

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 May 28, 2020, which denied the appellant's request for funding for a knee brace. The ministry accepted it was a medically essential orthoses, only the funding was at issue.

The ministry looked at two different regulations to determine if the appellant was eligible for funding of a knee brace as a health supplement. The ministry looked at the Employment and Assistance Regulation (EAR) and at the Employment and Assistance for Persons with Disabilities Regulation (EAPWDR).

The ministry held that the appellant was not eligible for health supplements under section 2 or 3 of Schedule C of the EAR because the appellant did not meet the eligibility criteria set out in either section 67 or section 76 of the EAR. The ministry had determined that;

- the appellant;
 - does not have qualification as a person with persistent multiple barriers to employment,
 - does not receive income assistance under section 8 of Schedule A (people receiving special care),
 - is not a person otherwise described in section 67, and
- the information provided in the initial request and Request for Reconsideration
 - does not establish the appellant was facing a *direct and imminent life-threatening health need*, or
 - that a knee brace is necessary to meet a *direct and imminent life-threatening health need* under section 76 of the EAR.

The ministry held that the appellant was not eligible for health supplements under section 2 or 3 of Schedule C of the EAPWDR because the appellant did not meet the eligibility criteria set out in section 62 of the EAPWDR. The ministry held that the appellant;

- was not a recipient of disability assistance, and
- was not a person otherwise described in section 62 of the EAPWDR.

APPEAL NUMBER
2020-00166

PART D – RELEVANT LEGISLATION

Employment and Assistance Regulation (EAR) Sections 66.1, 66.3, 66.4, 67, and 76
Employment and Assistance Regulation (EAR) Schedule C Sections, 3 and 3.10
Employment and Assistance for Persons with Disabilities Regulation, (EAPWDR) section 62

PART E – SUMMARY OF FACTS

The evidence before the ministry at the time of the reconsideration decision included:

The appellant's file was opened on April 10, 2019 and the ministry states the appellant is a single recipient of income assistance.

An Orthoses Request and Justification form (SD2894). Section two of this form had been completed by an Orthopedic Surgeon on 19 February 2020, which reports:

- Your medical condition is: "*Severe right knee osteoarthritis.*"
- The recommended type of orthosis is: "*Breg Fusion Plus knee brace.*"
- A custom-made orthosis is required.
- The knee brace will be required at least 6 hours per day.

A letter from the same Orthopedic Surgeon dated 31 January 2020, in which the doctor writes: *(the appellant) has severe right knee osteoarthritis. (The appellant) has been placed on the waiting list for right total knee replacement. The appellant requires a Breg Fusion plus knee brace to treat (the appellant's) knee arthritis while (the appellant) waits for surgery. This brace will decrease (the appellant's) pain and allow (the appellant) to perform the activities of daily living. This brace is not an option, it is medically required. The cost of the brace is \$900.*

In the request for reconsideration the appellant wrote:

Friday March 20th, I fell again.

Sunday March 22nd, I fell again.

I have no balance.

I have no life to do anything.

I'm afraid I might fall again and hit my head next time and who knows. (What).

I cannot walk without falling!

Please help me.

I need you to read what the Doctor wrote. It is not up for question.

It is very dangerous for me to go without.

I have hurt my hand right now, too.

Cannot get anyone to help me with from because of Corona Virus.

While the ministry held that the appellant did not fulfill the criteria for funding of the knee brace under the EAR or EAPWDR (as explained in Part C, above) the ministry accepted that the applicant had a medical need and wrote that;

A. The EAPWD Regulation, Schedule C, section 3.10 sets out the eligibility requirements for the provision of orthoses. Under subsection 3.10(1), an "orthosis" includes **(i) a knee brace**.

Therefore, a knee brace is an orthosis provided under Section 3.10.

B. Your request meets the eligibility requirement set out in the *EAPWD Regulation, Schedule C, subsection 3.10(2)(a)*, which specifies that the orthosis must be prescribed by a medical practitioner or nurse practitioner. Further, the ministry is satisfied that the orthosis is medically essential to achieve and maintain basic functionality, as required by subsection 3.10(2)(b).

In the notice of appeal the appellant wrote;

I keep falling. Cracking my ribs!

It is very necessary that I'm able to walk and not fall every other day.

Please I need this brace to do everyday things like walking. Read the report that doct (sic) said it is necessary.

At the hearing, the appellant provided additional oral evidence to support the position that the ministry had made the wrong decision. The appellant referred to the appeal package, and highlighted a comment in a letter from an orthopedic surgeon which states that the brace is needed. The appellant advised of always falling; a number of times, and has nothing to support the knee. The appellant has suffered a sprained ankle and is worried about falling and cracking the appellant's skull or breaking a hip. The appellant described not feeling disabled, as this is only temporary, and hating to use the word disabled. The appellant described not being in the best of shape, that the knee issue interferes with going to work with a limp. The appellant reported suffering from heart problems and advised about getting upset during the hearing.

The appellant stated again the doctor has written a note stating the brace is medically required.

In response to questions the appellant stated being unable to work and to receiving income assistance. The appellant cannot work because of the problems with the knee. The appellant offered that a person at the ministry had told her to apply for temporary disability but the appellant did not know how to do it and did not apply.

The appellant then clarified that it was in or about April or May of this year a ministry representative had advised applying for short term disability.

The appellant confirmed having worked for a while but could not do it now as recuperation was needed during days off, needing to rest and could not walk. The appellant also expressed that "no-one will hire you if you limp".

In response to a question, regarding whether the appellant wished to comment on the ministry's findings of ineligibility under the regulations regarding being a qualified person or a person with persistent multiple barriers, the appellant expressed exasperation and not understanding the question or the issue. The appellant reiterated it was clear the surgeon stated the knee brace was medically necessary. The appellant then advised of a fall while walking in a nearby canyon, becoming unconscious and needing to be rescued by the local search and rescue organisation.

The ministry at the hearing relied upon the reconsideration decision and explained to the panel and appellant that three essential requirements needed to be met. The appellant needed to be a qualified person, be a person with disabilities or be suffering from a life-threatening condition. These designations need to be applied for and once deemed eligible then the appellant can apply for health supplements or medical equipment.

In response to a question from the panel the ministry expanded on the requirement of needing to be eligible to receive health supplements. The ministry addressed the comments to the panel and to the appellant and described the requirement to be a qualified person as a person with persistent multiple barriers to employment. The ministry also provided an example that to meet the eligibility under the direct and imminent life-threatening condition for a brace, that a doctor would need to provide a written explanation of how this is a life-threatening need.

At this point the appellant expressed greater exasperation accusing the process of being a waste of time. The ministry commented they were trying to assist and would be available, following the hearing, to discuss the issue with the appellant and alternate sources of funding or assistance.

In response to a question from the panel as to whether the ministry itself would consider the possibility of an appellant being at risk of severe physical injury due to the diagnosis, under the direct and imminent

life-threatening category, the ministry stated the representative could not answer that question as it is hypothetical. The ministry reiterated their policy for eligibility criteria to be met for a need based on information provided by a medical practitioner.

In response to a question the ministry confirmed that the designation that a person has persistent multiple barriers to employment can be made based upon a medical condition which is not permanent. The ministry agreed stating; - "absolutely! a package is sent out to the appellant, not sure if the worker sends it out, but a doctor fills it out", and it can be a doctor at a walk-in clinic; - "yes, and easily faxed over".

The appellant responded to several questions from the panel and confirmed the appellant was receiving income assistance and not a disability allowance and cannot remember applying for designation as a person with persistent multiple barriers to employment. The appellant expressed having discussed the case with a local advocate society who were wonderful but could not help in the provision of a knee brace.

The appellant described not using a walker or a cane to get around, of being able to walk with pain and at one point using a crutch to assist but no longer having it, having left it on a bus. Now the appellant uses a hiking stick to assist and some days does not use anything.

The appellant advised on being allergic to certain drugs so does not take painkillers but needs to just get on with it and keep walking even though this means continuing to fall. The appellant offered there is nothing there but bone on bone.

The ministry reiterated a willingness to discuss potential next steps for the appellant.

In the concluding section of the hearing the timeframe for when the decision would be mailed out to the appellant was described. The appellant professed astonishment that the panel would not be providing an immediate decision at the hearing and was agitated and expressed a desire to disconnect from the call. The appellant stated that the panel was not to send anything by mail, that the appellant did not want to do anymore and did not want the panel to complete the decision.

The process was explained some more and the hearing concluded.

Admissibility of New Information

The appellant did not indicate a formal request to dismiss the appeal under section 23 of the Employment and Assistance Act, and did not take any other steps or request a form to do so. The ministry did not comment on the concerns expressed by the appellant relating to dismissal.

The hearing having formally concluded, the panel continued to deliberation on the appeal.

The ministry did not object to the information in the Notice of Appeal or in the oral testimony at hearing.

The Panel has admitted the information in the appellant's Notice of Appeal and the Appellant's oral testimony, as they are evidence that are not part of the record but the Panel considers 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.

PART F – REASONS FOR PANEL DECISION

Issue on Appeal

The issue on appeal is whether the ministry's decision to deny the appellant funding for a knee brace is reasonably supported by the evidence or a reasonable application of the applicable legislation in the circumstances of the appellant.

The ministry's decision contained a number of reasons for denial which are detailed below

First, the minister was not satisfied that the application meets the legislated criteria in the EAR, section **67**, in that;

- the appellant does not have qualification as a person with persistent multiple barriers to employment,
- does not receive income assistance under section **8** of Schedule A (people receiving special care), and
- the appellant is not a person otherwise described in section **67**, who meets the criteria set out in Section **67(1)(c), (2) or (3)**,

and therefore, the appellant is not eligible for health supplements under section **2 or 3** of Schedule **C**, of the EAR.

Second the minister determined that the application does not meet the legislated criteria in the Employment and Assistance for Persons with Disabilities (EAPWD) Regulation section **62(1)**. This was because the appellant;

- is not a recipient of disability assistance,
- is not a person otherwise described in section **62**, and
- is not a person described in section **66.1** of the EAR (**sic**).

Thirdly, the minister determined that the information provided in the appellant's initial request and Request for Reconsideration does not establish the appellant is facing a direct and imminent life-threatening health need, or that a knee brace is necessary to meet a direct and imminent life-threatening health need under section **76** of the EAR. Additionally, the minister determined that the request does not meet the eligibility requirement set out in the EAR subsection **76(d)(ii) (sic)** in that information has not been provided to confirm the request meets all the eligibility requirements set out in section **3.10** of Schedule C [Health Supplements]. The ministry went on to state that the appellant's request does not meet the requirements for a health supplement as set out under Section 76 because;

- the request does not meet the eligibility requirement in EAPWD (**sic**) Regulation, Schedule C, subsection **3.10(2)(c)**, in that it has not been reported that the appellant requires this brace due to the purposes listed in section **3.10(2)(c)**, and
- insufficient information has been provided to determine if the requested knee brace is off-the-shelf, or a custom-made orthosis, or to establish that the knee brace will be fitted by an orthotist, pedorthist, occupational therapist, physical therapist, or podiatrist, as required by section **3.10(2)(d)**.

The relevant sections of the Regulation provide:

EAA

Eligibility of family unit

2. For the purposes of this Act, a family unit is eligible, in relation to income assistance, hardship assistance or a supplement, if
(b) the family unit has not been declared ineligible for the income assistance, hardship assistance or supplement under this Act.

Act does not apply to persons with disabilities

3. A family unit that includes a person with disabilities is not eligible for income assistance or hardship assistance under this Act.

Dismissal of appeal

23. (1) If at any time before a panel makes a decision under section 24 [decision of panel], both parties to the appeal consent to the dismissal of the appeal by each signing the form specified by the minister,
(b) if the hearing required by section 22 (3) [panels of the tribunal to conduct appeals] has started,
(i) the minister must notify the chair of the consent to dismiss,
(ii) the chair must advise the panel of the consent, and
(iii) the panel must dismiss the appeal.

EAR

Definitions

1. In this Schedule:

"orthotist" means a person who is certified by and in good standing with the Canadian Board for Certification of Prosthetists and Orthotists;

"pedorthist" means a person who is certified by and in good standing with the College of Pedorthics of Canada;

"physical therapist" means a physical therapist registered with the College of Physical Therapists of British Columbia established under the Health Professions Act;

Persons who have persistent multiple barriers to employment

2. (1) In this section, "health professional" means a person who is
(a) authorized under an enactment to practise the profession of

- (i) chiropractor,
- (ii) medical practitioner,
- (iii) nurse practitioner,
- (iv) occupational therapist,
- (v) physical therapist,
- (vi) registered nurse or registered psychiatric nurse,
- (vii) registered psychologist, or
- (viii) registered social worker,

(b) a registered clinical counsellor in good standing with the BC Association of Clinical Counsellors, or

(c) acting in the course of the person's employment as a school psychologist by

- (i) an authority, as that term is defined in section 1 (1) of the Independent School Act, or

- (ii) a board or a francophone education authority, as those terms are defined in section 1 (1) of the School Act, if qualifications in psychology are a condition of such employment.
- (2) A person qualifies as a person who has persistent multiple barriers to employment if the person
- (a) is a recipient of income assistance or hardship assistance,
 - (b) has a health condition that is confirmed by a health professional and that,
 - (i) in the opinion of the health professional,
 - (A) has continued for at least one year and is likely to continue for at least 2 more years, or
 - (B) has occurred frequently in the past year and is likely to continue for at least 2 more years, and
 - (ii) in the opinion of the minister, is a barrier that seriously impedes the person's ability to search for, accept or continue in employment, and
 - (c) faces one or more additional barriers described in subsection (3).
- (3) For the purposes of subsection (2) (c), an additional barrier is any of the following:
- (a) any of the following circumstances if, in the opinion of the minister, the circumstance seriously impedes the person's ability to search for, accept or continue in employment:
 - (i) currently experiencing homelessness or having experienced homelessness in the past 12 months;
 - (ii) currently experiencing domestic violence or having experienced domestic violence in the past 6 months;
 - (iii) needing English language skills training;
 - (iv) not having basic skills for employment;
 - (v) having a criminal record;
 - (vi) having an education below grade 12;
 - (vii) having accessed emergency health, mental health or addiction services multiple times in the past 12 months;
 - (viii) being a Convention refugee as determined under the Immigration and Refugee Protection Act (Canada) or the Immigration Act (Canada), or having been such a refugee in the past 24 months, or being in the process of having a claim for refugee protection, or application for protection, determined or decided under the Immigration and Refugee Protection Act (Canada);
 - (ix) being a person who was a child in care or received similar care under an enactment of another Canadian jurisdiction;
 - (b) a circumstance that the minister considers to be a circumstance that seriously impedes the person's ability to search for, accept or continue in employment.
- (4) If a person qualified as a person who has persistent multiple barriers to employment on June 30, 2019, the person qualifies, subject to section 34, as a person who has persistent multiple barriers to employment.

66.1 In this Division:

"continuation date",

- (a) in relation to a person who is a main continued person under section 66.3 (1) [access to medical services only] or 66.4 (1) [access to transitional health services] as a result of having been part of a family unit on the date the family unit ceased to be eligible for income assistance, means that date, and
- (b) in relation to a dependent continued person under section 66.3 (2) or 66.4 (2) of a main continued person, means the continuation date of the main continued person;

"continued person" means

- (a) a main continued person under section 66.3 (1) or 66.4 (1), or
- (b) a dependent continued person under section 66.3 (2) or 66.4 (2);

"qualifying person" means a person who

- (a) has persistent multiple barriers to employment, or

(b) is a recipient of income assistance who is described in section 8 (1) [people receiving special care] of Schedule A.

66.3 (1) *Subject to subsection (4), a person is a main continued person if*

(a) the person was

(i) part of a family unit identified in subsection (3) on the date the family unit ceased to be eligible for income assistance, and

(ii) a qualifying person on that date, and

(b) the person has not, since that date, been part of a family unit in receipt of income assistance, hardship assistance or disability assistance.

(2) *Subject to subsection (6), a person is a dependent continued person if*

(a) the person was a dependant of a main continued person under subsection (1) on the main continued person's continuation date, and

(b) the person is currently a dependant of that main continued person.

66.4 (1) *Subject to subsection (4), a person is a main continued person if*

(a) the person was, on or after September 1, 2015,

(i) part of a family unit identified in subsection (3) on the date the family unit ceased to be eligible for income assistance, and

(ii) a recipient of income assistance on the date referred to in subparagraph (i), and

(b) the person has not, since the date referred to in paragraph (a) (i), been part of a family unit in receipt of income assistance, hardship assistance or disability assistance.

(2) *A person is a dependent continued person if*

(a) the person was a dependent child of a main continued person under subsection (1) on the main continued person's continuation date, and

(b) the person is currently a dependent child of that main continued person.

67. (1) *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 income assistance, if

(i) the family unit includes a qualifying person, or

(ii) the health supplement is provided to or for a person in the family unit who is under 19 years of age,

(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

(i) is a continued person under section 66.3 (1) or (2) [access to medical services only], or

(ii) is a continued person under section 66.4 (1) [access to transitional health services]

and was, on the person's continuation date, a qualifying person or part of a family unit that then included a qualifying person, or

(iii) is a continued person under section 66.4 (2).

(2) *Subject to subsection (3), 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 family unit if the health supplement is provided to or for a recipient in the family unit who*

(a) has received income assistance under the BC Benefits (Income Assistance) Act or the Act continuously from March 31, 1997 and on March 30, 1997 was eligible under section 37 (1) (a) of the BC Benefits (Income Assistance) Regulations, B.C. Reg. 272/96, as it read on March 30, 1997, for the health care services and benefits referred to in that provision, or

(b) is a dependant of a recipient referred to in paragraph (a).

(3) *Subsection (2) applies only until the earlier of the following dates:*

(a) the date the recipient ceases to receive income assistance;

(b) the first day of the calendar month after the minister makes a determination that the recipient, or any dependant of the recipient other than a dependent child, is capable of accepting employment.

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

76. (1) 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) the adjusted net income of any person in the family unit, other than a dependent child, does not exceed the amount set out in section 11 (3) of the Medical and Health Care Services Regulation, 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).

EAR SCHEDULE A

People receiving special care

8. (1) For a person who receives accommodation and care in a special care facility or a private hospital or who is admitted to a hospital because the person requires extended care;

EAR 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 67 [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.

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

(i) a knee brace;

(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.

(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.

EAPWD Act

Persons with disabilities

2. (2) The minister may designate a person who has reached 18 years of age as a person with disabilities for the purposes of this Act if the minister is satisfied that the person is in a prescribed class of persons or that the person has a severe mental or physical impairment that

(a) in the opinion of a medical practitioner or nurse practitioner is likely to continue for at least 2 years, and

(b) in the opinion of a prescribed professional

(i) directly and significantly restricts the person's ability to perform daily living activities either

(A) continuously, or

(B) periodically for extended periods, and

(ii) as a result of those restrictions, the person requires help to perform those activities.

(3) For the purposes of subsection (2),

(a) a person who has a severe mental impairment includes a person with a mental disorder, and

(b) a person requires help in relation to a daily living activity if, in order to perform it, the person requires

(i) an assistive device,

(ii) the significant help or supervision of another person, or

(iii) the services of an assistance animal.

Application of Act

4. To be eligible for disability assistance or hardship assistance under this Act, a family unit must include a person with disabilities.

EAPWD Regulation

Process for assessment of eligibility for disability assistance

4. (1) The eligibility of a family unit for disability assistance must be assessed on the basis of the 2-stage process set out in sections 4.1 and 4.2.
- 2) Despite subsection (1), the eligibility of a family unit for disability assistance may, at the minister's discretion, be assessed on the basis of the process set out in section 4.21, if disability assistance or income assistance has been provided to or for a person in the family unit in at least one of the 6 calendar months immediately preceding the calendar month for which the eligibility of that family unit is being assessed.

Alternate application for disability assistance

- 4.21 (1) The process for assessing the eligibility of a family unit referred to in section 4 (2) for disability assistance is fulfilling the requirements of subsection (2) of this section.
- (2) The applicants for disability assistance in a family unit must complete and submit to the minister a report using the same form as in section 29 [reporting requirement].

Applicant requirements

5. For a family unit to be eligible for disability assistance or a supplement, an adult in the family unit must apply for the disability assistance or supplement on behalf of the family unit unless
- (a) the family unit does not include an adult, or
 - (b) the spouse of an adult applicant has not reached 19 years of age, in which case that spouse must apply with the adult applicant.

General health supplements

61.01 In this Division:

"continued person" means

- (a) a main continued person under 61.1 (1), or
- (b) a dependent continued person under section 61.1 (2);

61.1 (1) Subject to subsection (4), a person is a main continued person if

- (a) the person was
 - (i) part of a family unit identified in subsection (3) on the date the family unit ceased to be eligible for disability assistance, and
 - (ii) a person with disabilities on that date,
- (b) the person has not, since that date, been part of a family unit in receipt of income assistance, hardship assistance or disability assistance, and
- (c) in the case that the family unit referred to in paragraph (a) (i) was a family unit identified in subsection (3) (g), the agreement referred to in subsection (3) (g) is in force.

(2) Subject to subsection (6), a person is a dependent continued person if

- (a) the person was a dependant of a main continued person under subsection (1) on the main continued person's continuation date and is currently a dependant of the main continued person, or
- (b) the person is a dependant of a person who is a main continued person under subsection (1) as a result of having been part of a family unit identified in subsection (3) (b), (c), (d), (e), (f) or (g).

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.

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

69. (1) *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,*
- (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).*

Arguments

The ministry has denied the appellant a knee brace based upon two distinct arguments related to lack of eligibility, one of lack of information on a direct and imminent threat to health, and also several specific arguments relating to the medical equipment requested. The panel will address each issue in turn.

The panel notes the reconsideration decision contains a number of recording errors. The ministry cites incorrect sections of regulations and indeed cites inconsistent regulations within the discussion body of the document which makes the logic unclear at times. The panel notes the frustration expressed by the appellant in not understanding the original or reconsideration decision, and why the funding was not approved.

Appellant's Position

The appellant's position is that the brace should be funded because the appellant is a recipient of income assistance who has a severe medical condition for which a requisition was signed by a medical practitioner for a custom-made orthosis, a knee brace. The panel notes that the appellant has testified to recently working but cannot work now due to health and that no-one wants to hire someone who limps. The appellant stated at the hearing that the ministry had recommended earlier this year that the appellant apply for temporary disability status. The panel notes the appellant has testified as not remembering having applied for or received designation as a person with multiple barriers to employment (PPMB).

Ministry's Position

The ministry argues that although the appellant is a single recipient of income assistance, the appellant is not eligible for health supplements under section **2 or 3** of Schedule **C** of the EAR due to not meeting

the eligibility requirements of the EAR. The appellant does not hold qualification as a PPMB and does not meet the other criteria of section **67** of the EAR.

Panel Reasoning and Decision

The panel notes in the reconsideration decision discussion on basic eligibility that the ministry has incorrectly summarised the eligibility requirements and omitted several classes of eligible persons regarding section 67 of the EAR. As discussed below these appear to be typographical or recording errors. The panel finds that this has not prejudiced the appellant, nor created substantive error.

The legislation relating to eligibility for general health supplements under sections **2 and 3** of schedule **C** for a person receiving income assistance is section **67** of the EAR.

Section **67(1)** provides for eligibility in three cases. First, if the family unit includes a “qualifying person” or it is provided to a person under 19 years of age. Second, if the family unit is in receipt of hardship assistance and the supplement is provided to someone under 19 years of age. And third, if the supplement is for a “continued person”.

For the first case, a “qualifying person” is defined under section **66.1** of the EAR as a PPMB or is a person who receives income assistance under section **8** of schedule **A** as a person receiving special care; that is receives accommodation and care in a special care facility, private hospital or who is admitted to hospital for extended care.

Section **2** of the EAR describes the process of designation as a PPMB. The panel finds no evidence that the appellant has applied for, or received PPMB status.

The Orthosis Request and Justification form shows the appellant address as a residential basement address. The panel finds no evidence that the appellant is a person designated as receiving special care under section **8** of Schedule A. The panel finds reasonable the ministry’s determination that the appellant was not eligible under section **67(1)(a)(i)**.

For the second case no evidence has been provided to suggest the appellant is receiving hardship assistance. The letter from the orthopedic surgeon provides a date of birth for the appellant that clearly shows the appellant is over 19 years of age. The panel finds reasonable the ministry’s determination that the appellant was not eligible under section **67(1)(a)(ii) or 67(1)(b)**.

In the third case the panel notes the appellant’s file was opened in April of 2019. Section **66.1** of the EAR defines a continued person and refers to sections **66.3 and 66.4** which further define a continued person as one who was a qualifying person and/or ceased to receive income assistance. The appellant is a single recipient of income assistance and no information has been provided to suggest that income assistance has ceased at any point. The panel finds reasonable the ministry’s determination that the appellant does not meet the definition as a continued person and therefore not is eligible under section **67(1)(c)**.

Lastly, within section **67**, section **67(2)** provides for eligibility where a person receives income assistance under the BC Benefits (Income Assistance) Act or the Act continuously from March 31, 1997 or the other requirements of the section. No information was provided to demonstrate the appellant received such assistance. The panel finds reasonable the ministry’s determination that the appellant is not eligible under **section 67(2) or (3)**.

For these reasons the panel finds the ministry decision, that the appellant is not eligible for health supplements under section **67** of the EAR to be reasonably supported by the evidence and a reasonable application of the applicable legislation.

Appellant's Position

The appellant holds that as a recipient of income assistance, and in receipt of a requisition signed by a medical practitioner for a knee brace that one should be funded. The appellant had been advised to seek temporary disability status but had not done so due to not understanding the process. The appellant also could not remember having sought or received a designation of PPMB status.

Ministry's Position

The ministry's position is the application does not meet the legislated criteria in the Employment and Assistance for Persons with Disabilities (EAPWD) Regulation. The ministry cites section **62(1)**, and expressed that this legislation states that the ministry may provide any health supplement set out in section **2 or 3** of Schedule C to or for a family unit if the health supplement is provided to or for a person in the family unit who is a recipient of disability assistance or is a person who otherwise meets the criteria set out in section **62(1) (b to g)**. The ministry expressed that the appellant;

- is not a recipient of disability assistance,
- is not a person otherwise described in section **62**, and
- is not a person described in section **66.1** of the EAR (**sic**).

The panel notes the ministry's argument references sections of the EAPWDR that do not exist. There is no section **62(1)** and no subsections **62(1) (b to g)** in either the EAPWDA or the EAPWDR, and the ministry included a finding within the discussion on the EAPWDR that relates to the EAR.

Panel Reasoning and Decision

Section **2(2)** of the EAPWDA sets out the process for a person to be designated as a person with disabilities and sections **2.1 and 4(1)** of the EAPWDR provides the process for alternative grounds for designation, and assessment of eligibility for disability assistance.

The panel notes that although the appellant claims to have been approached by the ministry to apply for temporary disability benefits or status in April or May of 2020, there is no evidence to suggest that the appellant has completed and submitted any forms or application for either PWD designation, disability allowances or supplements.

For these reasons the panel finds the ministry decision, that the appellant is not receiving disability assistance, is not a person otherwise described in section **62**, and is not therefore eligible for health supplements under section **62** of the EAPWDR to be reasonably supported by the evidence and a reasonable application of the applicable legislation.

Appellant's Position

The appellant holds that the knee braces should be funded as a recipient of income assistance, in receipt of a diagnosis of a severe physical condition and having a requisition signed by a medical practitioner for a knee brace. The appellant described having fallen numerous times and in one case while out walking in a nearby canyon, having collapsed, become unconscious and being recovered by a local search and rescue organization. The appellant testified as to having no balance, no life to do

anything, of being afraid of falling again and hitting (the appellant's) head and of being unable to walk without falling.

Ministry's Position

The minister considered the information provided in the appellant's initial request and Request for Reconsideration as it relates to a possible direct and imminent life-threatening health need, and whether a knee brace is necessary to meet that need under section **76** of the EAR. The minister stated the information did not establish such an imminent need nor that the brace recommended was appropriate.

The panel notes the ministry did not provide a definition of 'direct and imminent life-threatening need' in the reconsideration decision or at hearing but suggested in oral testimony that such a condition would need to be supported by a medical practitioner.

The ministry had previously found that under section **3** of Schedule C of the EAPWDR (sic) an orthosis includes a knee brace. Again, this ministry citing of regulation was in the reconsideration decision section on a discussion of eligibility within section 76 of the EAR. The panel believes this ministry finding to be a citing error.

Additionally, the minister found the request does not meet the eligibility requirement set out in the EAR subsection **76(d)(ii) (sic)** in that information has not been provided to confirm the request meets all the eligibility requirements set out in section **3.10** of Schedule C [Health Supplements]. The ministry goes on to state that;

- the request does not meet the eligibility requirement in EAPWD (**sic**) Regulation, Schedule C, subsection **3.10(2)(c)**, in that it has not been reported that the appellant requires this brace due to the purposes listed in section **3.10(2)(c)**, and
- insufficient information has been provided to determine if the requested knee brace is off-the-shelf, or a custom-made orthosis, or to establish that the knee brace will be fitted by an orthotist, pedorthist, occupational therapist, physical therapist, or podiatrist, as required by section **3.10(2)(d)**.

The ministry determined therefore, that the appellant's request did not meet the requirements for a health supplement as set out under Section **76** of the EAR.

The panel notes the ministry again cited incorrect sections of regulations and indeed cited inconsistent regulations. The panel assumes that the quoted **76(d)(ii)** was a typographical error and more correctly should read **76(1)(d)(ii)**. Further, in the detailed discussion on the requirements of section **3.10** the ministry has referred to the EAPWDR and the panel assumes this to be a typographical error and more correctly should read the EAR. For correctness, the panel notes that, as of the hearing date, sections **3** and **3.10** in both the EAR and the EAPWDR to have essentially the same wording and section numbers.

Panel Reasoning and Decision

Each of the EAR and the EAPWDR contain a legislative consideration to allow for the provision of a health supplement to a person who is otherwise not eligible for the health supplement under the respective regulations. In each case the specific wording of section **76** of the EAR and section **69** of the EAPWDR, as of the hearing date, are the same. Due to the ambiguity contained in the ministry reconsideration decision the panel will consider both regulations in the circumstances of the Appellant.

The language contained in both section **76** of the EAR and section **69** of the EAPWDR state the minister may provide to a family unit health supplements set out in sections **2 (1) (a) and (f)** and **3** of Schedule C, if the health supplement is provided to or for a person who is otherwise not eligible for the health supplement under the respective regulation if the minister is satisfied that the person faces a direct and imminent life threatening need, and the health supplement is necessary to meet that need.

Each section then refers to specific requirements specified in the following provisions of each Schedule C, as applicable, are met. These are paragraph **(a) or (f)** of section **2 (1)**, and sections **3 to 3.12**, other than paragraph **(a)** of section **3 (1)**.

Section **2** in both the EAR and the EAPWDR refer to medical supplies, either disposable or reusable, and include lancets, needles and syringes, ventilator supplies required for the essential operation or sterilization of a ventilator, and tracheostomy supplies. It also includes modes of transportation to hospitals.

When discussing section **76** of the EAR, and section **69** of the EAPWDR, it is Schedule C, section **3.10** that sets out the eligibility requirements for the provision of orthoses. Under subsection **3.10(1)**, an “orthosis” includes **(i)** a knee brace. Therefore, the panel finds a knee brace is an orthosis that may be provided by the minister as a health supplement under both the EAR and the EAPWDR.

A regulatory requirement that a medical or nurse practitioner confirm a health condition and/or suitability of medical equipment is present in some sections of schedule C, such as **3.10(2)(d)** and **3.10(3)(a)** which refer to the knee brace orthosis. The panel finds this lack of such a clear regulatory requirement within the existing section **76** legislation provides the minister with discretion in deciding what is and what is not a ‘direct and imminent life-threatening need’.

In the case of the appellant the ministry has received medical reports, commented on earlier, from an orthopedic surgeon stating that the appellant has severe right knee osteoarthritis, is on a waiting list for right total knee replacement and requires a Breg Fusion plus knee brace to treat the knee arthritis while the appellant waits for surgery. This brace will decrease the appellant’s pain and allow the appellant to perform the activities of daily living. One of the reports clearly states “this brace is not an option, it is medically required”.

The ministry was aware of the report stating the need for the specific brace to allow the appellant to conduct daily living and the ministry itself reported it is satisfied that the orthosis is medically essential to achieve and maintain basic functionality, as required by subsection **3.10(2)(b)**.

The panel notes no indication of likelihood of the term of the physical impairment, and no indication of the amount of any restriction to daily living activities was provided in the reports, or that any assistance is required by the appellant.

The ministry was aware of the health concerns due to falling expressed by the appellant, of being unable to walk without falling and having specific dates recorded of falls. The ministry has not explained how it exercised the discretion afforded and arrived at it’s finding the appellant was not in ‘direct and imminent life-threatening need’. Short of any other qualitative information on the condition of the appellant the panel puts a heavy weight on the personal testimony as to the appellants fear for safety and obvious increased risk of falling.

The panel finds there to be elevated risk to the appellant’s health and safety but is unable to conclude from the evidence that it is patent that the risk is of a direct and imminent life-threatening nature. The panel finds there isn’t enough information to demonstrate that the ministry’s decision on a ‘direct and

imminent life-threatening need' to be unreasonable. The panel finds therefore, that the ministry's determination is supported by the evidence and is a reasonable application of the applicable legislation in the circumstances of the appellant.

Both the EAR and the EAPWD Regulations contain a Schedule C, subsection **3.10(2)(c)** and **3.10(2)(d)**. Subsection **3.10(2)(c)** states that an orthosis is a health supplement if the minister is satisfied that the orthosis is required: to prevent surgery, for post-surgical care, to assist in physical healing from surgery, injury or disease, or to improve physical functioning that has been impaired by a neuro-musculo-skeletal condition.

The letter from the orthopedic surgeon on 31 January 2020 provides a diagnosis of severe right knee osteoarthritis. The letter states the appellant has been placed on the waiting list for right total knee replacement and requires a Breg Fusion plus knee brace to *treat the knee arthritis* while the appellant waits for surgery. This brace will decrease the appellant's pain and allow the appellant to *perform the activities of daily living*.

It is generally accepted that benefits-conferring statutes should be interpreted liberally. In this case the evidence is that the appellant's knee surgery is forestalled due to waiting lists. Later accessibility to surgery is not guaranteed (and the health of the appellant may affect this) meaning that it may be forestalled for a long or permanent time. The panel finds the brace's intended use to treat the knee arthritis will prevent surgery, decrease pain, assist in physical healing from an injury or disease and allow the appellant improved physical functioning until such time as the wait list surgery is scheduled and carried out.

Therefore the panel finds the ministry's decision, that it has not been reported that the appellant requires this brace due to the purposes listed in section **3.10(2)(c)**, of the EAR and/or the EAPWDR, is not supported by the evidence nor a reasonable application of the applicable legislation in the circumstances of the appellant.

Section **3.10(2)(d)** states that an orthosis is a health supplement for the purposes of section **3** if the orthosis is either off-the-shelf or custom made. For an orthosis to be custom-made, it needs to be medically-required (as confirmed by a medical or nurse practitioner) and fitted by an orthotist, pedorthist, occupational therapist, physical therapist or podiatrist.

The submittal from a local clinic and signed by an orthopedic surgeon on 31 January 2020 described above provides a diagnosis of severe right knee osteoarthritis and a cost of \$900 for a knee brace. The letter states the appellant has been placed on the waiting list for right total knee replacement and requires a Breg Fusion plus knee brace to *treat the knee arthritis* while the appellant waits for surgery. This brace will decrease the appellant's pain and allow the appellant to *perform the activities of daily living*.

The Orthoses Request and Justification form (SD2894), section two, had been completed by the same Orthopedic Surgeon on 19 February 2020, which reports the appellant having a medical condition of "Severe right knee osteoarthritis." The recommended type of orthosis is: "*Breg Fusion Plus knee brace.*" The panel notes no check mark box or section to identify who will supply or fit the orthosis.

Two boxes on the form are checked to show, first, that a custom-made orthosis is required and secondly, that the brace will be required at least 6 hours per day. The panel finds this information confirms the requested knee brace is a custom-made orthosis.

For these reasons the panel finds the ministry decision that insufficient information has been provided to determine if the requested knee brace is off-the-shelf, or a custom-made orthosis, as required by **3.10(2)(d)(i)** is not supported by the evidence.

The panel notes the specific language of the regulation which simply states that an orthosis “is fitted” by certain medical professionals. It’s not clear when the fitting must take place, but it seems reasonable for the ministry to require a fitting to take place to meet the requirements of the legislation.

The panel therefore finds the ministry requirement for independent confirmation of the ‘will be fitted’ by one of the listed registrants in **3.10(2)(d)(ii)** and as defined in section 1 of schedule C to be a reasonable interpretation of the legislation in the circumstances of the appellant.

The panel finds that although a price for the custom-made brace has been provided there is no evidence to establish who will supply the custom-made knee brace or that it will be fitted by an orthotist, pedorthist, occupational therapist, physical therapist, or podiatrist.

The panel therefore finds that the ministry decision that insufficient information has been provided to establish that the knee brace will be fitted by an orthotist, pedorthist, occupational therapist, physical therapist, or podiatrist, as required by section **3.10(2)(d)(ii)**, to be reasonably supported by the evidence, or is a reasonable application of the applicable legislation in the circumstances of the appellant.

Conclusion

In the circumstances of the Appellant, the Panel has determined in the first instance that the ministry’s decision to deny funding for a knee brace due to ineligibility under sections **62** of the EAR and **69** of the EAPWDR was reasonable.

The Panel also finds that the ministry’s decision to deny funding for a knee brace under section **76** of the EAR as it had not been established the appellant has a direct and imminent life-threatening health need was also reasonable.

Lastly the ministry’s decision to deny funding as the knee brace requested did not meet all the requirements set out under section **3.10** of Schedule C, was reasonable.

Therefore, the ministry’s reconsideration decision to deny funding is confirmed, and the appellant is not successful on appeal.

APPEAL NUMBER
2020-00166

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

Donald Stedeford

SIGNATURE OF CHAIR

DATE (YEAR/MONTH/DAY)

2020/07/20

PRINT NAME

Kent Ashby

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2020/07/20

PRINT NAME

Anne Richmond

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2020/07/20