

## PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation's ("the ministry") reconsideration decision dated May 9, 2017 in which the ministry denied the appellant's request for custom foot orthotics due to not meeting the eligibility criteria under the Employment and Assistance Regulation ("EAR") as follows:

- The ministry found that the appellant did not meet basic eligibility requirements for general health supplements under section 67 of the Regulation because he does not have the specified qualification as a Person with Persistent Multiple Barriers to employment ("PPMB"); he was not a person receiving special care; and he was not a person otherwise described in section 67 of the EAR.
- In addition, the ministry found that his application did not meet the legislated criteria under section of 62(1) [*sic* - 62] of the Employment and Assistance for Persons with Disabilities Regulation ("EAPWDR"); and that he was also not eligible for orthotics because it was not established that he faced a direct and imminent life-threatening health need under section 76 of the EAR.

## PART D – Relevant Legislation

Employment and Assistance Regulation - EAR - sections 66.1, 67 and 76, Schedule A - section 8(1), and Schedule C, section 2(1)(a)

Employment and Assistance for Persons with Disabilities Regulation - section 62

## PART E – Summary of Facts

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

**1.** A Request for Reconsideration ("RFR") signed by the appellant on May 1, 2017 to which he attached copies of the following documents:

- *Section 3: Reasons for Request for Reconsideration* in which he provided his argument for the reconsideration [which the panel will consider in *Part F - Reasons*] and stated that custom foot orthotics are required to prevent surgery. He further stated that he is losing his mobility, and despite receiving cortisone injections for pain, there are days when he cannot put his feet on the floor and his condition is crippling and can rapidly alter every aspect of his life.
- A letter from a podiatrist dated April 23, 2017 stating that the appellant requires custom foot orthotics to help prevent surgical intervention in the future. The podiatrist wrote that the appellant has significant gait abnormality which has led him to develop plantar fasciitis as well as hip, knee, and significant ankle instability and severe pronation in gait. The podiatrist wrote that the appellant has tried multiple other treatment modalities including medications; however, it is absolutely necessary at this point "to correct his biomechanical abnormalities via a custom foot orthotic...These are medically necessary to prevent surgery as well as correct his biomechanical and neuro-musculoskeletal conditions."

**2.** Information from the ministry's record as follows:

- The appellant is a single recipient of income assistance whose file was opened in December 2000.
- He applied for custom foot orthotics on March 16, 2017; the ministry denied his request on April 3, and received his RFR on May 1, 2017.
- *Orthoses - Request and Justification* form signed by a medical practitioner on January 10, 2017 describes the appellant's medical condition as "des planus and plantar fasciitis" for which custom foot orthotics were recommended.
- Section 3 of the form, signed by a podiatrist on January 12, 2017 contains the following information:
  - The appellant requires semi-rigid polypropylene functional foot orthotics with external rear foot posting, parallel plugs, and padded full length padded forefoot cushion.
  - The orthotics will stabilize ankle function to decrease ankle instability, support and cushion forefoot metatarsal, and correct abnormal pronation to decrease excessive, painful [illegible].
  - Orthotics are also required to prevent surgery, and to assist in physical healing from surgery, injury or disease [comment: "foot orthotics will stabilize subtalar and ankle joint to prevent degeneration of subtalar and tibiofibular joint."]
- A quotation from the podiatrist for custom molded orthotics, total cost \$550.

### ***Additional submissions***

Subsequent to the reconsideration decision the appellant filed his Notice of Appeal dated May 17, 2017 in which he provided his argument on appeal. The panel will consider both parties' arguments in *Part F*. The appellant did not attend the hearing and after confirming that he was notified of the date and time for the teleconference, the panel proceeded in his absence under section 86(b) of the EAR. At the hearing, the ministry relied on the reconsideration decision and did not submit any evidence that was not before the minister at reconsideration.

## PART F – Reasons for Panel Decision

The issue in this appeal is whether the ministry's reconsideration decision of May 9, 2017 that denied the appellant's request for custom foot orthotics due to not meeting the eligibility criteria under the EAR was reasonably supported by the evidence or was a reasonable application of the Regulation in the circumstances of the appellant. Specifically, the ministry found that the appellant did not meet basic eligibility requirements for general health supplements under section 67 of the Regulation because he does not have the specified PPMB qualification; he was not a person receiving special care; and he was not a person otherwise described in section 67 of the EAR. In addition, the ministry found that his application did not meet the legislated criteria under section 62(1) [*sic* - 62] of the EAPWDR; and that he was also not eligible for orthotics because it was not established that he faced a direct and imminent life-threatening health need under section 76 of the EAR.

### **Legislation – EAR**

*[Panel note: The ministry included a previous version of the Regulation in the reconsideration record. Below is the current version, in force as of the date of the ministry's decision]*

### **Definitions**

**66.1** In this Division:

"**qualifying person**" means a person who

- (a) has persistent multiple barriers to employment, or
- (b) is a recipient of income assistance who is described in section 8 (1) [*people receiving special care*] of Schedule A.

### **General health supplements**

**67 (1)** 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) a family unit in receipt of income assistance, if
  - (i) the family unit includes a qualifying person, or
  - (ii) the health supplement is provided to or for a person in the family unit who is a dependent child,
- (b) a family unit in receipt of hardship assistance, if the health supplement is provided to or for a person in the family unit who is a dependent child, or
- (c) a family unit, if the health supplement is provided to or for a person in the family unit who
  - (i) is a continued person under section 66.3 (1) or (2) [*access to medical services only*], or
  - (ii) is a continued person under section 66.4 (1) [*access to transitional health services*] and was, on the person's continuation date, a qualifying person or part of a family unit that then included a qualifying person, or
  - (iii) is a continued person under section 66.4 (2).

(1.1) and (1.2) Repealed. [B.C. Reg. 145/2015, Sch. 1, s. 8 (b).]

**(2)** Subject to subsection (3), 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 recipient in the family unit who

- (a) has received income assistance under the [BC Benefits \(Income Assistance\) Act](#) or the Act continuously from March 31, 1997 and on March 30, 1997 was eligible under section 37 (1) (a) of the BC Benefits (Income Assistance) Regulations, B.C. Reg. 272/96, as it read on March 30, 1997, for the health care services and benefits referred to in that provision, or
- (b) is a dependant of a recipient referred to in paragraph (a).

**(3)** Subsection (2) applies only until the earlier of the following dates:

- (a) the date the recipient ceases to receive income assistance;

(b) the first day of the calendar month after the minister makes a determination that the recipient, or any dependant of the recipient other than a dependent child, is capable of accepting employment.

### **Health supplement for persons facing direct and imminent life threatening health need**

**76** The minister may provide to a family unit any health supplement set out in sections 2 (1) (a) and (f) [*general health supplements*] and 3 [*medical equipment and devices*] of Schedule C, if the health supplement is provided to or for a person in the family unit who is otherwise not eligible for the health supplement under this regulation, and if the minister is satisfied that

(a) the person faces a direct and imminent life threatening need and there are no resources available to the person's family unit with which to meet that need,

(b) the health supplement is necessary to meet that need,

(c) a person in the family unit is eligible to receive premium assistance under the [Medicare Protection Act](#), and

(d) the requirements specified in the following provisions of Schedule C, as applicable, are met:

(i) paragraph (a) or (f) of section (2) (1);

(ii) sections 3 to 3.12, other than paragraph (a) of section 3 (1).

[en. B.C. Reg. 61/2010, s. 1; am. B.C. Regs. 197/2012, Sch. 1, s. 19; 145/2015, Sch. 1, s. 13.]

### **Schedule A - Income Assistance Rates**

#### **People receiving special care**

**8 (1)** For a person who receives accommodation and care in a special care facility or a private hospital or who is admitted to a hospital because he or she requires extended care, the amount referred to in section 28 (a) [*amount of income assistance*] of this regulation is the sum of

### **Schedule C - Health Supplements**

**2 (1)** The following are the health supplements that may be paid for by the minister if provided to a family unit that is eligible under section 67 [*general health supplements*] of this regulation:

#### **3.10 Medical equipment and devices – orthoses**

**(1)** In this section,

“**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 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. 1.]
  - (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.

## **Legislation - EAPWDR**

### **General health supplements**

**62** 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) a family unit in receipt of disability assistance,
- (b) a family unit in receipt of hardship assistance, if the health supplement is provided to or for a person in the family unit who is a dependent child, or
- (c) a family unit, if the health supplement is provided to or for a person in the family unit who is a continued person.

### **Analysis**

The panel assesses each of the ministry's findings as follows:

#### **EAR - section 67**

This section authorizes the minister to provide any health supplement set out in section 2 [general health supplements] or section 3 [medical equipment and devices] of Schedule C, to income assistance recipients, if the family unit includes a "qualifying person" or the supplement is for a dependent child. A "qualifying person" is defined in section 66.1 of the EAR as a person who was found to have persistent multiple barriers to employment (i.e., qualifies as PPMB), or a person who is described in section 8(1) of EAR Schedule A as receiving special care in a hospital or other specified facility.

In addition, sections 67(1)(b) and (c) of the EAR [*panel note: the ministry cited (c-h) from a previous version of the Regulation* ], and sections 67(2) and 67(3) set out criteria for other categories of recipients including persons receiving hardship assistance and *Medical Services Only* ("MSO") benefits under specified circumstances, and persons who received income assistance under previous legislation [*BC Benefits Act*].

The appellant did not argue that he falls into any of the categories of recipients under EAR section 67, and the ministry's position is that it is not authorized to provide custom foot orthotics because the appellant does not meet the criteria in section 67; in particular, he does not have the PPMB qualification, and he does not receive income assistance as a patient in a hospital or other care facility. The ministry further argued that the appellant is not a person otherwise described in section 67.

### ***Panel's decision***

The panel notes that there is insufficient evidence to indicate that the appellant qualifies for PPMB; that he is in a hospital receiving special care; that he is in receipt of hardship assistance or MSO; that he has dependent children; or that he qualified for income assistance under the previous legislation. The panel therefore finds that the ministry reasonably determined that the appellant does not meet the criteria in EAR section 67. Accordingly, the ministry is not authorized to fund the appellant's custom foot orthotics because in order to receive this health supplement, the Regulation requires the family unit to fall within the above-noted categories of persons described in EAR sections 67(1) to 67(3).

### **EAPWDR - section 62**

Under section 62(a) of the EAPWDR [*not 62(1) as stated by the ministry*], the minister is authorized to provide general health supplements and medical equipment and devices to a family unit in receipt of disability assistance. Under EAPWDR sections 62(b) and 62(c) [*not 62(1) (b to g) as noted by the ministry*], the minister is further authorized to provide these supplements to a family unit in receipt of hardship assistance if the supplement is provided to or for a dependent child, and to "continued persons"; i.e, recipients of MSO benefits.

### ***Panel's decision***

The appellant did not argue that he qualifies for disability benefits, and the ministry noted that the appellant is not a recipient of disability assistance, and he is not a person otherwise described in section 62; in particular, he is not a recipient of MSO. As there is insufficient evidence to indicate that the appellant is eligible for health supplements under EAPWD legislation, the panel finds that the ministry reasonably determined that his application for custom foot orthotics does not meet the criteria under section 62 of the EAPWDR.

### **EAR - section 76: life-threatening health need**

This section authorizes the minister to provide health supplements to persons not otherwise eligible for a health supplement under the Regulation, and if the minister is satisfied that the person meets the following requirements:

- faces a direct and imminent life-threatening health need; and
- there are no resources in the family unit to meet the need; and
- the health supplement is necessary to meet the need; and
- the family unit is receiving premium assistance under *Medicare* legislation; and
- the specific requirements for the requested health supplement [in this case, custom foot orthotics under section 3.10 of EAR Schedule C] are met.

The ministry argued that the information provided in the appellant's application for custom foot orthotics, and in his RFR, did not establish that he is facing a direct and imminent life-threatening health need under EAR section 76(a), or that custom foot orthotics are necessary to meet a direct and imminent life-threatening health need under section 76(b). The ministry therefore found that the eligibility criteria set out in section 76(d)(ii) [which references the specific criteria for custom foot orthotics under section 3.10 of Schedule C] were not met.

In his RFR *Reasons*, the appellant argues that his request for custom foot orthotics is in compliance with section 76 of the EAR, and that the orthotics are required to prevent surgery in accordance with section 3.12 [*sic* - 3.10] of Schedule C of the Regulation. He argues that without orthotics, he is losing his mobility and he needs them in order to be able to walk. He argues that his pain is crippling and can “rapidly alter every aspect of your life”, and despite injections from his doctor, “it will get worse if nothing is done to address it.”

In his *Notice of Appeal*, the appellant argues that the ministry overlooked his doctor’s note and did not take into account the “direct and cumulative effect of the impairment” on his ability to function in his daily life or, eventually, in the workplace. He argues that he is therefore eligible for orthotics under section 76 of the EAR. He stated that he also looked at an investigation into the ministry reconsideration process that mentions two cases in which the ministry approved a request for custom foot orthotics.

### ***Panel’s decision***

The panel finds that the ministry reasonably determined that the information provided does not establish that the appellant is facing a direct and imminent life-threatening health need, or that custom foot orthotics are necessary to meet such need. While the appellant argues that the ministry overlooked the information from his doctor, and has ruled favourably on other requests to fund orthotics, the ministry testified at the hearing that the adjudicator took a closer look at section 76 out of consideration for the appellant’s arguments. The panel notes that the ministry exhaustively considered all of the relevant sections of the Regulation and applied these to the appellant’s specific circumstances, and there is no indication that the ministry did not reasonably apply the legislation to the information provided by both the appellant and the podiatrist.

Regarding the podiatrist’s letter of April 23, 2017, the panel notes that while it addresses the appellant’s “direct and imminent health need” for orthotics and confirms that these are required to prevent surgery [in accordance with section 3.10(2)(c)(i) of EAR Schedule C], section 67 also requires evidence that the direct and imminent health need is “life-threatening”. While improving the appellant’s mobility, alleviating his pain, and preventing surgery are important health considerations, these benefits do not confirm the requirement under the Regulation that orthotics are necessary to meet a direct and imminent life-threatening health need as argued by the ministry.

In any event, even if the evidence did sufficiently establish a direct and imminent life-threatening health need for orthotics under section 76, as noted earlier, the ministry would still not be authorized to fund the appellant’s request because the Regulation also requires the family unit to meet the eligibility criteria in EAR section 67. As explained earlier, the panel found that the ministry reasonably determined that section 67 was not met because the appellant does not have PPMB qualification, and is not a recipient of MSO or any of the other classes of benefits set out in EAR section 67. In addition, he does not qualify for orthotics as a recipient of disability benefits under the EAPWDR.

### ***Conclusion***

The panel finds that the ministry’s reconsideration decision that denied the appellant’s request for custom foot orthotics due to not meeting the eligibility criteria under the EAR was a reasonable application of the Regulation in the circumstances of the appellant. The panel therefore confirms the decision under section 24(2)(a) of the *Employment and Assistance Act* and the appellant is not successful in his appeal.