



PART C – Decision under Appeal

The decision under appeal is the December 21, 2015 reconsideration decision of the Ministry of Social Development and Social Innovation (the “ministry”) denying the appellant’s request for a supplement in the form of funding for replacement of a custom knee-brace. The reasons given by the ministry for the denial were that one legislative criterion had not been satisfied - that the 4 year time period specified for replacement of a knee brace in sections 3(3)(b) and 3.10(10) of Schedule C of the Employment and Assistance for Persons with Disabilities Regulation (“EAPWDR”) had not elapsed - and that there was no evidence of change in the appellant’s medical condition or growth as required by ministry policy.

PART D – Relevant Legislation

EAPWDR, Schedule C, sections 3 and 3.10

PART E – Summary of Facts

The information and records that were before the ministry at the time of reconsideration included the following:

- Ministry policy with respect to the interpretation of the time limits specified for replacement of orthoses in section 3.10 of Schedule C of the EAPWDR.
- An Orthoses Request and Justification form for orthopedic footwear and a right knee brace, completed in December 2013 (“the first ORJ”).
- A supplier’s quote for a right custom knee brace (plus orthopedic footwear and other items) dated January 2, 2014.
- An Orthoses Request and Justification form for a custom right knee brace, completed in August 2015 (“the second ORJ”).
- A letter from the appellant’s orthotist dated December 12, 2015.
- A supplier’s quote for the requested custom knee brace in the amount of \$1,480.00 dated August 20, 2015.

The panel assessed the evidence as follows:

The appellant is a recipient of disability assistance, having lower extremity paralysis secondary to spina bifida. She had surgery for a total replacement of her right knee in 2013. Her surgeon recommended that the appellant be fitted with a custom knee brace to protect the prosthetic knee from early degradation. In the first ORJ a medical practitioner described the medical condition of the appellant as “spina bifida lower extremity paralysis, knee deformity.” The orthotist noted that the appellant “requires protection against hyperextension on [right] knee” and noted that the knee brace would “prevent genu recurvatum”, or knee hyperextension. The supplier’s estimate of January 2, 2014 described a “right custom knee brace to prevent pathological genu recurvatum.” In March 2014 the ministry approved funding and the appellant was fitted with an off-the-shelf right knee brace that was custom fitted to her.

In March of 2015 the appellant underwent surgery on her right ankle. In May 2015 the ministry provided funding for an ankle-foot orthosis.

In his December 12, 2015 letter, the orthotist stated that the appellant’s knee brace “worked well at a minimum cost for some time but slowly failed to control the rotary instability with which the [appellant] presents.” Numerous repairs were made to the knee brace in an attempt to address the rotary instability issue. As a result of increasing knee pain and a number of falls, the appellant submitted the second ORJ in August, 2015. In the second ORJ a medical practitioner recommend a custom right knee brace and described the appellant’s medical condition as “[right] knee laxity – rotation & hyperextension.” The orthotist wrote in the second ORJ that “[The appellant’s] previous knee brace is wearing out & does not control for excess rotation. She requires an increase in stability via custom molded device.” He explained that the new custom knee brace would “prevent hyperextension & rotation [right]; lock onto existing [ankle-foot orthosis.]”

At first instance the ministry appears to have misinterpreted the second ORJ and denied the appellant’s request for a “right custom knee ankle foot orthotic.” At reconsideration the ministry corrected that misapprehension, acknowledging that the appellant was requesting a custom knee brace. The reconsideration officer attempted to contact the appellant’s physician to make enquiries

about whether the appellant had experienced a relevant change in her medical condition since the ministry funded the appellant's knee brace in March 2014. The physician's locum replacement reviewed the appellant's medical file and informed the ministry that he could not confirm that there had been any relevant changes.

In her oral testimony on appeal, the appellant stated that she had never been seen or examined by the locum physician.

In response to questions from the panel, the ministry confirmed that it had provided funding for the ankle-foot orthosis after the appellant's ankle surgery in March 2015.

The oral testimony of the appellant and the ministry representative provides additional detail that tends to corroborate information that was before the ministry at the time of reconsideration. The panel admitted this information into evidence in accordance with section 22(4) of the *Employment and Assistance Act*.

PART F – Reasons for Panel Decision

The issue on appeal is the reasonableness of the ministry's reconsideration decision denying the appellant's request for a supplement in the form of funding for replacement of a custom knee-brace. The reasons given by the ministry for the denial were that one legislative criterion had not been satisfied - that the 4 year time period specified for replacement of a knee brace in sections 3(3)(b) and 3.10(10) of Schedule C of the EAPWDR had not elapsed - and that there was no evidence of change in the appellant's medical condition or growth as required by ministry policy.

The relevant legislation is as follows:

EAPWDR, Schedule C

Medical equipment and devices

- 3 (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.
- ...
- (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...

- (i) a knee brace;...

- (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.

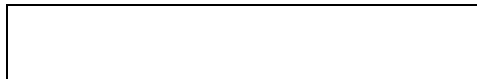


Table 2		
Item	Column 1 Orthosis	Column 2 Time period
1	custom-made foot orthotic	3 years
2	custom-made footwear	1 year
3	modification to footwear	1 year
4	ankle brace	2 years
5	ankle-foot orthosis	2 years
6	knee-ankle-foot orthosis	2 years
7	knee brace	4 years
8	hip brace	2 years
9	upper extremity brace	2 years
10	cranial helmet	2 years
11	torso or spine brace	2 years
12	off-the-shelf footwear	1 year
13	off-the-shelf orthopaedic footwear	1 year
14	toe orthosis	1 year

* * *

The appellant's position is that the knee brace provided to her in 2014 was an off-the-shelf knee brace, and that since she is now applying for a custom knee-brace – “a completely different brace”, the prescribed 4 year time limit should not apply. The appellant also argued that her current knee brace simply isn't dealing with the rotational issue in her knee. She stated that the medical information shows that she is at great risk of serious injury due to falls as well as failure of her prosthetic right knee.

The ministry's position is that the ministry is bound by the prescribed 4 year time limit before providing funding for a replacement knee brace. While stating that is unfortunate that the locum did not “dig deeper”, the ministry argued that there was no information before the ministry from a medical practitioner confirming a change in the appellant's medical condition.

Panel Decision:

Section 3.10 of Schedule C defines an off-the-shelf orthosis as a prefabricated, mass-produced orthosis that is not unique to a particular person. In the appellant's case, while her current knee brace started out as an off-the-shelf unit, the evidence indicates that it was custom-fitted to suit her needs. In the panel's view that made it “unique” to the appellant so it was no longer off-the-shelf as defined. In any event, section 3.10(10) does not differentiate between a custom knee brace and an off-the-shelf knee brace - the replacement period for a knee brace is 4 years.

The ministry has attempted, through policy, to establish guidelines as to the application of the

prescribed time limits for replacement of an orthosis. It may do so both as a means of guiding its own decision-makers and to inform applicants of the kinds of considerations the ministry takes into account in deciding individual cases. Without legislative authority to make binding policy, the ministry may only rely on and refer to policy so long as it is a reasonable interpretation of the legislation and the ministry continues to be open to considering case-specific circumstances. In the panel's view it is reasonable for the ministry to interpret the relevant provisions as allowing replacement of an orthosis within the prescribed time limit where there has been a substantive change in the applicant's medical condition.

The policy provides that "The replacement time period does not apply when an item is required due to changes in a person's medical condition or growth." In the appellant's case, the first ORJ described the appellant's relevant medical conditions variously as spina bifida, lower extremity paralysis, knee deformity, and genu recurvatum/hyperextension. The first ORJ, read together with the supplier's quote for the current knee brace and the orthotist's letter of December 12, 2015 indicates that hyperextension of the knee was the primary reason for provision of the knee brace. In the second ORJ both the medical practitioner and the orthotist referred to hyperextension and rotation. Neither professional had identified knee rotation as an issue in the first ORJ. The difference between the two ORJs, coupled with the evidence that the appellant underwent surgery on her right ankle after she received her current knee brace, indicates that the appellant did experience a substantive change in the functioning and condition of her right knee after she received her current knee brace. The professional evidence is consistent with the appellant's evidence that the current knee brace is not adequate to deal with the present rotational condition.

Based on the foregoing evidence and analysis, the panel finds that the ministry's reconsideration decision was not a reasonable application of the legislation in the appellant's circumstances, and rescinds the decision in the appellant's favour.

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PART G – Order

THE PANEL DECISION IS UNANIMOUS BY MAJORITY (Check one)

THE PANEL CONFIRMS THE MINISTRY DECISION RESCINDS THE MINISTRY DECISION

If the ministry decision is rescinded, is the panel decision referred back to the Minister for a decision as to amount? YES NO

LEGISLATIVE AUTHORITY FOR THE DECISION:

Employment and Assistance Act

Section 24(1)(a) and/or Section 24(1)(b)

and

Section 24(2)(a) or Section 24(2)(b)

PART H – Signatures

SIGNATURE OF CHAIR	DATE (YYYY MMM DDD)
	2016-01-20
PRINT NAME	

SIGNATURE OF MEMBER	DATE (YYYY MMM DDD)
	2016-01-20
PRINT NAME	
SIGNATURE OF MEMBER	DATE (YYYY MMM DDD)
	2016-01-20
PRINT NAME	