

PART C – DECISION UNDER APPEAL

The decision under appeal is the Ministry of Social Development and Poverty Reduction (the “Ministry”) reconsideration decision dated August 24, 2018 which held that the appellant was not eligible for replacement custom orthotic boots by reason that the medical device did not meet the eligibility requirements set out in schedule C EAPWDR. Specifically, the medical device was not the least expensive appropriate medical device available (subsection 3(1)(b)(iii)), the appellant’s previous medical device was not damaged, worn-out, or non-functioning (subsection 3(3)), and the medical device is not essential to achieve or maintain basic functionality (s.3.10(2)(b)).

PART D – RELEVANT LEGISLATION

22(3)(b), 22(4)(b) of the Employment and Assistance Act (“EAA”)

Schedule C, section 3, 3.10 Employment and Assistance for Persons with Disabilities Regulation (“EAPWDR”)

PART E – SUMMARY OF FACTS

With the consent of both parties, the hearing was conducted as a written hearing, pursuant to section 22(3)(b) of the EAA.

The evidence before the Ministry at reconsideration was:

- On April 26, 2018 the Ministry received an Orthoses Request and Justification Form (“ORJ Form”)
- Section 2 of the ORJ Form was completed by an unidentified medical or nurse practitioner on April 10, 2018 and states
 - o The appellant’s medical condition is cerebral palsy;
 - o The recommended type of orthosis is custom orthotic boots; and
 - o A custom-made orthosis is required
- Section 3 of the ORJ Form was completed by a pedorthist on April 16, 2018 and states:
 - o The specification of the orthoses required to meet your needs are “hypertonic cerebral palsy with resultant 1 ¼ inch leg length discrepancy left side;
 - o The prescribed item will assist with joint motion and/or support as follows: “custom made footwear in conjunction with his ankle foot orthosis and addressing leg length discrepancy allows daily activities;
 - o The prescribed item is required for prevention of surgery and to improve physical functioning that has been impaired by a neuro-muscular-skeletal condition: “has had custom footwear in past along and in conjunction with his ankle foot orthosis maintain and aid in controlling his pathomechanics; and
 - o In describing any other information that may be relevant to your application the pedorthist writes: “he is a very active individual and as such when footwear is structurally worn over then this creates increased strain on his knee.”
- A price quote prepared by a supplier dated April 13, 2018 was provided with the ORJ Form and lists the cost of a custom-made orthopaedic footwear at \$1650.00.
- Notes from a June 27, 2018 telephone call between a Ministry adjudicator and a supplier. Where the Ministry worker notes the following:
 - o the appellant came into the supplier’s shop wanting a new pair of shoes;
 - o the supplier stated there was nothing wrong with the appellant’s current shoes or that the shoes needed repair;
 - o The supplier states that he does not believe there is anything that needs repair on these shoes
 - o The supplier is OK with a denial; and
 - o the supplier states it is a client driven request for the new shoes.
- Undated photographs of the appellant’s feet and boots.

The appellant’s request for reconsideration includes:

- A handwritten statement stating:
 - o his doctor was on vacation from July 15 to August 14;
 - o his current custom orthotic boots are worn out and no longer functional as he is hard on the shoes due to his lopsided gait;
 - o His feet curve laterally outward which shift the pressure onto the walls of the boots not just the soles;
 - o He can’t help dragging his feet and as such has replaced the soles 3 times out of his own pocket.
 - o He walks and rides his bike every day in all weather;
 - o When the boots wear out it compromises their intended use; and
 - o He medically requires the custom orthotic boots.
- Letter from an Orthotist dated August 26, 2014 stating:
 - o the appellant medically requires custom orthotic boots; and
 - o The custom orthotic boots that the appellant has are perfectly designed but now expired.
- Letter from a pedorthist dated July 31, 2014 stating the appellant’s medical need for custom orthotic boots.

The appellant's notice of appeal has four sections. The panel has reviewed each section to determine admissibility.

Section A is argument in support of the appellant's position at reconsideration. The appellant argues that the evidence of the Ministry worker's discussions with his pedorthist is not complete. He argues that the photographs of his boots were old photographs. The appellant states that the Ministry workers' interpretation of the conversation with the pedorthist was misleading. The panel finds that Section A is not new information but is instead argument. The panel finds the details in Section A to be admissible.

Section B is a reiteration of the appellant's personal statement which was before the Ministry at reconsideration. No new evidence is provided in Section B of the appellant's submission. The panel finds the details in Section B to be admissible pursuant to s.22(4)(a).

Section C are photographs from the pedorthist. The photographs are an updated version of the appellant's boots. The photographs show significant wear and tear to the boots and are "recent photographs" as described by the appellant. The last photographs before the Ministry were undated, but the Ministry had the photographs when their June 27, 2018 initial decision was made. Given the length of time between when the appellant requested new custom orthopaedic footwear and when the "recent" pictures were taken, the panel finds that the new photographs are new information that was not before the Ministry at reconsideration and that they are not admissible pursuant to s.22(4)(b) EAA.

Section D is a letter from the appellant's pedorthist. The letter states that the pedorthist spoke with the Ministry on June 25, 2018 but he was not able to convince the social worker about the appellant's need for custom made footwear at that time. The letter states that on September 1, 2018 he inspected the appellant's footwear and determined:

- The appellant's footwear presented in terrible shape with following vamp points ripped and providing leaking points and structural deficiency for forefoot;
- In summary he believes his current footwear cannot be repaired cost effectively and should be replaced;
- and
- The photos used by the social worker were from an older file and not the appellant's recent pair.

The letter from the pedorthist describes his version of a conversation with the Ministry, and a new visit with the appellant both of which were not available to the Ministry when they made their reconsideration decision. The panel finds that the Section D letter is not admissible pursuant to s.22(4)(b) EAA.

PART F – REASONS FOR PANEL DECISION

The issue on appeal is whether the Ministry's decision to deny the appellant replacement custom orthotic boots by reason that the medical device did not meet the eligibility requirements set out in schedule C EAPWDR. Specifically, the medical device was not the least expensive appropriate medical device available (subsection 3(1)(b)(iii)), the appellant's previous medical device was not damaged, worn-out, or non-functioning (subsection 3(3)), and the medical device is not essential to achieve or maintain basic functionality (s.3.10(2)(b)) is reasonably supported by the evidence or a reasonable application of the applicable legislation in the circumstances of the appellant.

The legislation provides:

Medical equipment and devices – Schedule C, section 3 EAPWDR

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.

(...)

(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.

Eligibility Criteria – Schedule C, section 3.10(2) EAPWDR

(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.

The panel finds:

The Ministry determined that the appellant did not meet any of the eligibility requirements in Schedule C, subsections 3(1)(b)(iii), 3(3), and 3.10(2)(b). The Ministry states in their decision that they do agree that the appellant requires custom orthotic boots and that they are medically essential for the appellant. The Ministry's denial hinges on the fact that the appellant's current custom orthotic boots function to meet his needs currently. As such, the Ministry determines that his current custom orthotic boots have not been damaged, worn out or non-functioning.

The Ministry basis their decision on:

- the fact that in the ORJ Form they don't have information about the current state of the appellant's boots;
- the Ministry adjudicator's June 27, 2018 discussions with the appellant's footwear supplier; and
- the inadequacies in two 2014 letters.

The panel finds that it was not reasonable for the Ministry to base their wear and tear analysis on letters from 2014. This is especially so, since there is evidence before the Ministry that the appellant has been wearing custom-foot orthotics for some time and that these letters are almost certainly referring to old custom-foot orthotics of the appellant. The Ministry cannot state that the 2014 letters contained inadequate information, as the letters are not relevant or an accurate description of the condition of this pair of custom orthotic boots.

The Ministry states that the ORJ Form doesn't have information about the current state of the appellant's boots. The panel finds that on review of the ORJ Form there are no questions or space provided for a medical practitioner to put comments about the state of the current boots worn by the appellant. The panel finds that it was not reasonable for the Ministry to focus on inadequacies in the ORJ Form, when the form itself does not ask for information about the current state of the custom orthotic boots.

The Ministry relies on the Ministry adjudicators notes of her June 27, 2018 conversation with the appellant's footwear supplier. The Ministry accepts these June 27, 2018 notes as evidence about the status of the appellant's footwear. This is the case, even though the supplier was not asked if he met with the appellant or even assessed the appellant's footwear. Further, the Ministry does not take into account the appellant's evidence about the state of his custom orthotic boots. The appellant provided a detailed hand-written letter in his request for reconsideration about the status of his custom orthotic boots. The letter included reasons as to why his boots were worn out, the pattern of how his boots routinely wear out annually due to his disability and his heavy use. The panel finds that it is not reasonable for the Ministry to only rely on the evidence of an internal third-party telephone conversation describing the supplier's description to a Ministry worker without also addressing the evidence before them provided by the appellant himself. If the Ministry choose to not accept the appellant's evidence, they would at least need to address the evidence and state why it couldn't be accepted or why the evidence of the Ministry worker was preferred. Consequently, the panel finds that it was not reasonable for the Ministry to determine that the appellant did not meet the eligibility requirement in Schedule C, subsection 3(3) EAPWDR namely, that the appellant's previous medical device was not damaged, worn out or not functioning. With respect to Schedule C, subsections 3(1)(b)(iii) and s. 3.10(2)(b) EAPWDR, as the Ministry's arguments on these subsections hinged only on whether the medical device was worn out, the panel also finds the Ministry determinations on these sections to be unreasonable. For these reasons, the panel finds the Ministry's decision was not reasonably supported by the evidence and rescinds the decision.

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) or Section 24(1)(b)

and

Section 24(2)(a) or Section 24(2)(b)

PART H – SIGNATURES

PRINT NAME

MEGHAN WALLACE

SIGNATURE OF CHAIR

DATE (YEAR/MONTH/DAY)

2018/10/11

PRINT NAME

SARAH BIJL

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2018/10/11

PRINT NAME

LINDA SMERYCHYNSKI

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2018/10/11