PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation's (the "ministry") Reconsideration Decision of May 3rd, 2017 in which the ministry denied the appellant's request for a supplement to cover the cost of custom-made foot orthotics because the requisite period of time (3 years) had not passed to permit the replacement of custom-made foot orthotics, pursuant to Sections 3(3)(b) and 3.10(10) of Schedule C of the Employment and Assistance for Persons with Disabilities Regulation (EAPDR).

PART D – Relevant Legislation

EAPDR - *Employment and Assistance for Persons with Disabilities Regulation*, Section 62 and Schedule C Sections 3(3)(b) and 3.10

EAA – *Employment and Assistance Act*, Section 22

PART E – Summary of Facts

The information before the ministry at the time of reconsideration included the following:

1) **January 25th, 2017** – An Orthosis Request and Justification form. – **Section 2** of the form; completed by a physician on November 16, 2016, indicating a medical condition of severe foot pronation of both feet, with a recommendation for custom-made orthotics. **Section 3** of the form; completed by a different physician on June 17, 2017 indicating that the prescribed item is required for prevention of surgery and to assist in physical healing from surgery, injury or disease. Further highlighted; stopping the severe pronation with orthotics will solve the chances of surgery being needed in the future. It will help her inflammation and pain to heal, and stop hyper-pronation from occurring. Specifically, the requested item is described as orthotics made from plaster of Paris molds to stop the significant hyper-pronation occurring that is causing pain. Included in the Orthosis Request was a letter from the same physician highlighting the need for custom-made foot orthotics for the treatment of the following condition: severe plantar fasciitis and metatarsalgia caused by hyper-pronation occurring through the subtalar joint when weight bearing. Total cost: $476.00

2) **March 14th, 2017 –** A dated denial letter for the request to replace the appellant's custom-made foot orthotics**.** The Decision Summary highlights the reason for the denial which is due to the appellant having be provided with custom-made foot orthotics on **March 19, 2015 –** where a replacement at this time would be before the legislated time period of three years has lapsed. The denial letter indicates that the appellant would not be eligible for replacement orthotics until after **March 19, 2018**.

3) **April 20th, 2017** – A dated Request for Reconsideration – which includes a dated – April 10th, 2017 letter from a physician indicating that the appellant has broken her orthotics and requires new ones. That the appellant requires the orthotics because she has a difficult time walking without them, and that it causes her pain, and that she will become progressively more unfit if she does not have the support to walk.

4) **May 1st, 2017** – The Reconsideration Officer (RO) sent a fax to the physician requesting more information regarding the need for the replacement. Specifically, the RO writes: *the appellant was provided custom-made foot orthotics on Mary 19, 2015. The current information does not suggest a change in the appellant's medical conditions (causing a need for orthotics) has taken place between March 2015 and now. Could you confirm if there are any changes to the appellant's medical condition(s) or growth which has taken place between March 2015 and now?*

5) **May 2nd 2017** – A dated faxed response from the physician to the RO indicating: That the appellant is overweight, has broken her orthotics, and is now in need of a replacement.

Additional Information

At the hearing, the appellant's representative provided an Occupational Therapist letter dated June 26th, 2017 outlining his support of the appellant's need for custom-made foot orthotics. The panel determined that the submission was in support of what information was before the reconsideration officer at the time the decision was made, and the ministry did not object to the admissibility of the information. The panel determined that the information was admissible, pursuant to section 22(4)(a) of the Employment and Assistance.

The appellant's representative submitted oral testimony in support of the information that was before the minister when the decision being appealed was made; specifically, the representative provided an overview of the appellant's current medical conditions that was consistent with the information provided in the request for reconsideration and original application for custom-made orthotics. In effect, the information provided was a description of the particular

syndrome diagnoses, as well as what impact the syndrome has on the appellant's ability to walk unaided and without the use of orthotics. The ministry did not object to the admissibility of the testimony. The panel determined that the information was admissible pursuant to section 22(4)(b) of the Employment and Assistance Act.

At the hearing, the ministry relied on the reconsideration decision and did not introduce any additional evidence.

PART F – Reasons for Panel Decision

The issue under appeal is the reasonableness of the Ministry of Social Development and Social Innovation's (the "ministry") Reconsideration Decision of May 3rd, 2017 in which the ministry denied the appellant's request for a supplement to cover the cost of custom-made foot orthotics because the requisite period of time (3 years) had not passed to permit the replacement of custom-made foot orthotics, pursuant to Sections 3(3)(b) and 3.10(10) of Schedule C of the Employment and Assistance for Persons with Disabilities Regulation (EAPDR).

The relevant sections of the legislation are as follows:

EAPDR - *Employment and Assistance for Persons with Disabilities Regulation,* Section 62

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.

Health Supplements

Definitions

1 In this Schedule:

"orthotist" means a person who is certified by and in good standing with the Canadian Board for Certification of Prosthetists and Orthotists;

"pedorthist" means a person who is certified by and in good standing with the College of Pedorthics of Canada;

"physical therapy" has the same meaning as in the Physical Therapists Regulation, B.C. Reg. 288/2008;

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.
(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:
(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 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.
(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) 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;
(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, Sch. 2.]
(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.

(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 behaviour, 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.

Table 2

Item	Column 1 **Orthosis**	Column 2 **Time period**
1	**custom-made foot orthotic**	**3 years**

(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.]

(12) An accessory or supply that is medically essential to use an orthosis that is a health supplement under subsection (2) is a health supplement for the purposes of section 3 of this Schedule.

Panel Decision

The ministry's position, as set out in the reconsideration decision, is that the appellant is eligible to receive health supplements under Section 62 of the EAPWDR, but that the appellant's request for a supplement to cover the cost of custom-made foot orthotics does not meet the the legislative criteria set out in Schedule C section 3(3)(b) and 3.10. The ministry notes that pursuant to Section 3(3)(b) of Schedule C of the EAPWDR, the ministry may provide a replacement of orthotics previously provided by the ministry that is damaged, worn out or not functioning *if* the applicable period of time has passed. The ministry submits that Section 3.10(10) of Schedule C further provides that the applicable period of time for replacement of custom-made foot orthotics is three years from the date on which the ministry provided the orthosis being replaced. The ministry determined that the appellant was provided with custom foot orthotics on March 19th, 2015 and she, therefore will not be eligible for replacement of the custom foot orthotics until three years from that date, or March 19th, 2018. The representative's position on behalf of the appellant is that the appellant suffers from a particular syndrome and in part, as a result of that syndrome, walks on her ankles, and should be provided a replacement for her broken orthotics. The representative position is that the appellant is already morbidly obese, and if the appellant does not receive the orthotics replacement, she will progressively become less fit and less ambulate.

The ministry's position is that because the appellant's request is before the legislated three year eligibility time period has lapsed, approval for a custom-made foot orthotic cannot be granted. The ministry determined that the appellant was provided with custom foot orthotics on March 19th, 2015 and she, therefore will not be eligible for replacement of the custom foot orthotics until three years from that date, or March 19th, 2018.

The panel finds, that the evidence establishes the appellant has a medically justified need for custom-made foot orthotics. The panel finds that on May 1st, 2017 – the Reconsideration Officer (RO) faxed a request for further information regarding the medical status of the appellant, noting that there was nothing indicating in the records that a change in a medical condition or growth had occurred from the time of the initial application to the current replacement application – which according to ministry replacement policy would allow for justification of a replacement of the custom-made orthotics before the eligible time period had lapsed. However, the ministry cannot develop policy that is inconsistent with or otherwise contradicts the requirements set out the Act or regulation. In this case, the EAPWDR does not contemplate a discretion with respect to the time frame and the requirements under the EAPWDR prevail over ministry policy.

Section 3.10(1) of Schedule C of the EAPWDR sets out that the period of time referred to in section 3(3) (b) to allow for replacement of custom-made foot orthotics is three years from the date on which the ministry provided the orthosis being replaced. As the appellant's request for replacement of her current custom-made foot orthotics is dated January 25th, 2015, the panel finds that the ministry reasonably concluded that this request had been made prior to the three year period of time having passed from March 19th, 2015 as required by Sections 3(3)(b) and 3.10(10) of Schedule C.

Overall, the panel finds that the ministry reasonably determined that the appellant is not eligible for a replacement of her custom-made foot orthotics due to the time period of three years not yet passed from the original application for the health supplement, pursuant to Section 3(3)(b) and 3.10(10) of Schedule C of the Employment and Assistance for Persons with Disabilities Regulation (EAPWDR).

Accordingly, the panel finds that the decision of the ministry to deem the appellant not eligible for a replacement for her custom-made foot orthotics due to not meeting the time period eligibility requirements of Section 3(3)(b) and 3.10(10) of Schedule C of the *Employment and Assistance for Persons with Disabilities Regulation*, a reasonable application of the applicable enactment in the circumstances of the appellant. Therefore, the panel confirms the ministry's decision pursuant to section 24(1)(b) and section 24(2)(a) of the Employment and Assistance Act. The appellant therefore is not successful in her appeal.