

## PART C – Decision under Appeal

The decision under appeal is the ministry's reconsideration decision of January 11, 2012. That decision denied the appellant's request for Monthly Nutritional Supplements of additional nutritional items.

Based on the evidence before it the ministry found that it was not satisfied that the appellant requires nutritional items as part of a caloric supplementation to a regular dietary intake to alleviate the symptoms of his chronic, progressive deterioration of health and to prevent an imminent danger to his life, as set out in section 67 (1.1) and Schedule C, subsection 7 (a) of the *Employment and Assistance for Persons with Disabilities Regulation (EAPWDR)*.

The ministry determined that the appellant was eligible for the Monthly Nutritional Supplementation of vitamins/minerals and approved that portion of his request.

**PART D – Relevant Legislation**

*Employment and Assistance for Persons with Disabilities Regulation (EAPWDR) 67 (1) (1.1) and (2)*

*Schedule C Section 7, Health Supplements*

## PART E – Summary of Facts

The documents before the ministry at reconsideration included the following:

- a prescription signed by the appellant's medical practitioner for Ensure plus 1 can to be taken four times per day, dated March 31, 2011;
- an application by the appellant for Nutritional Items and Vitamin or Mineral supplementation signed by the appellant's medical practitioner on June 6<sup>th</sup>, 2011;
- a letter from the ministry, dated June 26<sup>th</sup> denying the appellant's request of June 6<sup>th</sup>, 2011;
- an application by the appellant for Nutritional items and Vitamin or Mineral supplementation signed by the appellant's medical practitioner on October 18, 2011;
- a letter from the ministry, dated October 25<sup>th</sup>, 2011, denying the appellant's request of October 18, 2011;
- A Request for Reconsideration signed by the appellant on October 31, 2011;

When he filed his Notice of Appeal the appellant submitted a two page question and answer document addressed, "To Whom it May Concern", and signed by the appellant's medical practitioner. This document is dated January 17, 2012. The information in the document is clearly written testimony in support of the information and records that were before the ministry at reconsideration. At the hearing, the minister having no objection, the panel admitted this document into evidence based on Section 22 (4) (b) of the *Employment and Assistance Act (EAA)*.

When the appellant's medical practitioner completed the appellant's application for nutritional items on June 6, 2011 he wrote that the appellant needed nutritional items of high protein and high calories. In answer to the question, "Does [the appellant] have a medical condition that results in the inability to absorb sufficient calories to satisfy daily requirements through a regular dietary intake", the medical practitioner wrote, "problem is his regular dietary intake is poor". He stated that the nutritional items would lead to improvement to the appellant's orthopedic recovery and his strength. When asked to describe how the requested nutritional items would prevent imminent danger to the appellant's life the medical practitioner wrote, "ability to look after self." The medical practitioner identified Malnutrition, Underweight status, Significant weight loss, and Significant muscle loss as symptoms displayed by the appellant and directly resulting from the chronic, progressive deterioration of the appellant's health. The appellant's severe medical conditions were described by the medical practitioner as severe alcoholism, multiple bony breaks, wheelchair bound, severe; and severe chronic pain.

In the application of October 18, 2011 the medical practitioner answered "No" to the question if the appellant has a medical condition that results in the inability to absorb sufficient calories to satisfy daily requirements through a regular dietary intake. He specified the nutritional items required by the appellant as, "Ensure or similar meal replacement to replace muscle mass". When asked to describe how the nutritional items would alleviate one or more of the appellant's described symptoms and provide caloric supplementation to his regular diet the medical practitioner wrote, "[the appellant] is unable to eat enough over the course of a day. Dietary supplements needed to maintain current mobility and health." Responding to the question of how the nutritional items would prevent imminent danger to the appellant's life, the medical practitioner wrote, "[the appellant] continues to have falls, despite mobilization mostly on a wheelchair. He remains in

falling danger [cannot decipher] trying to keep his current mobility." The appellant's height was given as 174 cms and his weight 68.56 kg. The medical practitioner identified the same symptoms he had described in the June 6, 2011 application.

There is a second application signed by the medical practitioner on October 18, 2011. His answers remain as noted above, but on this application there is a hand unsigned note, "Urgent: patient is really malnourished, chronic alcoholism".

When seeking reconsideration of the ministry's denial of October, 2011, the appellant submitted a hand-written statement that, "the doctor has identified a number of serious wasting symptoms arising from a chronic progressive deterioration of health, including severe malnutrition and that both vitamin supplements and nutritional items have been recommended to address the serious health deterioration and imminent danger to life".

When he submitted his appeal of the ministry's reconsideration decision the appellant wrote that "Severe Malnutrition" was the reason he disagreed with the ministry's decision. In the "To Whom it May Concern" document, the appellant's medical practitioner was asked if the appellant's wasting symptoms were directly related to a severe medical condition and responded, "Yes cervical radiculopathy immobility from severe arthritis and some fractures". In answer to the question whether increased caloric intake, such as Ensure over and above normal dietary intake would alleviate the appellant's wasting symptoms, the medical practitioner answered, "To the goal of putting some mass back on [the appellant] to increase his strength and self-reliance." The answer given to the question whether the appellant's health condition was at a stage where caloric supplements are required to relieve his symptoms and prevent further health deterioration was, "[The appellant's] overall goal of reversing a year of mass loss due to severe arthritis and fractures and current reliance on the wheelchair." In answer to the question of whether the appellant has significant muscle mass loss and significant neurological degradation, the medical practitioner responded, "[the appellant] has a cervical radicular compression-related cause for his upper extremity wasting. Re muscle wasting forearm measures 25 cm circumference, biceps area 24-25 cms (not flexed)." The medical practitioner also noted that the appellant's meat is often beans. That he has gone days without eating and that a clinic that had helped him by providing Ensure supplements for about a month was no longer doing so. Caloric supplements, wrote the medical practitioner, were necessary to prevent danger to life or return to hospital.

Based on the evidence before it the panel makes the following findings of fact:

1. The appellant is a Person with Disabilities in receipt of disability assistance.
2. The ministry has affirmed that the appellant, as a result of his chronic, progressive deterioration of health, displays at least two of the symptoms set out in the legislation, namely, Malnutrition and Moderate to severe immune suppression.
3. The appellant's medical practitioner has described Significant muscle mass loss, Malnutrition, Underweight status, Significant weight loss and Significant neurological degradation as symptoms displayed by the appellant as a direct result of chronic, progressive deterioration of health.
4. The nutritional items recommended for the appellant by his medical practitioner are Ensure or similar meal replacement to replace muscle mass.
5. The medical practitioner has confirmed that the appellant does not have a medical condition

that results in the inability to absorb sufficient calories to satisfy daily requirements through a regular dietary intake.

6. The opinion of the appellant's medical practitioner is that nutritional items are needed because the appellant is unable to eat enough over the course of a day, and further that they will assist the appellant to maintain his current mobility and health.
7. The medical practitioner's view is that the nutritional items will prevent imminent danger to the appellant's life because of the danger the appellant faces of falling despite spending most of his time in a wheelchair and because they will increase the appellant's ability to look after himself.
8. The appellant lives with severe alcoholism, severe chronic pain, multiple bony breaks and is wheelchair bound.

## PART F – Reasons for Panel Decision

The issue at appeal is whether the ministry's decision at reconsideration was reasonably supported by the evidence. At reconsideration the ministry denied the appellant's request for Monthly Nutritional Supplements of additional nutritional items.

Based on the evidence before it the ministry found that it was not satisfied that the appellant requires nutritional items as part of a caloric supplementation to a regular dietary intake to alleviate the symptoms of his chronic, progressive deterioration of health and to prevent an imminent danger to his life, as set out in section 67 and Schedule C, subsection 7 (a) of the *Employment and Assistance for Persons with Disabilities Regulation (EAPWDR)*.

The ministry determined that the appellant was eligible for the Monthly Nutritional Supplementation of vitamins/minerals and approved that portion of his request.

The appellant did not attend the hearing of his appeal. The panel had confirmation from the post office that the Notice to Attend had been delivered. The appellant's advocate was present and indicated that he had expected the appellant to attend but was not surprised that he had not arrived for the hearing. The advocate had both the Record and a Release of Information Form signed by the appellant naming the advocate as his representative. In these circumstances the panel proceeded with the hearing with the advocate representing the appellant.

Section 67 of the *EAPWDR* states at (1) that, "*the minister may provide a nutritional supplement in accordance with section 7 (monthly nutritional supplement) of Schedule C to or for a person with disabilities in a family unit who receives disability assistance*". When that condition is met, "*the minister must receive a request, in the form specified by the minister, completed by a medical practitioner or nurse practitioner, in which the practitioner has confirmed all of the following: (a) the person with disabilities to whom the request relates is being treated by the practitioner for a chronic, progressive deterioration of health on account of a severe medical condition ; (b) as a direct result of the chronic, progressive deterioration of health, the person displays two or more of the following symptoms: (i) malnutrition; (ii) underweight status; (iii) significant weight loss; (iv) significant muscle mass loss; (v) significant neurological degeneration; (vi) significant deterioration of a vital organ; (vii) moderate to severe immune suppression. (c) for the purpose of alleviating a symptom referred to in paragraph (b) the person requires one or more of the items set out in section 7 of Schedule C and specified in the request; (d) failure to obtain the items referred to in paragraph (c) will result in imminent danger to the person's life.*"

Regarding nutritional items, Section 7 of Schedule C states: "*The amount of a nutritional supplement that may be provided under section 67 (nutritional supplement) of this regulation is the sum of the amounts for those of the following items specified as required in the request under section 67 (1) (c): (a) for additional nutritional items that are part of a caloric supplementation to the regular dietary intake, \$165 each month. ... (c) for vitamins and minerals, up to \$40 each month.*"

The ministry found that the appellant does display two of the symptoms described in the legislation: Malnutrition and Moderate to severe immune suppression; and as such he therefore meets the criterion set out in the *EAPWDR*, subsection 67(1.1) (b).

Regarding the symptom of Underweight status the ministry found that the appellant's height and weight combined to create a BMI at 22.2 which is considered in the "normal range" and so this symptom could not be affirmed by the ministry. The ministry found that they lacked information as to the amount of weight the appellant had lost and over which period this loss had occurred and therefore could not affirm the symptom of Significant Weight loss. Similarly, the ministry found that they lacked evidence from the medical practitioner to confirm muscle mass loss. The ministry also found that they lacked evidence to establish that the appellant displayed the symptom of Significant neurological degeneration. They noted that right arm palsy was identified as a condition with which the appellant lived but found that this is not directly related to neurological degeneration.

When they issued their decision after Reconsideration the ministry made the following observations in support of their position to deny the requested Nutritional Items: The medical practitioner had not confirmed that the appellant requires a caloric supplement to a regular diet intake and required to prevent imminent danger to the appellant's life. Also, the medical practitioner had not confirmed that the appellant required caloric supplementation to alleviate his symptoms of malnutrition and moderate to severe immune suppression or that these symptoms present an imminent danger to the appellant's life. The panel finds these views which underpin the ministry's decision to be reasonably based on the evidence. The panel further finds that the ministry reasonably observes from the evidence that the medical practitioner had not indicated that the appellant has a medical condition that results in the inability to absorb sufficient calories to satisfy daily requirement through a regular dietary intake; and also that the medical practitioner had given no explanation as to why the appellant is not able to eat enough over the course of a day. The ministry's reading of the evidence before them, namely that the medical practitioner had not explained how the appellant's severe alcoholism, right arm palsy and severe chronic pain results in an inability to absorb sufficient calories to satisfy daily requirements through a regular dietary intake is also reasonable. Finally, the ministry note that although the medical practitioner states that the nutritional items will prevent imminent danger to the life of the appellant on the basis that the appellant continues to have falls despite moving in a wheelchair, that he remains in danger of falling, and is trying to keep his current mobility, the medical practitioner does not provide a diagnosis of a severe medical condition that is related to this impairment of his mobility.

At the hearing the Advocate drew the panel's attention to the answers given by the medical practitioner in the document signed on January 17, 2011. He pointed out that this document gives information both on the duration of the muscle mass loss suffered by the appellant – namely one year, and on the measurements of the appellant's wasted forearm and biceps. He drew the panel's attention to the description of the appellant's poor diet. He asked that the panel note that the prescription of March 31, 2011 indicated that the appellant required four cans of Ensure Plus a day, remarking that this was a high usage of this supplement. He argued that the appellant's wasting symptoms of malnutrition and muscle mass loss supported his need for the nutritional items and urged that the ministry's decision at reconsideration be rescinded and the appeal be allowed.

The representative from the ministry spoke to the reconsideration decision. She underlined the problem the ministry faced linking up the appellant's wasting and malnutrition with a medical situation. She stressed that the nutritional items had to be supplementary, that is in addition to, the appellant's regular diet and pointed out that there was insufficient evidence regarding whether or not he had a regular diet.

The panel will deal now with the ministry's findings with regards to the symptoms it declined to affirm. Based on the evidence the panel finds their decision with respect to underweight status to be reasonable based on the appellant's BMI. Given the lack of information provided as to either the amount of weight loss experienced by the appellant, or the period over which the weight was lost the panel also finds the ministry's finding on this symptom to be reasonable. However, with regards to significant muscle mass loss, this is a symptom on which the medical practitioner is consistently concerned. The panel has the advantage of information which was not before the ministry at reconsideration, namely the period of time over which the loss has occurred and the dimensions of the appellant's forearm and biceps. With this information the panel finds that this is a symptom that is reasonably supported by the evidence.

However, the over-riding concern of the ministry at reconsideration and emphasized by the ministry's representative at appeal is that the legislation makes clear that what is intended is that the nutritional items be a supplementation to a regular dietary intake, not a substitution for a regular dietary intake. This is something that is not addressed by any of the comments of the medical practitioner. As the ministry point out in their reconsideration decision the evidence concerning the appellant's height and weight show a BMI of 22.2 which is considered in the "normal range". This is not supportive of the need for additional nutritional items that are part of a caloric supplementation to a regular dietary intake. Further, although the medical practitioner states that the need for the nutritional items is to prevent danger to the life of the appellant, his description as to how this would occur are not supportive of such a conclusion.

Based on its analysis of the evidence, and notwithstanding the arguments of the appellant's advocate the panel finds that the ministry's decision at reconsideration was reasonably supported by the evidence. Accordingly the panel confirms that decision.