: a wheelchair seating system, an accessory to a wheelchair seating system.

Section 3.4 provides that the following items are health supplements for the purposes of section 3 of the Schedule, if the other criteria of the section are met: a scooter, an upgraded component of a scooter, an accessory attached to a scooter.

Section 3.5 provides that the following items are health supplements for the purposes of section 3 of the Schedule, if the other criteria of the section are met: a grab bar in a bathroom, a bath or shower seat, a bath transfer bench with hand held shower, a tub slide, a bath lift, a bed pan or urinal, a raised toilet seat, a toilet safety frame, a floor-to-ceiling pole in a bathroom or bedroom, a portable commode chair, a standing frame or a positioning chair for a person for whom a wheelchair is medically essential to achieve or maintain basic

mobility, and a transfer aid for a person for whom the transfer aid is medically essential.

Section 3.6 provides that the following items are health supplements for the purposes of section 3 of the Schedule, if the other criteria of the section are met: a hospital bed, an upgraded component of a hospital bed, an accessory attached to a hospital bed, and a positioning item on a hospital bed.

Section 3.7 provides that the following item is a health supplement for the purposes of section 3 of the Schedule, if the other criteria of the section are met: a pressure relief mattress.

Section 3.8 provides that the following item is a health supplement for the purposes of section 3 of the Schedule, if the other criteria of the section are met: a floor or ceiling lift device.

Section 3.9 provides that the following items are health supplements for the purposes of section 3 of the Schedule, if the other criteria of the section are met: breathing devices.

Section 3.10 provides that the following items are an orthosis which is a health supplement for the purposes of section 3 of the Schedule, if the other criteria of the section are met: a custom-made or off-the-shelf foot orthotic, custom-made footwear, a permanent modification to footwear, off-the-shelf footwear for a specific purpose, off-the-shelf orthopaedic footwear, an ankle brace, an ankle-foot orthosis, a knee-ankle-foot orthosis, a knee brace, a hip brace, an upper extremity brace, a cranial helmet, a torso or spine brace, a foot abduction orthosis, or a toe orthosis.

3.10(11) The following items are not health supplements for the purposes of section 3 of this Schedule:

- (a) a prosthetic and related supplies;
- (b) a plaster or fiberglass cast;
- (c) a hernia support;
- (d) an abdominal support;
- (e) a walking boot for a fracture.
- (f) Repealed. [B.C. Reg. 144/2011, Sch. 2.]

Section 3 and 3.1 through 3.12 of Schedule C of the EAPWDR

The ministry's position is that the appellant is eligible to receive health supplements under Section 62 of the EAPWDR but the Walking Boot Cast, is not an eligible item as medical equipment specifically set out in 3.1 through 3.12 of Schedule C of the EAPWDR. The ministry also argued that the Walking Boot Cast is specifically excluded as a health supplement, pursuant to Section 3.10(11)(e) of Schedule C, as a "walking boot for a fracture." The ministry disputed the persuasiveness of the previous decision of the Tribunal as the applicable legislation was amended in 2010.

The appellant's position is that Section 3.1 of Schedule C of the EAPWDR offers types of items that are health supplements that are medically essential to achieve or maintain basic mobility, it is clear that basic mobility is something that needs to be supported, and the appellant is dealing with ongoing pain with mobility. The advocate argued that a previous decision of the Tribunal rescinded a 2008 ministry decision to deny an Air Cast to another person and is persuasive. The advocate argued that the exclusion in Section 3.10(11) of Schedule C of the EAPWDR is for a walking boot "for a fracture" and the appellant does not require the walking boot for a fracture but, rather, for support. The advocate argued that the ministry needs to consider the unique circumstances of each case in detail. The advocate argued that the underlying medical condition for the appellant is cancer and she needs the cast to prevent injury and maintain stability. The advocate argued that the ministry's decision does not apply a broad interpretation of the legislation nor the ministry's foundational vision

statement, mission statement and guiding principles, and there is a lack of a benevolent purpose.

Panel decision

Section 3(1) of Schedule C of the EAPWDR stipulates that the medical equipment and devices described in Sections 3.1 to 3.12 of Schedule C are the health supplements that may be provided by the ministry. The appellant did not advance a position that the Walking Boot Cast is specifically set out in Section 3.1 through 3.12 of Schedule C of the EAPWDR, but argued that the Walking Boot Cast is an item, like many of the items listed, which is medically essential to achieve and maintain the appellant's basic mobility. The ministry acknowledged that the evidence provided by the appellant established her need for the Walking Boot Cast and that, if the exclusion in Section 3.10(11) had not been added to Schedule C of the EAPWDR, an argument is possible that the Walking Boot Cast falls within the definition of "orthosis" as set out in Section 3.10.

Section 3.10 of Schedule C, which sets out various types of orthoses, also lists items that are not health supplements for the purposes of Section 3 of Schedule C and a walking boot for a fracture is listed in sub-section 3.10(11)(e). The advocate argued that the exclusion is a walking boot specifically "for a fracture" and the appellant does not require the walking boot for a fracture but, rather as a result of the underlying condition of cancer and for support to the bone to prevent future potential injury. The item requested by the appellant is described in the hospital Guidelines for patients as: "a pneumatic walking brace used after surgery or injury to the lower leg or foot" and "the boot provides support and stability, as well as a custom fit throughout the healing process." The panel finds that the requested Walking Boot Cast is designed primarily to promote healing after surgery or injury, which would include a fracture. In this context, while the advocate argued that the appellant is using the walking boot to prevent injury, the panel finds that the requested Walking Boot Cast falls within the definition of a "walking boot for a fracture" as being descriptive of the primary purpose of the item to promote healing after an injury such as a fracture. Although the advocate argued that the ministry needs to consider the unique circumstances of each case and how the walking boot is being used by the particular individual, the panel finds that the ministry reasonably concluded that the words "for a fracture" are part of the description of the item excluded and is not sufficiently detailed to define the particular purpose for which the item is used.

The panel finds that the ministry reasonably determined that the Walking Boot Cast is not included as a health supplement as it is specifically excluded by Section 3.10(11) of Schedule C from the health supplements that may be provided by the ministry. Previous Tribunal decisions are not binding although they may be persuasive; however, the Tribunal decision referred to by the advocate, and which rescinded the ministry's decision to deny a request for an air cast boot, is distinguishable as it considered a different section of Schedule C of the EAPWDR relating to disposable medical or surgical supplies and a version of the legislation prior to amendments that were made in 2010.

Conclusion

In conclusion, the panel finds that the ministry's decision to deny the request for a supplement to cover the cost of a Walking Boot Cast as not meeting the legislated criteria of Schedule C, Sections 3.1 to 3.12, of the EAPWDR, was a reasonable application of the applicable enactment in the circumstances of the appellant and, therefore, confirms the decision.