

PART C – Decision under Appeal

The Ministry of Social Development and Social Innovation's (the ministry) reconsideration decision dated 7 January 2015 determined the appellant was not eligible for custom-made footwear under s. 62 of the Employment and Assistance for Persons with Disabilities Regulation (EAPWDR) and s. 3 and 3.10 of Schedule C of the EAPWDR because:

- The requested footwear was not the least expensive medical equipment to meet the appellant's needs as required by s. 3(1)(b)(iii) and 3.10(2) of Schedule C of the EAPWDR;
- The custom-made footwear was not specifically prescribed by a medical practitioner or nurse practitioner as required by s. 3.10(2)(a) of Schedule C of the EAPWDR;
- The ministry was not satisfied the custom-made footwear was medically essential to achieve or maintain basic mobility as required by s. 3.10(2)(b) of Schedule C of the EAPWDR;
- The information provided did not demonstrate that custom-made footwear was required to improve physical functioning that has been impaired by a neuro-musculo-skeletal condition as required by s. 3.10(2)(c) of Schedule C of the EAPWDR and
- The information provided did not demonstrate that it was custom-made footwear rather than custom-made foot orthotics that was required contrary to s. 3.10(2)(d) of Schedule C of the EAPWDR.

PART D – Relevant Legislation

Employment and Assistance for Persons with Disabilities Regulation (EAPWDR), section 62.
Employment and Assistance for Persons with Disabilities Regulation, Schedule C, s. 3 and 3.10.

PART E – Summary of Facts

The following evidence was before the ministry at the time of reconsideration:

- The appellant receives disability assistance and is eligible to receive health supplements.
- A 2-page form “Orthoses – Request and Justification completed in 3 parts as follows:
 - Section 1, dated 6 June 2014 and signed by the appellant stating that he authorizes any medical practitioner or nurse practitioner to disclose any medical information relevant to the request.
 - Section 2, also dated 6 June 2014 but signed by a medical practitioner (the resident) stating that the medical condition of the appellant as “metatarsalgia 2nd, 3rd, 4th metatarsal heads” and recommending an orthosis as “orthotic foot arch support [with] metatarsal pad to offload metatarsal heads, footwear (twice underlined)”.
 - Section 3 apparently dated 30 June 2014 (16 June according to the ministry) completed and signed by a podiatrist stating that the required orthoses to meet the appellant’s needs as “Metatarsalgia due to Lyme disease. Diagnosis metatarsalgia”. As to how the prescribed item would assist with joint motion and/or support, the podiatrist stated “Decrease pain, increase mobility”. To the question for what purpose the item was required, the podiatrist indicated that it was to improve physical functioning that has been impaired by a neuro-musculo-skeletal condition, explaining “Arthralgia [due] to Lyme disease”. He also answered “Yes” to the question “Will it be made from a hand cast mold?”
- A quote dated 5 May 2014 for “#44... boots to accomodate (sic) orthotics and high instep” for \$558.00.
- A second quote also dated 5 May 2014, from another footwear business for “custom-made orthopaedic footwear fabricated from raw materials”, specifically designed for the appellant, for \$840.00.
- A letter from the ministry to the appellant dated 22 October 2014 stating that the medical justification for the custom-made shoes did not support the request but that off the shelf orthopedic shoes could be considered up to a maximum of \$250 and that if the appellant is interested, to contact the ministry.
- In his request for reconsideration dated 19 December 2014, the appellant indicated that his initial application was delayed because the ministry had misplaced it and included medical recommendation for custom-made orthotic footwear and that the quote from a footwear business was for \$800, not \$250. He included a custom orthotic prescription from another medical practitioner made in February 2014.
 - A prescription from another medical practitioner, an orthopedic surgeon, undated but documents indicated that the appointment with that doctor was on 24 February 2014, stated “Metatarsalgia – for custom orthotic with arch support and metatarsal pad”.
- A letter dated 5 January 2015 from the ministry faxed to the appellant’s physician stated that there might have been a misunderstanding as to what exactly the appellant required and that clarification was needed: “Is it (a) a custom-made foot orthotic with off-the-shelf accommodative footwear, (b) a custom-made foot orthotic with accommodative orthopedic footwear; or (c) custom footwear?” The letter indicated that the decision was due 7 January 2015 and according to the ministry, no reply was ever received.

At the hearing the appellant testified that his intent was to become employable and the orthoses were essential for him to be able to work. He stated that this matter had dragged for much too long and

that his condition has worsened since then and he would now need an ankle brace according to his doctor. The appellant's advocate testified that she contacted the physician that supervised the resident who had provided the Orthoses request and justification details in June 2014 and to whom the letter dated 5 January 2015 had been faxed and he replied by a fax sent on 21 March 2015 that what was required was (a), a custom-made foot orthotic with off-the-shelf accommodative footwear.

The ministry testified that the documentation was confusing and they did not know exactly what was required for the appellant but that a request supported by a physician prescription could be approved up to the amount allowed by the legislation even if an estimated cost was not provided because the maximum payable is established by legislation. For instance, the ministry could approve custom-made foot orthotic with off-the-shelf accommodative footwear up to a maximum of \$450 for the orthotic and \$125 for the footwear.

The panel determined the additional oral and documentary evidence was admissible under s. 22(4) of the EAA as it was in support of the records before the minister at reconsideration, providing further details on the procedures followed by the ministry and the appellant's situation. The ministry did not object to the admissibility of the new documentary evidence and the panel determined it was admissible as responding to a question posed by the reconsideration officer in the fax dated 5 January 2015 and for which the ministry determined that it could be an option for the appellant to treat his condition and it substantiated the resident's recommendation in the Orthoses Request and Justification that read orthotic foot arch support with metatarsal pad to offload metatarsal head - footwear.

PART F – Reasons for Panel Decision

The issue under appeal is whether the ministry's determination that the appellant was not eligible for custom-made footwear under s. 62 of the EAPWDR and s. 3 and 3.10 of Schedule C of the EAPWDR because:

- The requested footwear was not the least expensive medical equipment to meet the appellant's needs as required by s. 3(1)(b)(iii) and 3.10(2) of Schedule C of the EAPWDR;
- The custom-made footwear was not specifically prescribed by a medical practitioner or nurse practitioner as required by s. 3.10(2)(a) of Schedule C of the EAPWDR;
- The ministry was not satisfied the custom-made footwear was medically essential to achieve or maintain basic mobility as required by s. 3.10(2)(b) of Schedule C of the EAPWDR;
- The information provided did not demonstrate that custom-made footwear was required to improve physical functioning that has been impaired by a neuro-musculo-skeletal condition as required by s. 3.10(2)(c) of Schedule C of the EAPWDR and
- The information provided did not demonstrate that it was custom-made footwear rather than custom-made foot orthotics that was required contrary to s. 3.10(2)(d) of Schedule C of the EAPWDR

was either a reasonable application of the legislation or reasonably supported by the evidence.

Section 62 of the EAPWDR provides the authority to the minister to provide health supplements, including medical equipment and devices:

62 (1) Subject to subsections (1.1) and (1.2), the minister may provide any health supplement set out in section 2 [*general health supplements*] or 3 [*medical equipment and devices*] of Schedule C to or for a family unit if the health supplement is provided to or for a person in the family unit who is (a) a recipient of disability assistance,...

Schedule C, Health Supplements, provides for what specific items the minister may approve. Section 3.10 deals specifically with orthoses. The relevant parts are:

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)
 - (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.
- (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. ...
- (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
2	Custom-made footwear	1 or 1 pair...
12	Off-the-shelf footwear	1 or 1 pair
13	Off-the-shelf orthopaedic footwear	1 or 1 pair...

The ministry acknowledged that the appellant is a recipient of disability assistance and is eligible to receive health supplements under s. 62 of the EAPWDR.

The ministry argued that the documentation provided by the appellant was so confusing that it was not possible to determine exactly what type of orthosis was required for the specific condition of the appellant as described by the medical practitioner. Additionally, the quotes provided did not relate to what the physician recommended, which made it impossible for the ministry to determine what exact items were requested and what financial limits would apply.

The appellant argued that the ministry focused only on custom-made footwear in its decision and did not consider the other possibilities that had been raised by the physician's report. The evidence showed that there were a number of possibilities that could apply to the appellant's situation and that was even reflected in the ministry's fax of 5 January 2015 that listed 3 options for orthoses and that the legislation itself recognized a number of options that qualified as an "orthosis". Thus, taken as a whole, the appellant met all the conditions for an orthosis and what was left to be determined was the type of orthosis that would be needed, which the ministry failed to do even though it acknowledged in its letter of 22 October 2014 that the appellant could be eligible for off-the-shelf orthopedic shoes up to a maximum of \$250. The appellant further argued that in the ministry procedures, it is clearly indicated that when considering a request for an orthosis, the ministry must take the application as a whole and that it could include more than 1 item. Thus he argued it was unreasonable for the ministry to limit its determination to only 1 item, the custom-made footwear.

The panel agrees that the documentation provided to the ministry was confusing and it was not clear what exactly the appellant needed. The panel noted for instance that the podiatrist did not specify what orthoses were required to meet the appellant's needs nor did he explain why the custom-made orthotic needed to be made from a hand cast mold, as asked in the form that he completed. Further, the quotes provided were not helpful as they were dated before the assessment made by the resident and did not really match what the previous physician recommended in his prescription of 24 February 2014. Given that confusion, the ministry had identified 4 different potential orthoses:

- Off-the-shelf orthopedic shoes (letter of 22 October 2014)
- Custom-made orthotic with off-the-shelf accommodative footwear (fax of 5 January 2015);
- Custom-made foot orthotic with accommodative orthopedic footwear (*idem*);
- Custom footwear (*idem*).

In assessing whether the "custom-made footwear" was the least expensive appropriate item, the ministry noted that the appellant's condition could be treated with "custom-made foot orthotics and accommodative off-the-shelf or orthopedic footwear" but did not determine whether the appellant was eligible for those latter items.

In assessing which item the medical practitioner prescribed, the ministry stated that he did not "clearly specify that *custom-made footwear*" (italics by the ministry) was required and went on to indicate that he "could also be prescribing custom-made foot orthotics and accommodative footwear" and inferred from the other physician's prescription that he was prescribing custom-made foot orthotics and not custom-made footwear to determine that the appellant was not eligible for the latter, without ever determining whether he would be eligible for any of those 2 other types of orthoses.

The ministry recognized that the podiatrist confirmed that a custom-made orthotic was required for improving physical functioning that had been impaired by a neuro-musculo-skeletal condition but determined the appellant did not meet that condition because the information did not demonstrate he required "*custom-made footwear*" (italics by the ministry).

Consequently, in assessing the eligibility of the appellant for an orthosis, the ministry based its determination on custom-made footwear and reasonably determined the appellant was not eligible for this item as it was not the device that was the least expensive appropriate device; the evidence demonstrated that the appropriate item would have been custom-made foot orthotic and accommodative off-the-shelf footwear that is less expensive than the custom-made footwear (s. 3.10 (3), (4) and (4.1) of Schedule C of the EAPWDR).

However, the ministry had already determined that the custom-made foot orthotic with off-the-shelf accommodative footwear could treat the appellant's condition and the new evidence provided by the appellant's physician faxed on 21 March 2015 confirms the ministry's opinion. Thus, the panel finds it was unreasonable for the ministry not to make a determination on the eligibility of the appellant for the custom-made foot orthotic with accommodative off-the-shelf footwear that it had determined could treat his condition as a result of the documentation that had been provided.

In conclusion, the panel finds the ministry's decision was not a reasonable application of the applicable enactment in the circumstances of the appellant and rescinds the decision. Therefore, the ministry's decision is overturned in favour of the appellant.