

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 07 September 2018 that denied the appellant’s request for off-the shelf orthopaedic footwear (“rocker bottom shoes”) and for custom-made foot orthotics. The ministry determined that the information provided did not establish that the following requirements of section 3.10 of Schedule C of the Employment and Assistance for Persons with Disabilities Regulation were met:

- The orthosis is prescribed by a medical practitioner or nurse practitioner, as specified in subsection (2)(a).
- For the off-the shelf orthopaedic footwear, the requirements set out in subsection (2)(b) – minister satisfied item is medically essential to achieve or maintain basic functionality; and subsection (2)(c) – minister satisfied item required is for one of the listed purposes.
- For the custom foot orthotics, the requirements set out in subsections (2)(d)(1) and (3)(a) – medical practitioner or nurse practitioner confirms that custom-made is medically required; and (3)(d) – made from a hand-cast mold.

PART D – RELEVANT LEGISLATION

Employment and Assistance for Persons with Disabilities Regulation (EAPWDR), Schedule C, sections 3 and 3.10.

Interpretation Act, section 29

PART E – SUMMARY OF FACTS

The evidence before the ministry at reconsideration included the following:

1. The appellant is a recipient of disability assistance,
2. A prescription from a podiatrist dated 03 May 2018: “Rocker Bottom Shoes – [brand and model number] (“Model1”) or any shoe with a rocker bottom sole.”
3. An Orthoses Request and Justification form (“ORJ form”), received by the ministry on 13 June 2018:
 - The section under Medical or Nurse Practitioner Recommendation was signed by the appellant’s podiatrist (a Doctor of Podiatric Medicine or DPM) on 08 June 2018.
 - The podiatrist describes the appellant’s medical condition in terms of over pronation with plantar fasciitis and ligament soreness on both ankles.
 - The recommended type of orthosis is: “Prescription orthotics to control pronation and offload 1st metatarsophalangeal joint bilateral.”
 - The Assessment section was also completed by the same podiatrist on 08 June 2018.
 - The podiatrist specifies the type of orthoses required as: “Prescription-made through foot doctor to control the position and motion of his feet.
 - The podiatrist explains how the prescribed item will assist with joint motion and/or support as: “Allow the 1st metatarsophalangeal joint to bend and prevent further joint destruction.”
 - The podiatrist indicates that the item is required to prevent surgery and to improve physical functioning impaired by a neuro-musculo-skeletal condition, explaining, “by controlling over-pronation and offloading 1st metatarsophalangeal joint will allow normal walking.”
 - The podiatrist indicates that the orthosis will be custom-made, explaining, “Hand done 3D image I did myself with a 3D laser scan.”
 - The podiatrist adds as further information, “Does not have a current corrective device.”
4. Price quotes for different models of rocker bottom shoes from two suppliers: Model 1 @ \$190.39 and Model 2 @ \$308.00.
5. The appellant’s Request for Reconsideration is dated 29 August 2018. Under Reasons, he writes *[edited to clarify references to legislation]*:

“[The podiatrist] did not mention on application as I heard personally with my visit the requirement of rocker bottom soled built-in footwear such as [Model 2]. This would prevent over pronating my vertical toe bone and stretch it perpendicularly with the flatfoot structure, thus preventing surgery. The podiatrist assessed [and] wrote the abnormality of over pronation. His position is an orthotist/podiatrist. My original orthotics are worn out, not functioning. [Name of doctor, a podiatrist] made them with approval via [EAPWDR Schedule C, section 3, sub] section 3(3). [Section] 3(a) [of Schedule C] states it to be more economical to replace medical equipment [than repair it]. [Model 1] has internally designed rocker bottom sole structure that stretches the feet. Also the period of time for usage has passed. Therefore, the minister may provide off-the-shelf footwear of \$125 with me paying the \$55 difference because EAPWDR section 62’s requirements [regarding basic eligibility] are met. [Schedule C section 3] preauthorization originated with [name of previous podiatrist]. [Model 1] is the least expensive medical device. No other resources are available to me. [Model 2] footwear has the same technology.”

Notice of Appeal

The appellant's Notice of Appeal was signed by the appellant on [day not shown] September 2018 and received by the tribunal on 24 September 2018. Under Reasons, the appellant writes, "See insert page attached." The ORJ form reviewed above was attached.

The hearing

At the hearing, the appellant provided background to his request. He stated that eight years ago, based on a referral from his then GP, he went to a podiatrist who diagnosed his condition much along the same lines as his current podiatrist. With ministry funding, that podiatrist provided him with custom-made orthotics. Over the years, these orthotics deteriorated. He went to the podiatrist for repairs, but after a while found that he could no longer afford the fees for these visits. These orthotics are no longer usable.

This past May, he found another podiatrist by searching the phone directory. On his first visit, this podiatrist made the same diagnosis as the previous one, and took images of his feet in his office using equipment similar to an MRI machine. The podiatrist recommended that he try rocker-soled orthopaedic shoes. According to the podiatrist, these would provide the same improvements to his gait, as would orthotics. These shoes were not available when he was first provided orthotics — they came onto the market only in the last couple of years. The appellant noted that the shoes are also significantly less expensive than the orthotics. On this basis, the podiatrist gave him the prescription for these shoes.

When he went to the ministry office to inquire about following up with this prescription, he was given the ORJ form. He then went back to the podiatrist to have him complete the form. The appellant stated that he did not realize that the podiatrist would then complete the form requesting and justifying custom-made foot orthotics rather than the orthopaedic shoes. He stated that it was not his intention to request the ministry to provide custom foot orthotics, given the availability of rocker-soled shoes. He would much prefer the shoes, as orthotics can be lost or stolen.

The appellant then reviewed in detail the documents presented – the prescription, the ORJ form, his Request for Reconsideration and the price quotes.

In answer to a question, the appellant stated that he does not currently have a family doctor/GP and thought that the podiatrist was a medical practitioner. This was then followed by a discussion on the meaning of "medical practitioner." (See Part F, Reasons for Panel Decision, below.)

The ministry stood by its position and reconsideration.

The ministry stated that it treated the requests for off-the-shelf orthopaedic footwear and for the custom-made orthotics as two separate applications under one Service Request. The ministry had not been advised that the appellant was interested in applying only for the orthopedic footwear. The request for the orthopaedic footwear was considered under the (limited) information provided in the prescription, and that for the orthotics on the information provided in the ORJ form.

Admissibility of additional information

The panel accepts the appellant's statement that he is interested in applying only for the off-the-shelf orthopedic footwear, and not the custom-made foot orthotics, as clarification of his request for orthoses before the ministry at reconsideration.

PART F – REASONS FOR PANEL DECISION

The issue in this appeal is whether the ministry was reasonable in denying the appellant's request for off-the shelf orthopaedic footwear ("rocker bottom shoes") and for custom foot orthotics. More specifically, the issue is whether the following ministry determinations are reasonably supported by the evidence or are a reasonable application of the legislation in the circumstances of the appellant:

The information provided did not establish that the following requirements of section 3.10 of Schedule C of the Employment and Assistance for Persons with Disabilities Regulation were met:

- The orthosis is prescribed by a medical practitioner or nurse practitioner, as specified in subsection (2)(a).
- For the off-the shelf orthopaedic footwear, the requirements set out in subsection (2)(b) – minister satisfied item is medically essential to achieve or maintain basic functionality; and subsection (2)(c) – minister satisfied item is required for one of the listed purposes.
- For the custom foot orthotics, the requirements set out in subsections (2)(d)(1) and (3)(a) – medical practitioner or nurse practitioner confirms that custom-made is medically required; and (3)(d) – made from a hand-cast mold.

The relevant legislation is from the *Interpretation Act*:

Expressions defined

29 In an enactment:

"**medical practitioner**" means a registrant of the College of Physicians and Surgeons of British Columbia entitled under the *Health Professions Act* to practise medicine and to use the title "medical practitioner";

And from the EAPWDR, Schedule C:

Medical equipment and devices

(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.

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;
- (p) a walking boot.

(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) to (9) *not relevant*]

(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
13	off-the-shelf orthopaedic footwear	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
13	off-the-shelf orthopaedic footwear	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) Repealed. [B.C. Reg. 94/2018, App. 2, s. 1 (b).]
- (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.

Analysis

The positions of the parties

The position of the appellant, as explained at the hearing, is that he is applying only for off-the-shelf orthopaedic footwear (rocker bottom shoes) as a health supplement to be provided by the ministry. He argues that his podiatrist, as a doctor of podiatric medicine, should be considered a “medical practitioner” as the term would be commonly understood, and that as such the podiatrist provided all the information required – a prescription, and, drawing from the information in the ORJ form and considering that the footwear has orthotics “built in,” an explanation that the footwear is medically essential for him to maintain basic functionality and required to prevent surgery and improve physical functioning impaired by his muscle-skeletal condition. He argues that it would be more economical to replace his previously provided orthotics with the rocker bottom shoes, as provided in EAPWDR Schedule C, section 3(3).

The position of the ministry, as explained at the hearing, is that it was unaware that the appellant’s request was for only off-the-shelf orthopedic footwear. Further, no information had been provided that would suggest that the orthopaedic footwear would provide the same benefits as the custom-made foot orthotics. All the ministry had to go on was a prescription for “rocker bottom shoes” written by the podiatrist and an ORJ form with a recommended type of orthosis as: “Prescription orthotics to control pronation...” The ministry therefore took the position that it had no alternative but to consider the submissions separately.

Accordingly, in the reconsideration decision, the ministry reviewed each request separately against the requirements of subsections (2) and (3) of section 3.10 of EAPWDR Schedule C.

For the off-the-shelf orthopaedic footwear (“rocker bottom” shoes), the ministry found that this orthosis was not prescribed by a medical practitioner or nurse practitioner as required under subsection (2)(a). The ministry explained that although the podiatrist is a Doctor of Podiatric Medicine, he is not a medical practitioner or a nurse practitioner. The ministry also noted that while in the ORJ form the podiatrist describes a medical need for custom orthotics to achieve or maintain basic functionality as set out in subsection (2)(b) and required for one or more of the listed purposes in subsection (2)(c), he makes no mention of rocker bottom shoes as an alternative. Thus there was no information of how the rocker bottom shoes met the subsections (2)(b) and (2)(c) criteria. The ministry therefore found that the appellant’s request for off-the-shelf orthopaedic footwear does not meet the eligibility requirements set out in the legislation.

As to the custom-made orthotics, the ministry also found that this orthosis, having been prescribed by the podiatrist, a Doctor of Podiatric Medicine, was not prescribed by a medical practitioner or nurse practitioner as required under subsection (2)(a). Similarly, a medical practitioner or nurse practitioner has not confirmed the need for the foot orthotics to be custom-made, as required under subsections (2)(d)(i) and (3)(a). The ministry also held that the request does not meet the requirements set out in subsection (3)(d) requiring custom orthotics be made from a hand cast mold, finding that 3D imaging by laser scan, as described by the podiatrist, is not equivalent to hand cast molding. The ministry therefore determined that the appellant’s request for off-the-shelf orthopaedic footwear does not meet the eligibility requirements set out in the legislation.

Panel Decision

The panel found the Appeal Record confusing, as it was unclear what exactly the appellant was requesting. While his Request for Reconsideration discussed the different brands of rocker bottom shoes, explains how such shoes would meet his needs, and cites EAPWDR Schedule C section 3(3) [*replacing worn out equipment*] as providing sufficient authorization, it would have been difficult for the ministry to not consider the ORJ form and its justification for custom-made orthotics. Considering the ministry was presented with a prescription note for the rocker bottom shoes and an ORJ form justifying custom-made foot orthotics, the panel finds that the ministry was reasonable in considering the requests separately. In terms of the appellant's argument that what he has requested is a replacement under section 3(3), in the panel's view, this provision relates to “like for like” replacement, not for replacing worn out orthotics with orthopaedic shoes. Even if the issue is replacing the worn-out orthotics with new orthotics, the provisions of section 3.10 still apply, including requiring a prescription by a medical practitioner. As explained by the ministry at the hearing, replacing worn out medical equipment and devices with new ones still requires a new decision.

The key issue in this appeal is the requirement that a *medical practitioner* or nurse practitioner provide a prescription for the requested orthosis and other specified justifying information. The panel recognizes that the term *medical practitioner* is not one of everyday usage. People do not say, “I’m going to see my medical practitioner tomorrow.” Instead they talk about going to see “my doctor,” “my family doctor,” “my GP,” or “the doctor at the walk-in clinic,” or if a specialist, “my urologist,” or “the orthopaedic surgeon.”

The term *medical practitioner* is not defined in the Employment and Assistance legislation, but in the *Interpretation Act*, as follows: ***“medical practitioner”*** means a registrant of the College of Physicians and Surgeons of British Columbia entitled under the Health Professions Act to

practice medicine and to use the title "medical practitioner." In practical terms, this means a person who has a degree in medicine (an M.D. degree) from a university or medical school or a school or college of osteopathic medicine, as approved by the College's board, and meets the initial training and other ongoing requirements to practise medicine in the province. The term does not apply to other health professionals who may use the title "Doctor," such as podiatrists, dentists, chiropractors, etc.

Despite the possibility for confusion over the meaning of the term "medical practitioner," it is a legislatively defined term that the ministry must use in applying the legislation. Nevertheless, the panel considers that it would have been helpful if the ministry had stated in both the original decision and in the reconsideration decision not just that the podiatrist is a Doctor of Podiatric Medicine and is not a medical practitioner or nurse practitioner, but what was meant by "medical practitioner" in everyday language, such as "your family doctor or a walk-in clinic doctor, one who has a MD degree."

Given that a medical practitioner has not prescribed the requested off-the-shelf orthopaedic footwear and that there is no other justifying information provided relating to the footwear in the ORJ form, as required in subsection (2) of EAPWDR Schedule C section 3.10, the panel finds that the ministry was reasonable in determining that the appellant was not eligible for this requested orthosis.

As the ministry noted in its decision, a medical practitioner has also not prescribed the custom-made orthotics recommended by the podiatrist, and has not provided justification for them to be custom made as required under subsections (2)(d)(i) and (3)(a). Regarding subsection (3)(d), the ministry found that 3D imaging by laser scan, as described by the podiatrist, is not equivalent to hand cast molding, but without explaining why this is the case. Without such an explanation, the panel finds this particular conclusion unreasonable. However, considering the application as a whole, with the other provisions not being met, the panel finds that the ministry reasonably determined that the appellant was not eligible for this orthosis.

Conclusion

Based on the foregoing, the panel finds that the ministry's decision denying the appellant health supplements for off-the-shelf orthopaedic footwear and for custom orthotics is reasonably supported by the evidence and a reasonable application of the legislation in the circumstances of the appellant. This decision does not preclude the appellant from making another application, while being mindful of the need for a prescription from a medical practitioner or nurse practitioner and other information as may be required in the legislation.

The panel confirms the ministry's decision. The appellant is therefore not successful in his 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) or Section 24(1)(b)

and

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

PART H – SIGNATURES

PRINT NAME

Richard Roberts

SIGNATURE OF CHAIR

DATE (YEAR/MONTH/DAY)

2018 October 15

PRINT NAME

Melissa McLean

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2018 October 15

PRINT NAME

Wesley Nelson

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2018 October 15