

PART C – DECISION UNDER APPEAL

The decision under appeal is the reconsideration decision of the Ministry of Social Development and Poverty Reduction (the “ministry”) dated June 29, 2018 that denied the appellant’s request for replacement custom-made foot orthotics and off-the-shelf orthopedic shoes.

The ministry found that the appellant was provided custom-made foot orthotics in March 2016 and the 3-year legislative period for replacement under the Employment and Assistance for Persons with Disabilities Regulation, Schedule C, sections 3(3) and 3.10 had not elapsed.

PART D – RELEVANT LEGISLATION

Employment and Assistance for Persons with Disabilities Regulation - EAPWDR - sections 62 and 69;

Employment and Assistance for Persons with Disabilities Regulation - EAPWDR - Schedule C. section 3 and 3.10

PART E – SUMMARY OF FACTS

The documentary evidence before the ministry at reconsideration included the following:

1. The reconsideration decision states that ministry records show the appellant received custom made orthotics in 2003, 2005, 2006 and 2008 every two years. In 2010 the legislation changed from 2 year to 3 years replacement period. The appellant received pairs of custom made orthotics in 2011 and again in 2016.
2. The reconsideration decision states that ministry records show the appellant received orthopedic shoes in 2003, 2006, 2008, 2010, 2011, and in 2014. The replacement period for off-the-shelf orthopedics is 1 year.
3. On April 20, 2018 the ministry received the following documents:
 - a. Orthoses Request and Justification form completed on April 26, 2018 by the appellant's medical practitioner, who completed section 2. The medical practitioner describes the appellant's condition as: "diabetic ulcers feet, lower back ache, and high arches – arch support" and recommends custom made foot orthotics.
4. Section 3 is completed by the Pedorthist, dated April 27, 2018 (Section 3) who provides the following information:
 - a. Specifications of the orthoses required to meet the appellant's needs: "Diabetic foot orthotics and shoes".
 - b. How the described item will assist with joint and/or support: "Offload and prevent potential ulceration".
 - c. The item is required for the prevention of surgery, post-surgery treatment, and to assist in physical healing from surgery, injury or disease. The pedorthist writes: "High risk diabetic, ulcer prevention".
 - d. The orthotics will be made from hand cast mold "non-weight bearing, subtalar neutral plaster of paris"

Additional Information

In the appellant's Notice of Appeal dated July 14, 2018, the appellant states that he disagrees with the ministry's reconsideration decision as it has always been two years between "issue of orthotics. Not it is 3 yrs. I disagree".

At the hearing, the appellant used his phone to show photos of the ulcers on both his feet. He also showed the actual shoes and orthotics that he felt needed to be replaced. The ministry representative did not object to these visual aids.

The ministry did not provide additional evidence at the hearing and relied on its reconsideration decision.

Admissibility of New Information

The panel accepted the photographs, shoes and orthotics as evidence as they are visual aids in support of information and records that were before the ministry at the time of reconsideration, in accordance with section 22(4) of the *Employment and Assistance Act*. In particular, the photographs confirm the evidence of the medical practitioner indicating that the appellant has foot ulcers. The shoes and orthotics confirm the appellant's evidence that his current shoes and orthotics are worn out and in need of replacement.

The panel accepted the information in the Notice of Appeal as argument.

PART F – REASONS FOR PANEL DECISION

The issue in this appeal is the reasonableness of the reconsideration decision in which the ministry found that the appellant was not eligible for replacement custom foot orthotics or off the shelf orthopedic shoes. The ministry found that the appellant was provided custom-made foot orthotics in 2016 and the 3-year legislative period for replacement under the EAPWDR, Schedule C, sections 3(3) and 3.10 has not elapsed.

With respect to the off-the-shelf orthopedic footwear, the ministry found that the medical practitioner who completed the Request indicates that the appellant requires custom fit orthotics but did not indicate that the appellant requires off the shelf orthopedic footwear as required by section 3(1)(b)(iii) of Schedule C to the EAPWDR.

The relevant legislation is as follows:
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 recipient 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.

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

69 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)

EAPWDR 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 (B.C. Reg. 197/2012)

- (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:

(B.C. Reg. 197/2012)

- (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 orthopedic 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 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 device referred to in section 3.9 (1) (b) to (g), in addition to the requirement in that section and subsequent (1) of this section, the family unit must provide the minister one or both of the following:
 - (a) a prescription of a medical practitioner or nurse practitioner for the medical equipment or device.
 - (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 orthopedic 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 behavior, 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 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
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 foot wear	1 or 1 pair (B.C. Reg. 144/2011)
13	off-the-shelf orthopedic footwear	1 or 1 pair (B.C. Reg. 144/2011)
14	foot abduction orthosis	1 or 1 pair (B.C. Reg. 197/2012)
15	toe orthosis	1 (B.C. Reg. 197/2012)

(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 (B.C. Reg. 144/2011)
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 foot wear	1 year (B.C. Reg. 144/2011)
13	off-the-shelf orthopedic footwear	1 year (B.C. Reg. 144/2011)
14	toe orthosis	1 year (B.C. Reg. 197/2012)

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 appellant's position as stated in his Request for Reconsideration and Notice of Appeal is that his current orthoses are torn and worn out, and as he is in pain with foot ulcers, he cannot walk without them.

The appellant's position is that the change in legislation from two to three years for replacement of orthosis is not reasonable.

The appellant also states that while the reconsideration decision indicates that the ministry found his information about his serious foot conditions to be compelling, the decision also states that this information and threat to imminent danger was not confirmed by the medical practitioner or the pedorthist. The appellant's position is that this statement is not accurate as the medical practitioner on the Request did confirm that he has foot ulcers and it was only the pedorthist who did not. The appellant's position is that the information in the Request and Section 3, along with his evidence, when considered together, should be sufficient to establish that he is eligible for custom fit orthotics and off the shelf orthopedic shoes.

The ministry's position is that with respect to custom fit orthotics, the appellant was provided orthoses in 2016 and the period for replacement under the legislation (3 years) has not passed so he is not eligible for new custom fit orthotics until 2019.

With respect to the request for off-the-shelf orthopedics the ministry's position is that the appellant met the time requirements for the replacement of these as it has been over one year since he received off the shelf orthopedic footwear, but that the medical practitioner had not included "off-the-shelf orthopedics" on the Request

The panel notes that the appellant was provided custom made foot orthotics in March 2016, and the period for replacement under s.3(3) of Schedule C, EAPWDR, which is 3 years, has not elapsed. Although the panel accepts that the appellant may require custom fit orthotics as his current ones are worn out, it finds that the ministry reasonably determined that the appellant is not eligible for custom made foot orthotics under the legislative criteria.

With respect to the ministry's denial of the off-the-shelf orthopedics, the panel finds that the ministry's statement that neither the appellant's medical practitioner nor pedorthist confirmed the appellant's serious foot problems is not accurate as the medical practitioner on the Request does confirm that the appellant suffers from diabetic foot ulcers. While the pedorthist indicates that the orthotics and shoes are required to prevent ulcers, the information provided by the appellant, particularly his photographs, confirm the information from the medical practitioner that he does have foot ulcers. However, while the appellant has serious foot problems and meets the 1-year criteria for replacement of his off the shelf orthopedic footwear, the medical practitioner on the Request did not prescribe the off the shelf footwear as is required by Schedule C section 3.10(2)(a).

As the medical practitioner did not prescribe the off the shelf footwear as is required by EAPWDR Schedule C, section 3.10(2)(a), the panel finds that the ministry reasonably determined that the appellant was not eligible for the off the shelf footwear.

The panel therefore confirms the ministry's reconsideration decision. The appellant is not successful on appeal.

PART G – ORDER

THE PANEL DECISION IS: (Check one)

 UNANIMOUS BY MAJORITY

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) X or Section 24(1)(b)

and

Section 24(2)(a) X or Section 24(2)(b) **PART H – SIGNATURES**

PRINT NAME

Marilyn Mellis

SIGNATURE OF CHAIR

DATE (YEAR/MONTH/DAY)

2018/08/06

PRINT NAME

Lauren Forsyth

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2018/08/06

PRINT NAME

Helene Walford

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2018/08/06