

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 April 9, 2020, which held that the appellant was not eligible for a replacement lumbar support brace.

The ministry held that the appellant is eligible to receive health supplements set out under the *Employment and Assistance for Persons with Disabilities Regulation* (EAPWDR) Schedule C, section 3(1), and that the appellant met the criteria under EAPWDR Schedule C section 3(3)(a) as the current lumbar support brace cannot be adjusted to be a better fit. However, the ministry held that the appellant did not meet the legislative criteria required of EAPWDR Schedule C section 3(3)(b) or section 3.10(10) which requires that two years must pass prior to the ministry providing funding for a replacement brace. As the appellant was funded for a brace on November 29, 2019 the reconsideration decision states that the ministry does not have the legal authority to provide funding for a replacement brace until November 2021.

PART D – RELEVANT LEGISLATION

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

PART E – SUMMARY OF FACTS

Summary of key dates:

- On November 18, 2019, the appellant requested a lumbar spine brace.
- On November 29, 2019, the ministry approved the appellant's request for a lumbar spine brace and the brace was provided by a medical equipment provider.
- On December 4, 2019 the appellant requested funding for a replacement lumbar support brace.
- On February 18, 2020 the ministry denied the appellant's request for funding for a replacement lumbar support brace.
- On March 19, 2020 the appellant submitted the Request for Reconsideration (RFR) dated March 18, 2020.
- On April 9, 2020 the ministry completed its review and the appellant's request was denied.

Summary of evidence at Reconsideration:

- MR Lumbar Spine report from a hospital dated September 9, 2019 indicating that the appellant has endplate compression fractures at L4 and L5 with corresponding mild marrow edema as well as multilevel spondylitic changes, as well as demonstrating a minimal disc bulge and moderate facet arthropathy of the L2- 3 and a minimal disc bulge and mild to moderate facet arthropathy of the L3-4.
- Prescription from the appellant's family physician (the "Physician") dated November 29, 2019 indicating that the appellant has lower backache due to old fractures at L4 L5 with right leg tingling and questioning whether orthotics would help.
- Orthoses Request and Justification dated December 12, 2019 completed by the Physician indicating that the appellant has "Lumbar disc disease L4 L5 old fractures + sciatica" and would benefit to see an orthosis specialist and would benefit from orthotics to alleviate backaches. The Physician indicates that the appellant is not having foot problems.
- Prescription from the Physician dated January 21, 2020 indicating that the appellant needs the replacement back brace for medical reasons -"lumbar disc disease".
- Letter from an orthotist (the "Orthotist") dated February 7, 2020 indicating that the appellant was assessed on December 12, 2019. The Orthotist indicates that the appellant was wearing the lumbar brace but that it was uncomfortable. The Orthotist indicates that the lumbar brace cannot be altered as the elastic material would fray if cut. The Orthotist recommended an alternative lumbar brace, the Summit 631 at a cost of \$325.
- Prescription from the Physician dated March 5, 2020 indicating that the appellant requires the replacement back brace, commenting that the appellant has "back problems, L4 L5, disc - old fractures, sciatica, etc".
- In the RFR the appellant reports severe back and leg pain, constant weakness which has led to a number of falls. The appellant indicates that the previous non-returnable brace funded by the ministry in November 2019 is too tall and "pure torture" to wear. The appellant states that a reassessment in December 2019 by an orthotist recommended a different lumbar support brace. The appellant reports waiting for another MRI for further assessment of the previously diagnosed compound fractures. The appellant reports taking two painkillers and is attempting physiotherapy while waiting for the next MRI.

Additional Information Provided

In the Notice of Appeal (the “NOA”) dated April 22, 2020 the appellant disagrees with the ministry’s reconsideration decision on the basis that the brace previously provided is not functioning, that the off the shelf brace that was purchased is not appropriate for the appellant’s needs, that the appellant’s condition is worsening daily, and that due to the covid-19 pandemic, the appellant was not able to get a further MRI.

Admissibility of New Information

The ministry did not object to the information in the appellant’s Notice of Appeal. The panel has admitted the information in the NOA, as it is information that is reasonably required for a full and fair disclosure of all matters related to the decision under appeal, in accordance with section 22(4) of the *Employment and Assistance Act*. In particular, the new information relates to the functioning of the appellant’s current brace, the appellant’s ability to obtain further supporting medical information, and the appellant’s medical condition.

With the consent of both parties, the hearing was conducted as a written hearing pursuant to section 22(3)(b) of the *Employment and Assistance Act*.

PART F – REASONS FOR PANEL DECISION

Issue on Appeal

The issue on appeal is whether the ministry's decision to deny the appellant's request for funding for a replacement lumbar support brace was reasonably supported by the evidence or was a reasonable application of the applicable enactment in the circumstances of the appellant.

In particular, was the ministry reasonable when concluding that the ministry is unable to provide funding for a replacement lumbar back brace until November 2021 based on EAPWDR Schedule C, section 3(3)(b) and 3.10(10) as two years had not passed since prior funding was provided for a lumbar support brace?

Relevant Legislation

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

(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.

(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.

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.

(8) For an orthosis that is a torso or spine brace, in addition to the requirements in subsection (2) of 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 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

Panel Decision

As the ministry noted in the reconsideration decision, the appellant included some information related to a request for orthotics but the reconsideration decision was limited to the appellant's request for a replacement lumbar support brace. The panel notes that the appeal is limited to a determination of whether the ministry was reasonable in denying the appellant's request for a replacement lumbar support brace. The panel does not have the jurisdiction to determine any request for orthotics as that is outside the scope of this appeal.

The appellant's position is that the replacement lumbar support brace is required due to severe back and leg pain as the initial brace funded by the ministry is not suitable. The appellant reports that the initial brace funded by the ministry is too tall, cannot be adjusted, is "pure torture" to wear, and is not refundable. The appellant's position is that the medical information provided supports the request, particularly the letter from the Orthotist which states that the lumbar brace the appellant was wearing cannot be altered as the elastic material would fray if cut. The Orthotist recommended an alternative lumbar brace, the Summit 631, at a cost of \$325. The appellant's position is that the policy exemption should apply as the appellant's medical condition is worsening, that due to covid-19 the appellant was not able to get an updated MRI, and there are no other options available for the appellant's needs.

The ministry's position is that the appellant is eligible to receive health supplements, that the appellant does not have the resources available to pay for the brace, that the brace is the least expensive appropriate medical equipment for the appellant's needs, and that the brace was prescribed by a medical practitioner, as required by EAPWDR Schedule C section 3(1) and (2). However, the ministry's position is that the appellant is not eligible for funding for the replacement lumbar brace as the legislative requirements of EAPWDR Schedule C sections (3)(3)(b) and 3.10(10) have not been met.

Section 3(3)(b) states that the ministry may provide a replacement of a lumbar brace that is damaged, worn out, or not functioning if the period of time set out in section 3.1 to 3.12 of Schedule C has passed. However, the ministry's position is that as section 3.10(10) states that a replacement brace can only be provided after two years has passed since funding of a previous brace, and as the appellant was provided funding for a lumbar brace in November 2019, the appellant is not eligible for a replacement lumbar brace until November 2021.

The reconsideration decision states that its Orthoses Repair or Replacement Policy indicates that the replacement time period does not apply in situations where a replacement is required due to changes in a medical condition or growth. However, the ministry's position is that the appellant's medical condition has not been assessed to have changed since the request was made for the initial brace in November 2019, so the ministry cannot conclude that the appellant's request meets the policy exemption.

The panel finds that the ministry reasonably concluded that the appellant is not eligible for a replacement lumbar brace.

Section 3(3)(b) states that the ministry may provide a replacement of a lumbar brace that is damaged, worn out, or not functioning if the period of time set out in section 3.1 to 3.12 of Schedule C has passed. EAPWDR Schedule C section 3.10(10) states that two years must pass before a replacement lumbar brace can be provided. As the ministry provided funding for the appellant's brace in November 2019 the panel finds that the ministry was reasonable in

determining that it does not have the legislative authority to provide funding for a replacement lumbar brace until November 2021.

Conclusion

The panel acknowledges, as did the ministry, that the appellant would benefit from another lumbar support brace as the initial brace funded in November 2019 is not suitable for the appellant. However, having reviewed and considered all of the evidence and the relevant legislation, the panel finds that the ministry's reconsideration decision finding the appellant ineligible for funding for the replacement lumbar support brace was reasonably supported by the evidence and a reasonable application of the legislation in the circumstances of the appellant. The panel therefore confirms the ministry's decision. The appellant is not successful on appeal.

APPEAL NUMBER
2020-00125

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

Helene Walford

SIGNATURE OF CHAIR

DATE (YEAR/MONTH/DAY)

2020/06/12

PRINT NAME

Wendy Marten

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2020/06/12

PRINT NAME

Daniel Chow

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2020/06/12