PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Poverty Reduction (the "Ministry") reconsideration decision of August 16, 2017 (the "Reconsideration"), which denied the Appellant a health supplement for coverage of bilateral orthopaedic shoes because the Appellant did not meet the statutory requirements of sections 3(1)(b)(iii) and 3(3) of Schedule C to the *Employment and Assistance for Persons With Disabilities Regulation* ("EAPWDR") because:

- the medical practitioner who completed the Appellant's Orthoses Request and Justification form (the "Request") did not specifically set out that the Appellant required "off the shelf" *orthopaedic* footwear, as opposed to less expensive "off the shelf" accommodative footwear, as required by section 3(1)(b)(iii) of Schedule C to the EAPWDR; and
- the Appellant had not demonstrated that the footwear previously funded by the Ministry on March 13, 2015 was damaged, worn out, or not functioning as required by section 3(3) of Schedule C of the EAPWDR.

PART D – Relevant Legislation

EAPWDR, section 62 and Schedule C, sections 3 and 3.10

PART E – Summary of Facts

The Appellant is a recipient of disability assistance. On February 21, 2017, the Appellant submitted the Request with an estimate, dated February 16, 2017 for a bilateral orthopaedic shoe, in the amount of $290.00 (the "Estimate").

On June 16, 2017, the Ministry approved a supplement for "off the shelf" accommodative footwear in the amount prescribed by section 3.10(4.1) of Schedule C to the EAPWDR.

Information before the ministry at the time of the Reconsideration

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

- The Request, submitted to the Ministry on February 21, 2017, in which the Appellant's doctor recommended "shoes to accommodate her current orthotics" and made diagnoses including "myasthenia Gravis, inflammatory arthritis, and spina bifida" and in which the Appellant's pedorthist recommended "extra depth footwear to accommodate ankle foot orthosis";
- The Estimate;
- A purchase authorization, dated June 16, 2017 for "off the shelf" accommodative footwear in the amount of $139.00, inclusive of applicable taxes;
- A purchase authorization from 2015 for "off the shelf" orthopaedic footwear in the amount of $240.00;
- The Appellant's Request for Reconsideration ("RFR"), in which the Appellant states that the orthopaedic shoes that she obtained from the Ministry in 2015 have worn out and that she requires the same shoes as she cannot use her orthotics without them.

In her Notice of Appeal, the Appellant stated that she needed a new pair of shoes as the first pair had completely worn out and that the person filling out her original request had done so incorrectly.

In the Appellant's oral evidence, the Appellant described that her custom orthotics are not usable with the "off the shelf" shoes approved by the Ministry, as her orthotics require deeper shoes because they extend beyond the length that ordinary shoes can accommodate and up the Appellant's leg. The Appellant stated that she cannot walk without orthopaedic shoes that can support her orthotics. The Appellant reiterated that her previously approved orthopaedic shoes were completely worn out and that she had discarded them.

In addition to her oral evidence, the Appellant submitted the following documents to the tribunal at the hearing:

- A letter from her doctor, dated October 2, 2017 from her family doctor, which sets out that the Appellant requires "orthopedic (sic) shoes in order to accommodate her custom orthotics" and that "regular shoes are unable to deal with these issues adequately and she requires (sic) shoes for medical reasons";
- A letter from her pedorthist, dated September 29, 2017, in which the pedorthist writes that the Appellant requires "bilateral orthopaedic shoes with additional depth to accommodate her ankle foot orthotic.

The Ministry representative did not object to the admissibility of the two letters, dated October 2, 2017 and September 29, 2017, from the Appellant's doctor and pedorthist, respectively.

The panel finds that both letters are admissible, pursuant to section 22(4) of the *Employment and Assistance Act*, S.B.C. 202, c.40 as written testimony in support of the information and records that were before the Ministry at the time of Reconsideration. In addition to being consistent with the information set out in the Request. Both letters set out with more precision than was contained in the Request the specific type of shoes required by the Appellant and why “off the shelf” footwear, which the Ministry did approve as a supplement, are unsuitable for the Appellant’s use. Likewise, the panel finds that the Appellant’s oral evidence is admissible as oral testimony in support of the information and records that were before the Ministry at the time of Reconsideration.

PART F – Reasons for Panel Decision

The issue on this appeal is whether the Ministry reasonably determined, applying sections 3(1)(b)(iii) and 3(3) of Schedule C to the EAPWDR, that the Appellant was ineligible for a health supplement for coverage of bilateral orthopaedic shoes because:

- the medical practitioners who completed the Appellant's Orthoses Request and Justification form (the "Request") did not specifically set out that the Appellant required more expensive "off the shelf" *orthopaedic* footwear, as opposed to "off the shelf" accommodative footwear, as required by section 3(1)(b)(iii) of Schedule C to the EAPWDR; and
- the Appellant had not demonstrated that the footwear previously funded by the Ministry on March 13, 2015 was damaged, worn out, or not functioning as required by section 3(3) of Schedule C of the EAPWDR

Statutory Framework

Section 62 of the EAPWDR permits the Ministry to provide health supplements set out in Schedule C of the EAPWDR to eligible recipients of disability assistance:

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.

[en. B.C. Reg. 145/2015, Sch. 2, s. 4.]

Section 3 of Schedule C to the EAPWDR sets out the general requirements for eligibility for supplements in respect of the medical equipment enumerated in sections 3.1 to 3.12 of Schedule C:

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.

Section 3.10 of Schedule C to the EAPWDR sets out the requirements for approval of orthoses generally:

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.

...

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
3	modification to footwear	1 or 1 pair
4	ankle brace	1 per ankle
5	ankle-foot orthosis	1 per ankle
6	knee-ankle-foot orthosis	1 per leg
7	knee brace	1 per knee
8	hip brace	1
9	upper extremity brace	1 per hand, finger, wrist, elbow or shoulder
10	cranial helmet	1
11	torso or spine brace	1
12	off-the-shelf footwear	1 or 1 pair
13	off-the-shelf orthopaedic footwear	1 or 1 pair
14	foot abduction orthosis	1 or 1 pair
15	toe orthosis	1

(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

(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.

Appellant's position

The Appellant's position is that she requires bilateral orthopaedic shoes and that her orthotics are not usable with the type of footwear (non-orthopaedic "off the shelf" footwear) which the Ministry did authorize as a medical supplement. The Appellant submits further that the recent letters from her pedorthist and doctor both confirm her need for orthopaedic footwear.

Ministry's position

The Ministry's position is that the Appellant has not established that the orthopaedic shoes for which the Appellant sought a supplement were the least expensive appropriate equipment or device, as required by section 3(1)(b)(iii) of Schedule C to the EAPWDR because neither the Appellant's pedorthist nor the Appellant's doctor specifically confirmed the Appellant's need for "orthopaedic" footwear as opposed to non-orthopaedic "off the shelf" footwear. The Ministry also takes the position that the Appellant has not established that her previously approved footwear was "damaged, worn out or not functioning", as required by section 3(3) of Schedule C to the EAPWDR.

Panel's decision

Section 3(1)(b)(iii) of Schedule C to the EAPWDR

Section 3(1)(b)(iii) requires a recipient to satisfy the Ministry that the equipment for which a supplement is sought is "the least expensive appropriate medical equipment or device." Neither the Appellant's pedorthist nor her doctor specifically confirmed the need for "orthopaedic" shoes in the Request, despite recommending "extra depth footwear" and "shoes to accommodate her current orthotics", respectively. Because of this omission, the Ministry denied the Appellant's request for a supplement on the basis that it was difficult for the Ministry to conclude that the Appellant had established that bilateral orthopaedic shoes, for which she had submitted an estimate, were "the least expensive appropriate medical equipment or device", as required by section 3(1)(b)(iii) of Schedule C to the EAPWDR, notwithstanding the Appellant's having previously having been approved for orthopaedic footwear in 2015.

However, the Appellant's oral evidence was that the "off the shelf" footwear approved by the Ministry was not usable with her current orthotics. The follow-up letters from her pedorthist and her doctor, dated September 29, 2017 and October 2, 2017, respectively, both specifically confirm the Appellant's need for "orthopedic (sic) shoes" and the doctor's letter, in particular, confirms that "regular shoes" cannot adequately accommodate the Appellant's orthotics.

In view of the fact that the "off the shelf" footwear approved by the Ministry is not suitable for the Appellant, the panel finds that it was not reasonable for the Ministry to deny the Appellant funding for "off the shelf" orthopaedic footwear on the basis that "off the shelf" footwear, which the Ministry did approve as a medical supplement, was the least expensive *appropriate* medical equipment or device.

Section3(3) of Schedule C to the EAPWDR

In order to be eligible for any supplement for the replacement of medical equipment, a recipient of disability assistance must satisfy the requirements of section 3(3) of Schedule C to the EAPWDR. Namely, the recipient must satisfy the Minister that the item sought is "damaged, worn out or not functioning" and that:

- it is more economical to replace than to repair the medical equipment or device previously provided by the minister, and
- 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.

For both "off the shelf footwear" and "off the shelf orthopaedic footwear" the time set out in section 3.10 of Schedule C to the EAPWDR is one year. The Appellant was most recently approved for orthopaedic footwear in 2015. As such, adequate time has passed for the Appellant to be eligible for a replacement. In the Reconsideration, there is no suggestion by the Ministry that it could be more economical to repair the Appellant's worn out shoes and the Ministry did approve funding for "off the shelf" non-orthopaedic footwear, which on the evidence, is less expensive than orthopaedic footwear. It stands to reason that the Ministry accepts that it was more economical to replace than to repair the Appellant's previously approved orthopaedic shoes.

In the Reconsideration decision, the Ministry found that "the information provided does not establish that the footwear funded on March 13, 2015 is damaged, worn out or not functioning." It is the panel's finding that such a determination is wholly inconsistent with the Ministry's decision to replace the Appellant's footwear with "off the shelf" non-orthopaedic footwear. In effect, the panel finds that it is not reasonable for the Ministry to determine that the Appellant did establish that her previously approved footwear was "damaged, worn out or not functioning" for the purpose of determining her eligibility for "off the shelf" non-orthopaedic footwear but that it was not "damaged, worn out or not functioning" for the purpose of determining her eligibility for orthopaedic footwear. Either the Appellant's previously awarded footwear was "damaged, worn out or not functioning" or it wasn't. The Ministry's approval of the "off the shelf" footwear is an implicit acknowledgement that the Appellant's previously approved footwear was "damaged, worn out or not functioning."

In view of all of the foregoing, the panel finds that the Ministry's denial of the Appellant's request for a supplement for orthopaedic shoes was not a reasonable application of the relevant statutory provisions in the circumstances of the Appellant and, in the result, the panel rescinds the Reconsideration decision.

The Appellant is successful in her appeal.