

## PART C – Decision under Appeal

The decision under appeal is the ministry's reconsideration decision dated January 18, 2012 which determined that the appellant was not eligible for a Monthly Nutritional Supplement (MNS) for additional nutritional items and vitamins/minerals because all of the criteria of s. 67 and s. 7 of Schedule C of the Employment and Assistance for Persons with Disabilities Regulation (EAPWDR) were not met. Specifically,

- the appellant's medical practitioner had not demonstrated that the appellant has two or more symptoms as a result of a chronic, progressive deterioration of health as required by s. 67(1.1) (b);
- the requested nutritional items are not required as part of a caloric supplementation to a regular dietary intake as required by s. 7 of Schedule C and are not required to prevent imminent danger to life as required by s. 67(1.1)(d); and
- vitamin/mineral supplementation is not required for the purpose of alleviating one of the symptoms set out in s. 67(1.1)(b) as required under s. 67(1.1)(c) or to prevent imminent danger to life as required under s. 67(1.1)(d).

## PART D – Relevant Legislation

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

## PART E – Summary of Facts

The evidence before the ministry at reconsideration was comprised of an Application for Monthly Nutritional Supplement (MNS Application) signed and dated by a physician on August 31, 2011, a November 16, 2007 physician's letter, and the Request for Reconsideration.

In the MNS Application the appellant is diagnosed with spinal cord injury (C4/5) described as the fracture of the 4<sup>th</sup> and 5<sup>th</sup> cervical vertebrae with left sided paraplegia. In response to the question "As a direct result of the severe medical condition(s) noted above, is the applicant being treated for a chronic, progressive deterioration of health? If so, please provide details and any information on treatments including any relevant clinical or diagnostic reports", the physician responds "chronic mobility problems + muscle wasting/wt loss." When asked, "As a direct result of the chronic, progressive deterioration of health noted above, does the applicant display two or more of the following symptoms?" the physician provided no response. The physician reports that the appellant is 5' 11" in height and weighs 155 lbs.

In the MNS Application section respecting vitamin or mineral supplementation, the physician has provided no responses when asked to specify the vitamin or mineral supplement(s) required and expected duration of need, describe how this item will alleviate the specific symptoms identified, and describe how this item(s) will prevent imminent danger to the applicant's life.

In the MNS Application section respecting nutritional items, the nutritional items required are described as "Daily multivitamins + Boost or Ensure caloric supplements." When asked how the nutritional items will alleviate one or more of the specified symptoms and provide caloric supplementation to the regular diet, the physician responds "will help combat the muscular deterioration." The response when asked how these items will prevent imminent danger to the applicant's life is "it will prevent pt [patient] from collapsing + hurting self while mobilizing."

The 2007 physician's letter confirms the diagnosis of spinal cord injury and notes that, in addition to great difficulty with mobility, the appellant suffers chronic neck and back pain and has problems with depression, anxiety and insomnia.

In the Request for Reconsideration, the appellant writes that he has lost significant weight and muscle mass due to his exercise and cardio regime being affected by his medical condition. He requires vitamin B12 to help nerve blood cells reconnect. He adds that 155 lbs is not his normal weight as he was always a healthy 200 lb soccer player. He reports lower energy, especially during cold weather which affects his nerves. He requires MNS for energy, weight gain, nerve reconnection, and better balance.

In the Notice of Appeal, the appellant writes that he has lost 45 lbs, that he is getting weaker and that his muscles and muscle mass are disintegrating. Due to low energy and fatigue, he is unable to walk as much or continue his therapy or exercises. He reports that standing hurts and he has weak legs due to weight loss.

At the hearing, the appellant confirmed the information in his Request for Reconsideration and Notice of Appeal emphasizing that he is afraid that if he deteriorates further he will end up back in a wheelchair. In response to questioning, the appellant stated that he has a difficult time climbing stairs and that due to weakness and balance problems he has had many close calls of falling on stairs. The appellant stated that he has fallen hurting his shoulder and twisting his arm with his most recent fall being a few days ago when he landed on a mantel and cut his forehead. The appellant stated that prior to his spinal injury his weight was 205 lbs. and that after the injury he was able to maintain a weight of approximately 185 lbs. but that over the last year he lost 30-40 lbs. which he has been unable to regain. The appellant's oral testimony was considered additional description of the appellant's mobility and weight loss and admitted pursuant to s. 22(4) of the Employment and Assistance Act as being in support of the information and records before the ministry at reconsideration.

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At the hearing, the ministry reviewed the reconsideration decision but did not provide additional evidence.

## PART F – Reasons for Panel Decision

The issue to be decided is whether the ministry reasonably determined that the appellant was not eligible under s. 67 and s. 7 of Schedule C of the EAPWDR for a MNS for nutritional items and vitamins/minerals because:

- the appellant's medical practitioner had not demonstrated that the appellant has two or more symptoms as a result of a chronic, progressive deterioration of health as required by s. 67(1.1) (b);
- the requested nutritional items are not required as part of a caloric supplementation to a regular dietary intake as required by s. 7 of Schedule C and are not required to prevent imminent danger to life as required by s. 67(1.1)(d); and
- vitamin/mineral supplementation is not required for the purpose of alleviating one of the symptoms set out in s. 67(1.1)(b) as required under s. 67(1.1)(c) or to prevent imminent danger to life as required under s. 67(1.1)(d).

The relevant legislation, section 67 and section 7 of Schedule C of the EAR, provide as follows.

**67 (1)** 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 under

(a) section 2 [*monthly support allowance*], 4 [*monthly shelter allowance*], 6 [*people receiving room and board*] or 9 [*people in emergency shelters and transition houses*] of Schedule A, or

(b) section 8 [*people receiving special care*] of Schedule A, if the special care facility is an alcohol or drug treatment center,

if the minister is satisfied that

(c) based on the information contained in the form required under subsection (1.1), the requirements set out in subsection (1.1) (a) to (d) are met in respect of the person with disabilities,

(d) the person is not receiving a supplement under section 2 (3) [*general health supplement*] of Schedule C,

(e) the person is not receiving a supplement under subsection (3) or section 66 [*diet supplements*],

(f) the person complies with any requirement of the minister under subsection (2), and

(g) the person's family unit does not have any resources available to pay the cost of or to obtain the items for which the supplement may be provided.

(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.

(2) In order to determine or confirm the need or continuing need of a person for whom a supplement is provided under subsection (1), the minister may at any time require that the person obtain an opinion from a medical practitioner or nurse practitioner other than the practitioner referred to in subsection (1) (c).

7 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 a regular dietary intake, up to \$165 each month;

s. 67(1.1) – displays two or more of the listed symptoms

The ministry accepts that a medical practitioner has confirmed that the appellant is being treated for a chronic, progressive deterioration on account of a chronic, progressive deterioration of health on account of a severe medical condition – chronic mobility problems and muscle wasting/weight loss due to a spinal cord injury as required under s. 67(1.1)(a). However, the ministry's position is that the criterion of s. 67(1.1)(b) has not been met because, although the medical practitioner's evidence establishes that the appellant has the symptom of significant muscle mass loss, the information does not demonstrate that the appellant displays the symptom of significant weight loss. The ministry points to the absence of information from the appellant's medical practitioner as to how much weight has been lost and over what time period as well as the information respecting the appellant's weight and height which indicates a BMI within the normal range.

The appellant's position is that the information establishes that he displays the symptoms of two of the listed symptoms, namely significant muscle mass loss and significant weight loss. The appellant argues that his current weight is not a healthy weight for him as he has lost 45-55 lbs from his previous weight of 200-205 lbs.

The panel finds that the ministry appears to have accepted weight loss as part of the appellant's severe medical condition when assessing the criterion of s. 67(1.1)(a) and also accepted the medical practitioner's identification of muscle wasting as a symptom in the absence of further explanation from the medical practitioner respecting muscle loss. Therefore, the panel finds that when assessing eligibility under ss. (1.1)(b) it was not reasonable for the ministry to rely on the absence of details as to how much weight was lost over what time period or the ministry's calculation of BMI based on the appellant's height and weight of 5'11" and 155 lbs. which are in keeping with the physician's identification of weight loss as a symptom. The panel finds that the ministry unreasonably determined that the appellant does not display two of the listed symptoms under s. 67(1.1)(b) of the EAPWDR.

Nutritional Itemss. 7 of Schedule C - caloric supplementation to a regular dietary intake

The ministry's position is that the medical practitioner's information does not establish that the appellant requires the requested nutritional items, daily multivitamins and Boost or Ensure, as part of a caloric supplementation to a regular dietary intake as required by s. 7 of Schedule C. The ministry contends that the medical practitioner does not indicate that the appellant is displaying the symptoms of malnutrition, underweight status, or significant weight loss that would demonstrate a need for caloric supplementation to a regular dietary intake. The ministry further contends that the medical practitioner's description of how the nutritional items required will alleviate one or more of the symptoms "will help combat the muscular deterioration" does not establish that caloric supplementation to a regular dietary intake is required.

The appellant's position is that he requires Boost or Ensure to enable him to regain weight that he has lost, including the loss of 30-40 lbs over the last year.

As the panel found the ministry unreasonable in its decision that significant weight loss was not established as a symptom confirmed by a medical practitioner, the panel also finds the ministry unreasonable in relying on that determination to determine that the need for caloric supplementation to a regular dietary intake has not been met. With respect to the ministry's argument that medical practitioner's evidence that nutritional items are required to combat muscular degeneration is not sufficient to establish the need for caloric supplementation to a regular dietary intake, the panel finds that, when this information is viewed together with a plain reading of the medical practitioner's identification of Boost or Ensure as "caloric supplements" and the information respecting the appellant's height and weight, the physician has confirmed that the items are required to supplement the appellant's caloric intake. Therefore, the panel finds that the ministry unreasonably determined that the criterion of s. 7 of Schedule C of the EAPWDR was not met for the requested nutritional items.

Vitamins and mineralss. 67(1.1)(c) – alleviate specific symptoms

The ministry's position is that while the medical practitioner mentions daily multivitamins in the MNS application section respecting nutritional items, he does not specify how vitamins in particular will alleviate the specific symptoms.

The appellant's position is that the requested vitamins and minerals, including vitamin B12, have been proven to aid in the regeneration of nerves and improved blood flow which will help rebuild his muscle mass and improve mobility.

The panel finds that although the medical practitioner does not state how the requested vitamin/minerals will help prevent muscular deterioration in the section respecting vitamins/minerals, the medical practitioner has confirmed that daily multivitamins (and Boost or Ensure) will help combat muscular deterioration. Therefore, the panel finds that the ministry was unreasonable in determining that the legislative criterion of s. 67(1.1) was not met.

Nutritional items and vitamins/mineralss. 67(1.1)(d) – imminent danger to life

The minister is not satisfied that the medical practitioner has described how the requested nutritional items and/or vitamins/minerals will prevent imminent danger to the appellant's life by stating they will prevent the appellant from collapsing and hurting himself while mobilizing.

The appellant's position is that he requires the requested nutritional items and vitamins and minerals to increase his strength and mobility and prevent falls, noting that he fell as recently as a few days ago.

The panel finds that although the medical practitioner indicates that the requested nutritional items and vitamins will prevent the appellant from collapsing and hurting himself while mobilizing, the ministry has reasonably viewed the medical practitioner's insufficient as it has not identified a more immediate connection between the requirement for the requested MNS and a threat to the appellant's life in order to establish that the appellant's life will be in imminent danger if he does not obtain the requested nutritional items or vitamins. Therefore, the panel finds that the ministry reasonably determined that the criterion of s. 67(1.1)(d) was not met for both nutritional items and vitamins/minerals.

The panel finds that the ministry's reconsideration decision which held that all of the eligibility criteria for a MNS for nutritional items and vitamins/minerals of s. 67 and s. 7 of Schedule C of the EAPWDR were not met was reasonably supported by the evidence and confirms the decision.