

Part C – Decision Under Appeal

The decision under appeal is the Ministry of Social Development and Poverty Reduction (ministry) reconsideration decision, which found that the appellant is not eligible for funding for unloader knee brace. The ministry determined the request failed to meet the legislative criteria set out in the Employment and Assistance for Persons with Disabilities Regulation (the Regulation).

In particular, the ministry found that because the appellant was provided with a hinged knee wrap brace for his right knee in October 2022:

- Another knee brace for the right knee cannot be provided because of section 3.10(9) of Schedule C which says that only one knee brace can be provided per knee, and;
- A replacement knee brace for the right knee cannot be provided because of section 3.10(10) of Schedule C which says that 4 four years must pass before any subsequent knee brace can be provided.

The ministry also found that, although its policy states that the replacement period does not apply if the replacement of the product is due to a change in medical condition or growth, in the case of the appellant, it has not been reported that there is a change in the appellant's medical condition.

Part D – Relevant Legislation

Employment and Assistance for Persons with Disabilities Regulation – Sections 69 and Schedule C, sections 3.10(9) and 3.11(10).

The legislation can be found in Appendix A

Part E – Summary of Facts**Evidence at Reconsideration**

1. Prescription for an unloader right knee brace from the appellant's orthopedic surgeon dated February 21, 2023: "the unloader brace differs in its structure and construction than the previous neoprene brace that was used. It is expected that an unloader brace would be more likely to help treat the knee problem that is rooted in underlying varus alignment, more than a simple neoprene brace".
2. Prescription for an unloader right knee brace from the appellant's orthopedic surgeon dated March 21, 2023. This prescription had the same information as the February 21, 2023 prescription and added "Furthermore, the brace will be of benefit to be worn any time when standing or walking and will likely need to be used for at least 6 hours per day. This may allow him to avoid a surgical procedure".
3. Prescription for a right knee valgus producing unloader brace from the appellant's orthopedic surgeon dated November 2, 2022. This brace will be required at least 6-hours per day.
4. Orthoses Request and Justification Form – signed and dated January 13, 2023. The request stated the following:
 - Section 1 was completed by the appellant
 - Section 2, which should be completed by a medical or nurse practitioner was left blank.
 - Section 3 was completed by the assessor. The assessor requested an off-the-shelf right unloader knee brace. This brace "will help provide stability and unload the medial compartment of the right knee, which will work to improve mobility and reduce pain. The brace is not for prevention of surgery or for post surgical treatment. The brace is to assist in physical healing from surgery, injury or disease, and to improve physical functioning that has been impaired by a neuro-musculo-skeletal condition. The assessor also said that the appellant "is currently using a wrap hinged brace which is not providing any pain relief due to a lack of unloading. He has had numerous meniscal operations, resulting in severe medial OA. He is no longer a surgical candidate".
5. 2 photographs: one of the hinged knee brace and one of the unloader knee brace.
6. 1-page letter from the appellant's assessor dated February 24, 2023. The letters stated, in part, the following:
 - The appellant was using a hinged knee wrap as a temporary brace until he saw a specialist.
 - Based on the specialist assessment, examination and recommendation, it was determined that the appellant's current knee brace is not appropriate in managing the damaging effects of his osteoarthritis. A medical explanation was provided to demonstrate that the current brace is not appropriate. The letter stated that based on the surgeon's recommendation and the imaging from the x-ray, the current knee brace is not appropriate.
 - The unloader knee brace has an adjustable hinge to provide a corrective force on the lateral aspect of the knee to unload the medial aspect. The rigid frame and uprights also reduce the amount of genu varum at mid-stance to reduce the deformational forces on the knee to assist with pain management.

- The unloader has the ability to improve quality of life, delay the progress of the damaging effects of osteoarthritis and delay total knee replacement surgery.
7. Quote for an Off-the-shelf Breg Fusion OA at a cost of \$1395.00 dated Jan 13, 2023.
8. Request for Reconsideration signed and dated March 29, 2023. It reiterated some of the details that were provided in the letter from the assessor, and in part, stated the following:
- His ability to use the right knee was progressively worse and causing hip problems, more pressure on the left knee, and causing bow leggedness.
 - Not knowing when he would get to see the specialist a temporary knee brace was prescribed to alleviate pain, use the knee and reduce the use of medication.
 - The unloader knee brace would allow him some quality of life and the use of his knee with minimal pain and discomfort.
 - His current knee brace does not support him for long periods or for him to participate in any activities.
 - He would like to be active and exercise, the unloader would make this possible.

Evidence on Appeal

Notice of Appeal (NOA), signed and dated April 11, 2023, reiterated details that were said in the letter from the assessor and in the request for reconsideration. It also said, in part, the following:

- The ministry denial was financially motivated and not in meeting the needs to give quality of life.
- “They state that I only qualify for one knee brace every 4 years, unless an item is required due to changes in a person’s medical condition”.
- “[The] family doctor, prescribed a knee brace based on an MRI from August 2022 that showed damaged meniscus in my right knee that would require surgery and was causing me severe pain and inability to walk”.
- “In February 2023 I saw [the specialist] who advised me that the knee brace I had was insufficient as I no longer had any meniscus left to remove, therefore surgery was not an option”.
- As the diagnosis of the injury was not what was previously assumed, the specialist prescribed a Right knee valgus producing unloader brace which would help straighten bow leggedness, support the knee, improve knee function, decrease pain, and reduce joint stiffness, allowing more mobility, confidence, and delay any knee replacement surgery as well as decrease dependence on opioids for pain relief. Something the current knee support does not do.
- In the reconsideration decision, the ministry noted that the replacement time period does not apply when an item is required due to changes in a person’s medical condition or growth. “This last note is what qualifies me for what the specialist knee surgeon prescribed to me as the condition has changed from the diagnosis of family practitioner”.

Evidence at the Hearing

At the hearing, the appellant and his advocate, in part, indicated the following:

- The first knee brace was prescribed by the doctor and not the specialist. However, the knee brace that the doctor prescribed was not the appropriate brace. Therefore, based

on section 3(1) the appellant is eligible for a new appropriate brace, which has been prescribed by the specialist.

- The appellant needs a knee brace to improve physical functioning impacted by a Neuro-Musculo-skeletal condition. Therefore, the appellant meets the requirements of section 3(10)(2).
- For these two reasons the 4-year replacement stipulation does not apply.
- Also, per ministry policy, if there is a change in the medical condition or growth the 4-year wait does not apply. There is a change because the medical condition is much worse than originally believed.
- The original knee brace (the hinged knee wrap) was based on the doctor's understanding of the MRI results but he was not qualified to understand the information. The specialist is and concluded that the appellant is not a candidate for surgery.
- The appellant explained the medical condition and why the unloader knee brace is best for his condition. Currently the knee is bone-on-bone with no cartilage. His current brace allows the knee to move side to side and front to back. The new brace (the unloader knee brace) does not allow the knee to shift, holds it in place and is more stable. This stability will allow for re-generations of parts of the knee and will allow pain-free movement. This will improve his physical and mental health.
- Currently he must rest even after a 10-minute walk.

When asked, the appellant stated the following:

- He provided the background information of how he ended up with an inappropriate knee brace. This information was a reiteration of the information in the appellant's request for reconsideration and notice of appeal.
- He added that he could not attend physiotherapy because he could not afford it but continues with the exercises given to him by the specialist.
- He is prone to collapsing because the current knee brace does not stabilize his knee and these episodes of collapsing have caused a hernia for which he needs surgery.
- There are no negative effects of the new (unloader) knee brace and his functionality will return and he can even play sports.

At the hearing, the ministry relied on its reconsideration decision and added the following:

- The appellant was approved for a semi-rigid knee brace in October 2022.
- The ministry's policy is that the 4-year replacement period does not apply if there is a change in medical condition or growth. In this case, the change is not in the medical condition; rather the change is in the understanding of the medical condition.
- The appellant would qualify for the new unloader right knee brace but the 4-year replacement stipulation is holding this back.

Admissibility of Additional Information

The ministry did not object to the admission of the new information.

A panel may consider evidence that is not part of the record and the panel considers is reasonably required for a full and fair disclosure of all matters related to the decision under appeal.

The panel found that the May 21, 2023 prescription from the specialist and the appellant's reference to his hernia provided additional detail or disclosed information that provides a full and fair disclosure of all matters related to the decision under appeal. The panel has admitted this new information as being in accordance with s. 22(4) of the *Employment and Assistance Act*.

Part F – Reasons for Panel Decision

The issue on appeal is whether the ministry's decision in the case of the appellant was reasonable given the evidence and legislation. In particular, was the ministry reasonable when it said that it can only provide one brace per knee and it can only provide knee brace every 4-years.

The Appellant's Position

The appellant argued that he qualifies for the unloader right knee brace because the wrap knee brace:

- Was not an appropriate medical device for his condition and the unloader knee brace is needed for a Neuro-Musculo-skeletal condition.
- The ministry's policy stipulates that the 4-year replacement policy does not apply if there is a change in medical condition and in this case, there is a change in condition.

The Ministry's Position

The ministry argued that the appellant's request for funds for a knee brace for the right knee does not meet the legislative requirements.

The Panel's Decision

The appellant argued that the current knee brace is not an appropriate brace for his medical condition. It was requested based on the doctor's understanding of his medical condition but after seeing the specialist, it turns out that the medical condition is much worse than initially thought.

The panel understands that when requesting the hinged knee brace, the appellant was working on the understanding that his doctor understood the extent of the problem and prescribed the proper medical device to alleviate his pain and allow some mobility. However, the panel finds that, per the legislative requirements, the current hinged knee brace is an appropriate medical device because it was prescribed by the appellant's medical practitioner for his diagnosed medical condition and that opinion was based on the results of an MRI. In this case, the panel finds that the ministry's interpretation of the legislation and the evidence is reasonable.

The ministry denied the appellant's request for an unloader right knee brace because:

1. Only one knee brace per knee can be provided because of section 3.10(9) of Schedule C, and;
2. A knee brace can only be provided every 4 years because of section 3.10(10) of Schedule C.

After a thorough examination of the evidence, the panel finds that the evidence demonstrates that a right-knee hinged brace was provided to the appellant in October 2022 and that the legislation states that only one brace per knee can be provided. The appellant does not deny this.

The legislation [Schedule C, section 3.10(10)], states that four years must pass prior to the ministry funding a replacement knee brace for a knee that has previously received a brace. The

appellant's request for an unloader right knee brace came in January 2023. The panel finds that four years have not passed since the previous knee brace was provided to the appellant and that a second knee brace for the right knee cannot be provided to the appellant within a 4-year period. The panel finds that the ministry was reasonable in its finding in this regard.

The ministry also noted that, per ministry policy, the replacement period does not apply if the replacement of the product is due to a change in medical condition or growth. In the case of the appellant, it has not been reported that there is a change in the appellant's medical condition. It has only been reported that there is a change in the understanding of the appellant's medical condition. However, the panel does not have the jurisdiction to assess the application of ministry policy. Therefore, the panel cannot make a determination on whether the ministry was reasonable about the use of its policy in the case of the appellant.

Conclusion:

The panel finds that the ministry reasonably concluded that the evidence establishes that the appellant's request for an unloader right knee brace did not meet the legislative criteria set out in the Regulation sections 3.10(9) and (10). The panel therefore finds that the ministry's decision to deny the appellant funding for an unloader right knee brace was a reasonable application of the legislation in the circumstances of the appellant and therefore confirms the ministry's reconsideration decision. The appellant is not successful at appeal.

Appendix A

Medical equipment and devices — orthoses**3.10**

(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

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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)

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

Part H – Signatures

Print Name

Neena Keram

Signature of Chair

Date: 2023/05/29

Print Name

Kulwant Bal

Signature of Member

Date: 2023/05/29

Print Name

Elaine Jeffery

Signature of Member

Date: 2023/05/29