

PART C – Decision under Appeal

The decision under appeal is the ministry's Reconsideration Decision of 25 January 2012, which held that the appellant was not eligible for a monthly nutritional supplement (MNS) for additional nutritional items requested pursuant to section 67 and Schedule C section 7 of the Employment and Assistance for Persons with Disabilities Regulation because his application did not meet the requirements of section 67 (1.1)(c) and (d) of the Regulation. These requirements are that a medical practitioner or nurse practitioner must confirm that the requested nutritional item is required for the purpose of alleviating a prescribed symptom and failure to obtain the item will result in imminent danger to health.

The ministry did determine that the appellant's application met the other criteria set out in the legislation, namely that the appellant is designated as a person with disabilities in receipt of disability assistance, the request has been completed by a medical or nurse practitioner, that he is being treated by the practitioner for a chronic, progressive deterioration of health, that he displays two or more of the prescribed symptoms and that the requested nutritional items are part of a caloric supplementation to a regular dietary intake.

PART D – Relevant Legislation

Employment and Assistance for Persons with Disabilities Regulation (EAPWDR), section 67 and Schedule C, section 7.

PART E – Summary of Facts

The ministry failed to appear at the hearing at the scheduled time and date. After verifying that the ministry had received notification of the hearing at least 2 business days before the hearing date by examining the Notice of Hearing fax transmit confirmation report, the hearing proceeded under section 86(b) of the Employment and Assistance Regulation.

The panel notes that in its Reconsideration Decision, the ministry concluded by stating: "Based on the information provided, the ministry determines that you are eligible for MNS of nutritional items." The Panel reviewed the entire reconsideration decision and notes that the first sentence in that same section states: "The minister is not satisfied that you require nutritional items to alleviate the symptoms of your chronic, progressive deterioration of health and to prevent an imminent danger to your life, as set out in section 67(1.1) of the [EAPWDR]." Based on this statement, the ministry's reasoning in its decision and the context of that decision, the panel finds that the last sentence has a typographical error: "not" was omitted before the word "eligible." The panel proceeded on the basis that the ministry determined that the appellant was "not eligible".

The evidence before the ministry at reconsideration consisted of the following:

- A prescription dated 02 November 2011 by the appellant's physician. He notes chronic hepatitis C and severe hypoproteinemia). He prescribes 3 bottles of Ensure Plus for at least 3 months and perhaps indefinitely.
- An Application for Monthly Nutritional Supplement dated 02 November 2011, completed and signed by the appellant's physician, a medical practitioner under the legislation and completed as follows:

Under severe medical conditions, the physician listed chronic hepatitis C, chronic leg edema, low hemoglobin, thrombocytopenia, neutropenia and hypoalbuminemia.

The physician described how these conditions are being addressed, including referral to a liver clinic.

The physician reported that the appellant displays the following of the 7 prescribed symptoms: malnutrition (hypoalbuminemia/hypoproteinemia), significant muscle mass loss (progressive skeletal-muscle weakness), and moderate to severe immune suppression (pancytopenia/neutropenia).

The physician specified the additional nutritional items required as Ensure Plus, 3 bottles/day.

The physician did not answer the following questions asked on the form:

- Does the applicant have a medical condition that results in the inability to absorb sufficient calories to satisfy daily requirements through a regular dietary intake? If so, please describe.
- Describe how the nutritional items required will alleviate one or more of the symptoms in Question 3 and provide caloric supplementation on a regular basis.
- Describe how the nutritional items requested will prevent imminent danger to the applicant's health.

- The appellant's Request for Reconsideration, dated 17 January 2012. On this form, his physician stated:

I am [the appellant's] physician and was very surprised to learn that he did not qualify for monthly nutritional supplements that were requested in his initial application. This unfortunate man has a number of chronic problems, including chronic hepatitis C,

hypoalbuminemia, pancytopenia, chronic leg edema and living with a very low income. He had a prolonged admission to hospital in October 2011 for the above problems and all his caregivers, including the nutritionist and hospital social worker and myself felt that he greatly benefits from and deserves this monthly supplement. Please contact me [name and telephone number] should you have any questions on this matter.

In the appellant's Notice of Appeal dated 31 January 2012, the physician wrote:

As his family physician, I am surprised that he has been declined for this supplement and invite you to call me to discuss his current health situation. [signature and telephone number]

At the hearing, the appellant stated that his knees were deteriorating and sometimes he seemed to feel like he was in "a big misty cloud." When he was in the hospital, he was given Ensure Plus and he kept taking it afterwards when he could afford it as it seemed to help. He said he finds it difficult to eat regular food – he can't bear it – as he has no teeth. He recently moved out of his mother's place as he wasn't getting anything to eat there.

The appellant's physician appeared as a witness. He stated that the appellant had moved from his mother's house where there was substance abuse and no meal preparation despite his paying for room and board. The appellant doesn't abuse drugs or alcohol and moving into his own accommodation can improve his living conditions. The improved nutrition through supplement will improve his general well-being, lessen his leg edema and improve his mobility and ambulation. Without it, his condition will decline as he becomes more house-bound, with reduced social contact. The physician stated that, pending the appellant going to the liver clinic, his treatment of the appellant relied on pressure stockings and the recommended Ensure Plus.

The panel pointed out that the place to provide the narrative to satisfy the ministry that the appellant met the criteria of the legislation was the set of questions on page 3 of the MNS Application, questions not addressed by the physician. The physician provided answers to these questions at the hearing. As these answers involved some technical medical terminology, the physician wrote those answers on the MNS application and submitted a completed copy of page 3 of the Application to the panel. The physician's answers are as follows:

Q: Does the applicant have a medical condition that results in the inability to absorb sufficient calories to satisfy daily requirements through a regular dietary intake? If so, please describe.

A: [The appellant] is unable to take in sufficient calories and especially protein due to poor appetite, lack of dentition.

Q: Describe how the nutritional items required will alleviate one or more of the symptoms in Question 3 and provide caloric supplementation on a regular basis.

A: With improved nutrition he feels more energetic. With improved protein intake, his leg edema is greatly reduced and this improves his mobility and lessens episodes of cellulitis, which are frequent cause of hospitalization.

Q: Describe how the nutritional items requested will prevent imminent danger to the applicant's health.

A: The improved nutrition through supplement will improve his general well-being, lessen his leg edema and improve his mobility and ambulation. Without it, his condition will decline as he becomes more house-bound, with reduced social contact. The physician acknowledged at the hearing that without increased caloric intake, the effects would not be imminent, but would appear within the coming years.

The panel finds that the new information provided by the physician is in support of the information and records that were before the ministry at the time of reconsideration. The physician's comments clarify the background and current circumstances of the appellant's situation and his answers are relevant to, and a required part of, the appellant's MNS request. As such the panel admits the new information as evidence pursuant to section 22(4) of the Employment and Assistance Act.

PART F – Reasons for Panel Decision

The issue under appeal is whether the ministry reasonably determined that that the appellant was not eligible for a MNS for additional nutritional items requested pursuant to section 67 and Schedule C section 7 of the EAPWDR because his application did not meet the requirements of section 67 (1.1)(c) and (d) of the Regulation, namely that his physician had not confirmed that the requested nutritional item is required for the purpose of alleviating a prescribed symptom; nor had he confirmed that the failure to obtain the item will result in imminent danger to health.

The legislation relevant to this appeal is section 67(1.1) of the EAPWDR:

(1.1) In order for a person with disabilities to receive a nutritional supplement under this section, 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.

The ministry did determine that the appellant's application met the other criteria set out in the legislation, namely that the appellant is designated as a person with disabilities in receipt of disability assistance, the request has been completed by a medical or nurse practitioner, that he is being treated by the practitioner for a chronic, progressive deterioration of health, that he displays two or more of the prescribed symptoms and that the requested nutritional items are part of a caloric supplementation to a regular dietary intake.

The position of the ministry was that no narrative was provided to be able to establish how Ensure Plus will alleviate one or more of the symptoms outlined or that failure to receive this product will present imminent danger to the appellant's life.

The position of the appellant is that the answers provided by his physician provide the narrative needed to establish that these criteria are met.

With respect to alleviating the prescribed symptoms displayed by the appellant (malnutrition, significant muscle mass loss and moderate to severe immune suppression), the physician refers to

how the appellant would benefit from the improved protein intake resulting from taking the requested product. As one of the conditions associated with his malnutrition is hypoproteinemia, and as the product would address the protein shortfall manifested in his hypoproteinemia, the panel finds that the ministry was unreasonable in determining that this criterion was not met.

As to whether failure to obtain the Ensure Plus will result in imminent danger to the appellant's life, the physician refers to how the product will improve the appellant's well-being and states that without it, his condition will decline as he becomes more house-bound, with reduced social contact. The panel finds that, while the Ensure Plus would benefit the appellant's overall health, the physician's statement does not constitute evidence that failure to obtain it would constitute an imminent danger to life. The panel therefore finds that the ministry reasonably determined that this criterion had not been met.

Therefore the panel finds that the ministry decision that the appellant is ineligible for a MNS for nutritional items, because his application did not meet all the requirements set out in section 67(1.1) of the EAPWDR, is reasonably supported by the evidence. The panel thus confirms the ministry decision.