

Part C – Decision Under Appeal

The decision under appeal is the Ministry of Social Development and Poverty Reduction’s (the “Ministry”) reconsideration decision dated February 1, 2024, denying the Appellant a health supplement for OrthoPro HyperEx left and right knee braces (the “knee braces”).

The Ministry found that the Appellant was not eligible for replacement knee braces under the Employment and Assistance for Persons with Disabilities Regulation (the “Regulation”).

The Ministry denied the Appellant’s request for replacement knee braces saying the request does not meet the requirements set out in the Regulation, Schedule C, sections 3 or 3.10. Specifically, the replacement period will not elapse until August 2024 and the Ministry was unable to determine that the Appellant’s request for replacement knee braces had been prescribed by a medical practitioner.

Part D – Relevant Legislation

Employment and Assistance for Persons with Disabilities Regulation (“Regulation”), Section 62
Employment and Assistance for Persons with Disabilities Regulation (“Regulation”), Schedule C, s. 3
Employment and Assistance Act (“EAA”), s. 22(4)

Full text of the Legislation is in the Schedule of Legislation at the end of the Reasons.

Part E – Summary of Facts

The hearing took place by videoconference on March 5, 2024. The Appellant attended together with an Advocate (the “Advocate”) who also provided Witness testimony.

Evidence Before the Ministry at Reconsideration:

The information the Ministry had at the time of the decision included:

- August 9, 2023 quote for the knee braces: \$372.96;
- August 15, 2023 letter from the Physiotherapist (the “Physiotherapist letter”);
- Orthoses Request and Justification forms (the “form(s)”)
 - August 24, 2023 , Sections 2 and 3 completed by the Physiotherapist (the “August 24, 2023 form”) and submitted to the Ministry on August 24, 2023;
 - September 11, 2023, Section 2- “Medical or Nurse Practitioner Recommendation”, which has been signed where the signature of a medical or nurse practitioner is requested (the “September 11, 2023 form”) and submitted to the Ministry on October 31, 2023; and
- Request for Reconsideration (signed by the Appellant January 4, 2024 and submitted January 19, 2024) with a typewritten letter from the Appellant (the “Appellant letter”).

Physiotherapist Letter:

The Physiotherapist’s letter indicated the following:

Diagnosis and Medical Background: The client has a history of spinal cord related medical issues and she had further spinal surgery and subsequent rehabilitation in late 2022.

Physical Assessment and Functioning: The client is wheelchair bound; however, client is able to stand and slowly move her feet to transfer bilaterally on standing. The client’s knees go into hyperextension and she cannot release her knees.

Current Equipment: Client has a set of OrthoPro HyperEx knee braces that were purchased in 2020. They are now worn beyond repair.

Targeted Outcomes: Client will be able to safely and independently continue to transfer.

Recommendations: OrthoPro HyperEx knee braces small left and right. The client transfers independently with a Superpole transfer. To maintain safety and her independence we are recommending the above knee braces.

August 24, 2023 form:

Sections 2 and 3 completed by the physiotherapist.

Section 2 of the form —Medical or Nurse Practitioner Recommendation—the physiotherapist indicates knee braces are recommended and that they will be worn at least six hours/day.

Section 3 of the form—Assessment—the physiotherapist says the knee braces limit knee hyperextension, which allows the Appellant to stand and transfer safely; the current knee braces no longer limit knee hyperextension adequately for transfers. The physiotherapist also confirms that the knee braces are required by the Appellant to improve physical functioning that has been impaired by a neuro-musculo-skeletal condition.

September 11, 2023 form:

Section 2 of the form—Medical or Nurse Practitioner Recommendation—completed and signed by the Appellant’s physician, indicates knee braces are recommended and that they will be worn at least six hours/day.

Request for Reconsideration—Appellant letter:

In her letter, the Appellant notes many reasons for her request:

- She requires one brace for each knee which meets the requirements of Section 3.10 (9);
- The requested knee braces assist with successful weight bearing, transfers, and mobility; they are the least expensive option to meet her need;
- Her previous knee braces have failed and are not repairable;
- She needs knee braces to transfer, and to walk, independently;
- She must be able to transfer independently to remain at her current residence;
- She is currently using knee braces on loan from the hospital that will need to be returned;
- She wears the knee braces continuously when up and out of bed; and
- If she does not receive new knee braces, the Appellant will lose her independence and require a higher level of care.

Additional Evidence:

Evidence after the reconsideration decision:

In her Notice of Appeal—Reasons, the Appellant notes:

- The previously purchased knee braces did not last through the billing cycle;
- The knee braces have been repaired multiple times; one brace has snapped along the plastic requiring the Appellant to borrow a replacement;
- The knee braces are required for ambulation, standing, transferring; and to prohibit hyperextension of her knee and prevent her knee from locking;
- The knee braces “are a necessity for daily living”; and
- The Appellant has made every effort to extend the life of her current knee braces, but they are now unusable.

Evidence at the Hearing-Appellant:

At the hearing, the Appellant and her Advocate said:

- Over the past four years, the Appellant's condition has improved drastically, and her use of the knee braces has greatly increased; she has progressed from being able to stand for just a few minutes, three times per day to now walking with a walker;
- A note on the Appellant's medical chart dated January 9, 2024 confirms the change in her condition; although the medical documentation is not in the appeal record and has not yet been provided to the Ministry, it can be; and
- Section 2 of the September 11, 2023 form was completed and signed by the Appellant's doctor.

Evidence at the Hearing-Ministry:

In response to questions from the Panel, the Ministry indicated:

- There are two versions of the Orthoses Request and Justification forms currently in use:
 - the form completed and signed by the Physiotherapist August 24, 2023 is the newest version where Section 2—Medical or Nurse Practitioner Recommendation—provides boxes to indicate "Position/Title" and "Professional Registration Number";
 - the form completed and signed September 11, 2023 is the older version where Section 2—Medical or Nurse Practitioner Recommendation—does not include the "Position/Title" and "Professional Registration Number" boxes and provides only boxes for signature, telephone number, and date; and
- With orthoses requests—whether new or replacement—the Ministry requires a medical note from the medical or nurse practitioner.

Admissibility of Additional Evidence:

Neither party objected to the admissibility of each other's additional oral evidence.

The Appellant's and her Advocate's oral evidence provide further information about the Appellant's advancement with her mobility that have been supported by the knee braces, and her changing needs as a result. The Ministry's testimony gives more clarity about the different forms and added information about the review and assessment process that occurs with new and replacement orthoses requests.

The Panel finds that the additional evidence provided by both parties is reasonably required for the full and fair disclosure of all matters in the appeal. Therefore, the Panel finds that the additional evidence is admissible under EAA s. 22(4).

Part F – Reasons for Panel Decision

The issue on appeal is whether the Ministry's decision denying the Appellant a health supplement to purchase replacement knee braces, is reasonably supported by the evidence or is a reasonable application of the legislation.

The Ministry found that the Appellant was not eligible to receive replacement knee braces because the replacement period established in the Regulation, does not elapse until August 2024. Further, the Ministry denied the Appellant's request because they said they were unable to determine that the Appellant's request for replacement knee braces had been prescribed by a medical practitioner.

ARGUMENTS**Appellant's Position:**

The Appellant and her Advocate say that the Ministry's decision, and its reasons for not providing funding for replacement knee braces, were incorrect. The Ministry was wrong to deny the knee braces on the basis that they had not been prescribed by a medical practitioner; the form was taken to the doctor and clearly signed by them on September 11, 2023. In addition, the Advocate argues that from 2020 when the Appellant first got her knee braces to present, the Appellant's mobility has increased so much which requires greater use of the knee braces, and results in greater wear on, and breakdown of, the knee braces. The Appellant's existing knee braces are simply not meeting her current needs and abilities and should be replaced.

In addition, the Appellant and her Advocate highlight the fact that the Appellant's living situation demands that she can transfer (from bed, from sitting, etc.) independently and exit the building on her own. The Appellant has been able to achieve this level of independence in part due to the knee braces. If they are not replaced and available to support and maintain her current activity levels, her mobility would decline, she would require more care and would have to move to a more costly residence. At present, the Appellant is borrowing a knee brace for her broken one, but it needs to be returned. For all these reasons, the Appellant and her Advocate say that her request for replacement knee braces should be granted.

Ministry's Position:

The Ministry largely relied on the reasons provided in its reconsideration decision and emphasized that replacement knee braces could not be provided because the requirements set out in the legislation had not been met. The Ministry did clarify that the Appellant's request for two knee braces did not exceed the number allowed per the

legislation under s. 3.10(9), and the reconsideration decision noting the request was denied based on this reason, was in error.

The Ministry said that the request was denied because the four-year period required by the Regulation had not elapsed and it had no discretion to vary that time frame. The Ministry also said it could not approve the request because the Ministry was not able to confirm that the knee braces had been prescribed by a medical practitioner. However, the Ministry conceded that it had no evidence of having taken any steps to verify who signed the September 11, 2023 form and agreed that based on the evidence of the Appellant and her Advocate, a medical practitioner had given the required recommendation for the knee braces. In any event, because all the legislated criteria had not been met, the Ministry could not approve the request for replacement knee braces.

Finally, although the Ministry understood that there had been changes with the Appellant's condition reported by the Appellant and her Advocate, which were also noted January 9, 2024 in her medical chart, without having that updated medical information from her chart available at the time of the request(s), the Ministry was unable to approve replacement knee braces before the four-year period had passed. For the Ministry to consider the request for replacement sooner than four years, the Appellant would need to submit a new request with the new information.

Panel Analysis and Decision:

The Ministry may fund knee braces if the request meets the requirements set out in section 3.10 of Schedule C of the Regulation, as well as other provisions under section 3 (1) that are not at issue in this appeal. For example, the Ministry was satisfied that the Appellant did not have resources available to cover the cost of the knee braces and the knee braces are the least expensive appropriate medical device to meet the Appellant's needs. However, the Ministry said it could not approve the Appellant's request for a health supplement for replacement knee braces because they could not confirm that the knee braces had been prescribed by a medical professional and because four years had not passed from the last time the Appellant received knee braces.

Prescribed/Recommended by a Medical or Nurse Practitioner

Schedule C; section 3.10(2) of the Regulation requires that the orthosis is prescribed by a medical practitioner or nurse practitioner. The Ministry found that it was not able to determine that the knee braces were prescribed by a medical practitioner. The Ministry provides an Orthoses Request and Justification form to be completed both by the medical practitioner and the mobility specialist (i.e. Physiotherapist). The medical practitioner completes Section 2—Medical or Nurse Practitioner Recommendation.

At the hearing, the Ministry confirmed that the form had been updated and that both versions remained in use in the medical community; a newer one of which Section 2 had space for the medical practitioner to indicate their professional designation and registration, and an older version where Section 2 did not contain spaces for designation or registration—just signature and telephone number. The Ministry further agreed that the September 11, 2023 form submitted by the Appellant was the older version with no spaces in Section 2 for the Appellant's doctor to indicate professional designation or registration. The Ministry also confirmed that it had not taken any basic steps such as searching or calling the telephone number provided to determine whether the signatory was the required medical or nurse practitioner or not.

Although the Regulation says a health supplement for orthoses may be provided if supported by a *prescription* from a medical or nurse practitioner, the legislation does not define prescription. It is reasonable that the ordinary, common understanding of a prescription being a direction enforced and signed off by the practitioner, applies. The Ministry provided form does not say practitioner prescription, it says *recommendation*. However, it is reasonable that as required by Section 2 of the Ministry's form, the practitioner's recommendation both confirms and gives the authority of a prescription by virtue of the practitioner's sign off. If the Ministry intended that a prescription/medical note from the practitioner was required, and practitioner recommendation and sign off in Section 2 of its form is an insufficient alternative to a medical note/prescription, then this should be clearly indicated. In the absence of that clarification, it is reasonable that the Ministry's form and Section 2 Recommendation completed by the practitioner serves to meet the requirement for a prescription.

Given the above reasons, the Panel finds that the Ministry was not reasonable in its finding that it could not confirm that the knee braces had been prescribed by a medical practitioner. After submitting her original request form to the Ministry August 24, 2023 where the Appellant's physiotherapist completed Section 2 in error, the Appellant stated that as requested by the Ministry, she took the form to her doctor to complete Section 2. The doctor completed and signed Section 2 Recommendation on September 11, 2023, which was provided to the Ministry on October 31, 2023. At the hearing, the Appellant also clarified the name and designation of the medical practitioner and confirmed that the noted telephone number was the practitioner's medical office number.

Four Years Must Pass Before Replacement Knee Braces

Section 3(3)(b) of the Regulation notes the timelines in section 3.10 that must pass prior to the Ministry providing a health supplement to replace requested medical equipment.

Regarding knee braces, section 3.10(10) says that four years must pass prior to the Ministry providing a health supplement to fund replacement knee braces. There was no dispute from the Appellant that she had received her original knee braces in August 2020. Although the Appellant and her Advocate identified that earlier replacement is required and indeed, is permitted by Ministry policy due to a change in her medical condition, no medical confirmation of the change was provided.

The Ministry, and this Panel, must be guided by the Regulation, sections 3(3)(b) and 3.10(10) of Schedule C. The Appellant received her original knee braces in August 2020 and makes her request for replacement knee braces prior to August 2024, before the legislated four-year period has been reached. As such, the Panel finds that the Ministry was reasonable in deciding that the Appellant was not eligible to receive a health supplement for replacement knee braces as her request does not meet section 3(3)(b) and 3.10(10) of Schedule C of the Regulation.

Conclusion:

The Panel finds that the Ministry's reconsideration decision, which determined that the Appellant was not eligible for replacement knee braces because not all eligibility requirements were met, was reasonably supported by the evidence, and was a reasonable application of the legislation. The Panel confirms the Ministry decision.

Even though the Ministry was not reasonable to decide that the requirement for a medical practitioner's prescription was not met, because the legislated four-year period has not passed, the Panel confirms the Ministry's reconsideration decision. The Appellant is not successful with her appeal.

Footnote: The Panel recognizes the Appellant's progress with and changes to her mobility and the resulting wear on her existing knee braces. The Panel notes the Ministry's suggestion at the hearing that the Appellant submit a new application with updated information.

Schedule – Relevant Legislation

Employment and Assistance for Persons with Disabilities Regulation**General health supplements**

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.

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.

(2.1) For medical equipment or devices referred to in section 3.9 (1) (b) to (g), in addition to the requirements in that section 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 a respiratory therapist, 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.
- (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.
- (5) Subject to subsection (6), the minister may provide as a health supplement repairs of medical equipment or a medical device that was not previously provided by the minister if
 - (a) at the time of the repairs the requirements in this section and sections 3.1 to 3.12 of this Schedule, as applicable, are met in respect of the medical equipment or device being repaired, and
 - (b) it is more economical to repair the medical equipment or device than to replace it.
- (6) The minister may not provide a replacement of medical equipment or a medical device under subsection (3) or repairs of medical equipment or a medical device under subsection (4) or (5) if the minister considers that the medical equipment or device was damaged through misuse.

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) 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.
- (6) For an orthosis that is an upper extremity brace, in addition to the requirements in subsection (2) of this section, the upper extremity brace must be intended to provide hand, finger, wrist, elbow or shoulder support.
- (7) For an orthosis that is a cranial helmet, in addition to the requirements in subsection (2) of this section, the cranial helmet must be a helmet prescribed by a medical practitioner or nurse practitioner and recommended for daily use in cases of self abusive behaviour, seizure disorder, or to protect or facilitate healing of chronic wounds or cranial defects.
- (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

(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]
- (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.

Employment and Assistance Act

s. 22 (4) A panel may consider evidence that is not part of the record as the panel considers is reasonably required for a full and fair disclosure of all matters related to the decision under appeal.

APPEAL NUMBER 2024-0064

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
Carmen Pickering

Signature of Chair

Date (Year/Month/Day)
2024/03/10

Print Name
John Pickford

Signature of Member

Date (Year/Month/Day)
2024/03/09

Print Name
Linda Pierre

Signature of Member

Date (Year /Month/Day)
2024/03/10