

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Poverty Reduction (the ministry) reconsideration decision dated September 6, 2017 which found that the appellant was not eligible for custom-made footwear (with built-in custom ankle-foot orthoses) as the appellant did not meet the criteria set out in the Employment and Assistance for Persons with Disabilities Regulation (EAPWDR), Schedule C, subsection 3. The ministry was not satisfied the evidence established that:

- The medical equipment or device is the least expensive appropriate medical equipment or device.
- The medical equipment or medical device, previously provided by the ministry was damaged, worn out or not functioning.

PART D – Relevant Legislation

Employment and Assistance for Persons with Disabilities Regulation (EAPWDR)– Section 62

Employment and Assistance for Persons with Disabilities Regulation (EAPWDR)– Schedule C, section 3

PART E – Summary of Facts

The appellant is a single person in receipt of Medical Services Only.

March 23, 2017-the appellant submitted to the ministry an application for custom-made footwear (with built-in custom ankle-foot orthoses).

July 31, 2017-the appellant's application for custom-made footwear (with built-in custom ankle-foot orthoses) was denied.

August 9, 2017- the appellant requested a reconsideration and submitted a signed request for reconsideration on August 28, 2017.

September 6, 2017- the ministry reviewed the appellant's request and the request was denied.

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

- Orthoses Request and Justification form submitted March 23, 2017.
 - Section 2 was completed on January 9, 2017 by an unidentified Medical or Nurse Practitioner. They stated:
 - Appellant's condition described as "left hemiplegia", (secondary to) traumatic brain injury
 - Recommended type of orthosis was a Custom orthopedic boot with wide lateral buttress and left AFO with full dorsal wrap
 - A custom-made orthosis is required
 - Section 3 was completed by an Orthotist March 23, 2017 who stated:
 - Specifications to meet appellant's needs are- custom form cast
 - Prescribed item will assist with joint motion and /or support
 - Prescribed item is required to improve physical functioning- "allow safe ambulation".
 - Appellant requires custom footwear to manage his deformity
- Price quote from Orthotic services dated March 23, 2017 stating \$2460 for orthopedic shoes, custom fabricated
- Picture and tracings of the appellant's foot
- Letter written by Physical Therapist dated August 21, 2017 which states:
 - Appellant has had long problems with his mobility, will continue to have problems in the future, is aging.
 - The request is a definite necessity for his well-being to prevent him from being re-admitted into hospital for another fractured bone. He has had many fractures in the past.
- Physical Therapy Mobility Assessment written by a Physical Therapist dated December 7, 2016 which provided the following information:
 - Appellant's medical conditions
 - The appellant suffered a recent fall as well as a history of fractures due to falling. The appellant has a high falls risk due to difficulty shifting weight to his left side.
 - The appellant uses a 4-wheel walker
 - A follow-up home visit is recommended
- A follow-up visit summary by Physical Therapist dated February 28, 2017 which stated:
 - Numerous strategies for the appellant to use in order to cope with his medical condition

Information submitted by the appellant included:

Appellant Submission (appendix A) dated September 28, 2017, from the community physiotherapist

address to a Health Authority

- The submission was not in the possession of the ministry representative. The ministry representative read the submission at the hearing and did not object to the admission of this evidence.
- The submission noted the following points:
 - The appellant had fallen twice, September 14 and September 22
 - The caregiver was concerned about the weight of the appellant's boots- too heavy, and therefore stumbling

In the appellant's Notice of Appeal, the appellant wrote:

- Community professionals (doctor, Physiotherapist, and orthotics suppliers) have stated that the requested footwear is necessary for safety

At the hearing, the appellant with the assistance of his day caregiver stated:

- His orthotic footwear is so heavy it causes him to drag his foot and as a result he kicks his walker and he falls
- His orthotic footwear is worn out, the sole is coming off
- Normal mobility is the issue, he is having trouble lifting his feet as he ages the problem has become worse
- The requested footwear should be considered safety equipment

At the hearing the ministry representative, when asked how they would determine if an "off the shelf orthotic" would meet the appellant's needs, stated that the appellant's request was reviewed in conjunction with the Health Assistance Branch's consulting physiotherapist who determined the purchase of off the shelf orthopedic footwear is a more basic option to provide treatment for the appellant's diagnosis.

Admissibility of New Information

Section 22(4) of the *Employment and Assistance Act* states that the panel is empowered to admit as evidence only "the information and records that were before the minister when the decision being appealed was made" and "oral or written testimony in support of" the record of the ministry decision. If the additional evidence substantiates or corroborates the information and records before the minister at the reconsideration stage, the evidence should be admitted; if it does not, then it does not meet the test of admissibility under s. 22(4)(b) of the *Employment and Assistance Act* and should not be admitted.

The panel found that Appendix A, which refers to the weight of the appellant's boot being a possible cause for his recent falls and the oral submission of the appellant that his boots are too heavy and worn out, is new information and does not substantiate or corroborate the information and records before the minister at the time of reconsideration therefore it does not meet the test of admissibility under s. 22(4)(b) of the *Employment and Assistance Act* and will not be admitted.

PART F – Reasons for Panel Decision

Panel Decision

The issue on appeal is whether the ministry's reconsideration decision, which found that the appellant is not eligible for custom-made footwear (with built-in custom ankle-foot orthoses), was reasonably supported by the evidence or was a reasonable application of the applicable regulation in the circumstances of the appellant.

In the ministry's decision, the ministry notes the appellant was not eligible under Schedule C, subsection 3.10(1)(iii) specifying that the medical equipment or device is the least expensive appropriate medical equipment or device and subsection 3(3) which sets out that the ministry may provide as a health supplement a replacement of medical equipment or device, previously provided by the minister under this section, that is damaged, worn out or not functioning.

As there is no subsection 3.10(1)(iii) in Schedule C, after examining the evidence of the July 31, 2017 denial of the application for custom-made footwear and the statements made by the ministry in the Reconsideration Decision, the panel concluded that the reference to subsection 3.10(1)(iii) was an error and that the legislative language of Schedule C, subsection 3(1)(b)(iii) of the EAPWDR, which mirrors the ministry's analysis, should replace the incorrect legislation label.

The ministry found that the evidence does not establish that the appellant met the requirements set out in the EAPWDR, Schedule C, subsections 3(1)(b)(iii) and 3(3).

The relevant legislation is as follows:

Employment and Assistance for Persons with Disabilities Regulation

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 under 19 years of age, 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.

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.

Schedule C, subsections 3(1)(b)(iii) and 3(3) of the EAPWDR

Schedule C, subsection 3(1)(b)(iii) of the EAPWDR requires that the medical equipment or device is the least expensive appropriate medical equipment or device. The appellant has supplied a quote for custom orthopedic shoes (\$2460) as he believes, given the professional advice, that custom footwear and orthotics are required for his medical needs. The ministry's position is having supplied funding in May 2013(\$1565) for off-the-shelf orthopedic footwear with modifications in addition to an ankle-foot-orthosis there is insufficient evidence that the previously funded items were insufficient in meeting the appellant's needs therefore the appellant does not require the costlier custom-made footwear (with built-in custom ankle-foot orthoses).

Panel Decision

The appellant has requested more expensive replacement orthosis based on the input of medical professionals but the panel finds there is insufficient evidence given in the Orthoses Request and Justification form as there is no mention that orthopedic needs of the appellant have changed since the ministry provide funding in May, 2013 nor is there sufficient evidence given that the items provided were not meeting the appellant's orthopedic needs. The panel finds that the ministry was reasonable to determine the appellant had not met the requirements of Schedule C, subsection 3(1)(b)(iii) of the EAPWDR.

Schedule C, subsection 3(3) of the EAPWDR states 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. During the hearing, the appellant explained his current orthopedic footwear was worn out and the sole was becoming detached and that he required new footwear. The ministry noted that within the appellant's Orthoses Request and Justification form, there was no description provided as to the condition of the off-the-shelf orthopedic footwear.

Panel Decision

As the panel has determine the appellant's evidence which presented that his current orthopedic footwear was worn out is new evidence and not admissible the panel addressed the evidence found in the appellant's application for custom footwear and his Request for Reconsideration. The panel found there was insufficient evidence to determine the current condition of the appellant's orthotic footwear. The panel therefore finds that the ministry was reasonable to determine the appellant had not met the requirements of Schedule C, subsection 3(3) of the EAPWDR.

Conclusion

The panel finds that the ministry's reconsideration decision dated September 6, 2017 which determined that the appellant was not eligible for custom-made footwear (with built-in custom ankle-foot orthoses) in accordance with Schedule C, subsections 3(1)(b)(iii) and 3(3) of the EAPWDR was reasonably supported by the evidence, and therefore confirms the ministry's decision.

The Appellant was not successful in his appeal.