

PART C – Decision under Appeal

The decision at appeal is the decision of the ministry at reconsideration on February 13, 2012. In their decision the ministry denied the appellant's request for the Monthly Nutritional Supplement (MNS) items of vitamin/mineral supplements and nutritional items. The ministry found that the appellant is not eligible for MNS as she did not meet the eligibility requirements of the *Employment and Assistance for Persons with Disabilities Regulation, EAPWDR* Section 67 (1) (a), (b), and (g).

Based on section 67 (1.1) and Schedule C, subsection 7(a) of the *EAPWDR* the ministry was also not satisfied that the appellant met the eligibility requirements for nutritional items.

The ministry found that the medical evidence before them regarding the appellant's need for the vitamin/mineral supplement showed that the appellant met the criteria set out in the *EAPWDR*, subsection 67 (1.1). However based on their earlier finding that she does not meet the basic eligibility requirements for the receipt of MNS items her request had to be denied.

PART D – Relevant Legislation

The Employment and Assistance for Persons with Disability Regulation, EAPWDR, Sections 67.1 (a), (b) and (g), section 67 (1.1) and Schedule C, subsection 7 (a).

PART E – Summary of Facts

The documents before the ministry at reconsideration included the following:

- the appellant's application for MNS, signed by the appellant's medical practitioner on December 8, 2011;
- a letter from the ministry dated December 22, 2011 stating that the appellant did not meet the eligibility requirements and denying the request, together with a completed Monthly Nutritional Supplement Decision Summary, signed on December 22, 2011;
- a Request for Reconsideration form completed and signed by the appellant on January 16, 2012.

When she submitted her Notice of Appeal, dated February 20, 2011, the appellant attached a letter from the Program director of the place where she resides supporting the appellant's request. The information in this letter, regarding the nature of the residence, is clearly supportive of materials that were before the ministry at reconsideration, and with no objections from the ministry's representative at the hearing this document was admitted into evidence, as provided for in the *Employment and Assistance Act (EAA)* Section 22 (4) (b).

At the hearing both the appellant and her advocate testified as to the appellant's need for the requested items and the status of the home where the appellant resides.

Based on the evidence in the documents and testimony at the hearing the panel's finding of facts is:

1. The home where the appellant resides is designated the appropriate Health Authority as a Special Care facility.
2. The appellant is designated as a person with disabilities.
3. The appellant has been diagnosed by her medical practitioner with three of the legislated symptoms, namely Malnutrition, (secondary to Hep C and obesity – poor nutrition, previous polysubstance abuse); Significant neurological degeneration (chronic psychosis- confusion and ongoing deteriorating, unstable on meds) and Significant deterioration of a vital organ, specifically metabolic syndrome/impaired pancreatic function; impaired fasting blood sugar.
4. The nutritional items required by the appellant in the opinion of her medical practitioner are those of a Diabetic diet – she needs protein in her diet (3 meals and 3 snacks) her antipsychotic medications are contributing to weight gain and pre-diabetes.
5. 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 appellant needs a diabetic diet, higher in protein to prevent the impaired blood sugars and progression to diabetes.

PART F – Reasons for Panel Decision

The issue to be determined on appeal is whether the ministry's decision at reconsideration was a reasonable application of the applicable legislation, the *EAPWDR*, in the circumstances of the appellant.

At reconsideration, the ministry denied the appellant's request for the Monthly Nutritional Supplement (MNS) items of vitamin/mineral supplements and nutritional items. The ministry found that the appellant is not eligible for MNS based on the *Employment and Assistance for Persons with Disabilities Regulation, EAPWDR* Section 67 (1) (a), (b), and (g).

Based on section 67 (1.1) and Schedule C, subsection 7(a) of the *EAPWDR* the ministry was also not satisfied that the appellant met the eligibility requirements for nutritional items.

The ministry found that the medical evidence before them regarding the appellant's need for the vitamin/mineral supplement showed that the appellant met the criteria set out in the *EAPWDR*, subsection 67 (1.1). However based on their earlier finding that she does not meet the basic eligibility requirements for the receipt of MNS items her request had to be denied.

Section 67 (1) of the *EAPWDR* states 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 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 centre, if the minister is satisfied that [] (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*".

Section 67 (1.1) states that, "*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 wording of Schedule C, subsection 7 concerning MNS is, "*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.*

The ministry in their decision at reconsideration deal first with what they describe as the appellant's Basic Eligibility. They point out that although the appellant is designated as a person with disabilities, she is not a person with disabilities in receipt of disability assistance as set out in subsections 67 (1) (a) and (b) of the *EAPWDR*. In particular although the appellant receives assistance from the ministry as a resident of a special care facility she does not receive a monthly shelter allowance or a monthly support allowance.

The ministry then looks at the designation of the home where the appellant resides. They point out that it is a special care facility, but that it is not an alcohol or drug treatment centre as set out in the *EAPWDR*, Schedule A, subsection 8 (2).

When they look at the ability of the appellant to pay (*EAPWDR* Section 67 (1) (g)) the ministry argues that as the appellant's meals are being provided by the residence in which she lives the appellant has the resources available to meet her nutritional needs.

At the hearing the appellant's advocate stated that the residence was licensed as a 10 bed long term dual diagnosis transitional home. She said that it is unique in the province and that its character does not fit into any of the categories of licensed homes. So, she stated, the home was designated as a Special Care facility. This designation was something that the Board of the residence might be looking to have changed. She said that the facility did not have the means to provide meals for those with special dietary needs. The home could, she explained, provide brown as against white rice, or one vegetable as against another, but with the per diem received they were not in a position to cater to more specialized dietary needs. She stated that there are other persons at the residence who are in receipt of the MNS. The appellant's testimony was that she lacked the resources to provide the required special diet. Her comfort allowance of \$95 was inadequate to cover that need.

The representative from the Ministry clarified that it was not the ministry but the Health Authority that designates residential facilities such as the one where the appellant lives. She said the legislation dictates whether the ministry can or cannot provide the MNS to particular individuals. She said that she knew of one person residing at the same facility as the appellant who did receive MNS but she said that was due to a decision of the Employment and Assistance Appeal Tribunal (EAAT). The ministry, she said could not make an exception of a particular individual. It was bound by the legislation. She reassured the appellant that the ministry did not dispute her health issues, and the ministry found that the appellant's health did lead them to find that she met the particular legislated requirements regarding vitamin and mineral supplements, but for the fact that the facility in which she resided did not meet the requirement as set out in the *EAPWDR* section 67 (1) (a,b).

The panel finds that the ministry's decision regarding the nature of the facility in which the appellant resides is reasonable. It may be that in the future the designation of the facility might be changed, but at the moment although it may be correct that some of the residents at the facility have drug or alcohol problems and receive some treatment for these conditions, the facility has not been designated as such by the appropriate authority. In that situation the panel finds reasonable the ministry's determination that the appellant does not meet the eligibility criteria of the *EAPWDR* section 67 (1) (a, b, and g). The panel is unaware of the particular circumstances of the individual currently at the same home as the appellant who is receiving MNS and cannot infer from the fact that a resident is in receipt of this benefit that the appellant also should be a recipient of the requested

MNS.

Based on our finding regarding this facet of the appeal, the panel also finds reasonable the ministry's decision that, albeit the appellant meets the legislated criteria in terms of vitamin/minerals supplements in terms of her medical condition, she is ineligible to receive such based on the fact that she did not meet the threshold requirement to be eligible to receive MNS.

The appellant's failure to meet this threshold requirement to be eligible to receive MNS also applies to her request for nutritional items.

Nevertheless, the ministry in their decision analyzed the information before them to determine whether the criteria of 67(1.1) and section 7 of Schedule C, *EAPWDR* were met.

The medical practitioner confirmed the appellant was being treated for a severe medical condition. The ministry confirmed the appellant had a chronic, progressive deterioration of health as a result of this severe medical condition, thus meeting the criteria of 67(1.1) (a) *EAPWDR*.

The medical practitioner stated the appellant displayed symptoms of malnutrition (with comment "secondary to Hep C and obesity – poor nutrition, previous polysubstance abuse"); significant neurological degeneration (with comment "chronic psychosis – confusion and ongoing deteriorating, unstable on meds") and significant deterioration of a vital organ (with comment "metabolic... impaired pancreatic function; impaired fasting blood sugar"). The ministry determined the appellant met the criteria of 67(1.1) (b) of the *EAPWDR*, that as a direct result of the chronic progressive deterioration of health the appellant displayed two or more of the enumerated symptoms.

To meet the criteria of section 67(1.1)(c) *EAPWDR* states that for the purpose of alleviating a symptom referred to in (b), the person requires one or more of the items set out in section 7 of Schedule C and specified in the request [in this case, nutritional items].

Schedule C, section 7(a) states, "for the additional nutritional items that are part of a caloric supplementation to a regulatory diet."

When they look at how caloric supplementation to a regular dietary intake would alleviate the symptoms of the appellant's chronic, progressive deterioration, the ministry argues that the medical practitioner had described a, "diabetic diet with higher protein to prevent the impaired blood sugars and progression to diabetes." On the application form the medical practitioner stated the appellant requires (a) a diabetic diet, (b) increased protein in her diet – three meals plus 3 snacks (c) that the appellant's antipsychotic medicals are contributing to her weight gain and pre-diabetes and (d) that she needs a restricted diabetic diet to prevent progress to diabetes. The ministry concludes that what the medical practitioner had described is a dietary regime with higher protein rather than a need for caloric supplementation to alleviate the symptoms of the appellant's chronic, progressive deterioration of health.

The legislation makes it clear at section 67 (1.1.) that there must be a direct link between the requested nutritional items, namely caloric supplementation, and the alleviation of the symptoms of the appellant's chronic, progressive deterioration of health. The evidence provided by the appellant's

medical practitioner does not make such a link. The ministry accurately reflects the medical practitioner's evidence that the diet that is required to alleviate the symptoms of the appellant's chronic progressive deterioration of health is a diabetic diet higher in protein to prevent the impaired blood sugars and progression to diabetes, rather than a caloric supplementation diet. As such, the panel finds that the ministry's conclusion that the link has not been made, is reasonable.

The ministry points out that the medical practitioner did not indicate that the appellant is displaying the symptoms of underweight status, significant weight loss or significant muscle mass loss that would demonstrate a need for caloric supplementation to a regular dietary intake. Additionally, they state that the medical practitioner had not confirmed that the appellant has a medical condition that results in the inability to absorb sufficient calories to satisfy daily requirements through a regular dietary intake, and that the medical practitioner had indicated that the appellant is obese.

The appellant's advocate at the hearing stated that although the appellant was overweight, thus leading to an assumption that she does not require caloric supplementation, nevertheless the appellant did not efficiently absorb nutrition from her meals. The advocate stated that the appellant's weight was caused in large part by water retention and bloating.

The ministry's representative emphasized that the appellant is clearly not underweight, and therefore not in need of caloric supplementation.

The legislative requirement for this supplement is based on the appellant's caloric needs, not on general nutritional needs. The ministry's finding on this element of the appellant's request accurately reflects the evidence. There is a clear distinction between a restricted diabetic diet and dietary caloric supplementation. The panel therefore finds that the ministry's conclusion that the additional nutritional items are not required for caloric supplementation to a regular dietary intake as per section 7 of Schedule C, *EAPWDR* is reasonable.

In terms of the imminent danger to the appellant's life, the medical practitioner wrote that, "Improved overall health and prevention of chronic disease contributes to improved mental health and less suicidal ideation, improvement in psychosis, etc." The ministry found that the information before them did not confirm that failure to provide nutritional items will result in imminent danger to the appellant's life.

There was no argument put forward by the appellant or her advocate on this, nor was there comment from the representative from the ministry.

The panel's finding is no link having been made between the appellant's need for a caloric supplementation diet and the symptoms of a progressive deterioration of her health, so no link had been made in the evidence provided that failure to provide nutritional items, i.e. caloric supplementation to a regular diet, will result in imminent danger to her life. The panel therefore finds the ministry's conclusion on this matter to be reasonable.

Based on its analysis above, the panel finds that the ministry's determination was a reasonable application of the legislation in the circumstances of the appellant. Accordingly, we confirm the Ministry's decision.