

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) item. The ministry found that the appellant is not eligible for MNS as he did not meet the eligibility requirements of the *Employment and Assistance for Persons with Disabilities Regulation, EAPWDR* Section 67 (1.1) and Schedule C, subsection 7 (a) of the *EAPWDR*.

Specifically, the ministry was not satisfied that the appellant required 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.

The ministry was satisfied that the appellant requires vitamin/mineral supplementation to alleviate the symptoms of his chronic, progressive deterioration of health and to prevent imminent danger to life, as set out in section 67 (1.1) of the *EAPWDR*.

PART D – Relevant Legislation

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

PART E – Summary of Facts

Documents before the ministry at reconsideration included the following:

- Application for Monthly Nutritional Supplement (MNS) signed by the appellant on October 13, 2011, with part C of the application completed by the appellant's physician.
- A letter from the ministry dated December 13, 2011 stating that the appellant did not meet the eligibility requirements for MNS and setting out the reasons why the eligibility requirements were not met.
- A Request for Reconsideration form completed by the appellant and signed by him on December 16, 2011,
- An Authorization to Release Information form completed by the appellant for release of information to an advocacy group;
- A Diet Allowance Request for the appellant signed by her physician on March 19, 2011.

At the written hearing the panel also had before it Submissions from the appellant in the form of a memorandum and a 2-page Question and Answer document containing 5 questions put to the appellant's physician regarding the appellant's health in relation to the appellant's request for the MNS item Ensure, and answers provided by the appellant's physician. The Submissions and Question and Answer document had been sent to the ministry who had registered no objection to them being received. The panel found the Question and Answer document to be clearly in support of information that was before the ministry at reconsideration. Accordingly, and based on section 22 (4) (b) of the *Employment and Assistance Act (EAA)*, the panel admitted this document into evidence.

In the Question and Answer document the appellant's physician answered "Yes" to the following questions:

1. "Does your patient suffer from chronic diarrhea and poor absorption of nutrients, fat loss (30 lbs in seven months and cannot regain) muscle mass loss, diabetic neuropathy especially feet, susceptibility to frequent infections especially feet (4 toes and part of right foot amputated in August 2011) and retinopathy resulting from brittle diabetes and blood clot in left thigh?"
2. Does your patient require caloric supplementation in the form of fresh produce, fish, poultry, and lean red meat in addition to regular dietary intake to prevent or alleviate further wasting and deterioration and subsequent health risks resulting from - the health conditions noted above in Question 1?
3. [dealt with the appellant's need for vitamins supplements which the ministry had allowed at reconsideration]
4. Is your patient's medical condition at a stage where nutritional intervention, specifically increased caloric intake and vitamin and mineral supplementation, is required to prevent or alleviate further health deterioration or reduce the rate of further deterioration and prevent imminent danger of life?

The appellant's physician answered "no" to the question: Is the \$35 diabetes diet allowance sufficient to meet your patient's nutritional needs.

Based on the documents the panel's finding of facts is as follows:

1. The appellant is a Person with Disabilities (PWD) in receipt of disability assistance.

2. The appellant is being treated for a chronic, progressive deterioration of health on account of a severe medical condition, specifically, Type 1 Diabetes with neuropathy and recent amputation of his right foot.
3. As a result of the appellant's chronic, progressive deterioration of health, the appellant displays at least two of the symptoms set out in the relevant legislation, *EAPWDR* Section 67 (1.1) (b): namely underweight status and significant muscle mass loss.
4. The minister is satisfied that the appellant requires vitamin/mineral supplementation to alleviate the symptoms of his chronic, progressive deterioration of health and to prevent imminent danger to life, as set out in section 67 (1.1) of the *EAPWDR*.

PART F – Reasons for Panel Decision

The decision to be made at appeal is whether the ministry's decision at reconsideration was a reasonable application of the applicable enactment in the circumstances of the appellant. The applicable enactment in this appeal is the *Employment and Assistance for Persons with Disabilities Regulation (EAPWDR)*. In their decision the ministry denied the appellant's request for the Monthly Nutritional Supplement (MNS). The ministry found that the appellant is not eligible for MNS as he did not meet the eligibility requirements of the *EAPWDR* Section 67 (1.1) and Schedule C, subsection 7 (a) of the *EAPWDR*. Specifically, the ministry was not satisfied that the appellant required 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.

The ministry was satisfied that the appellant requires vitamin/mineral supplementation to alleviate the symptoms of his chronic, progressive deterioration of health and to prevent imminent danger to life, as set out in section 67 (1.1) of the *EAPWDR*.

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.*

In their decision at reconsideration to deny the appellant's request for a MNS item, the ministry looked at the information provided by the appellant's physician on the MNS application and signed by him on October 8, 2011. The ministry argued that what the physician stated was required by the appellant was a high protein diet and a diabetic diet to relieve muscle wasting, to help control glucose levels, slow the disease progression, and to improve the appellant's appetite, increase his weight and improve his general health status.

However, argued the ministry, the physician had not indicated that the appellant's medical condition results in his inability to absorb sufficient calories to satisfy daily requirements through a regular dietary intake. Further, they point out that whereas the physician had indicated that the appellant requires caloric supplementation to alleviate the symptoms of underweight status and muscle mass loss, the physician had not indicated that the appellant has a medical condition that results in the

inability to absorb sufficient calories. The intention of the legislation, argued the ministry, is to provide a caloric supplementation to a regular dietary intake and they find that the appellant's physician had not provided the required additional information to indicate that the appellant requires extra calories – caloric supplementation – over and above those found in the appellant's regular diet.

The ministry pointed out that since March 15, 2011 the appellant has received a diabetic diet allowance of \$35.00 per month.

In his submissions the appellant argued that apart from the health problems noted by his physician at the time of his application for MNS, he also suffers from chronic diarrhea and poor absorption of nutrients. He gives details of his weight loss – 30 lbs in seven months - which he says cannot be regained. He describes the caloric supplementation needed as fresh produce, fish, poultry and lean red meat in addition to regular dietary intake to prevent or alleviate further wasting and subsequent health risks resulting from chronic diarrhea and poor absorption of nutrients, fat loss etc. A high protein diet, he asserted, does not preclude the need for extra calories because after all, extra calories must take some form or other. He stated that his diabetes diet allowance of \$35 per month is not sufficient to meet his nutritional needs.

In the Question and Answer document the appellant's physician confirms that the appellant requires caloric supplementation in the form of fresh produce, fish, poultry and lean red meat in addition to regular dietary intake to prevent or alleviate further wasting and deterioration and subsequent risks resulting from the appellant's health conditions. Among the health conditions that the physician confirms affect the appellant are chronic diarrhea and poor absorption of nutrients. In this document the physician also confirms that the appellant's medical condition is at a stage where nutritional intervention, specifically increased caloric intake is required to prevent or alleviate further health deterioration or reduce the rate of further deterioration and prevent imminent danger of life.

The appellant's physician also confirmed that the \$35 diabetes diet allowance is not sufficient to meet the appellant's nutritional needs.

This Question and Answer document was not before the ministry at reconsideration.

In their decision the ministry wrote that the appellant had requested an extension of time in order to submit additional information but that up to February 14, 2012 no additional information had been submitted to the ministry. The panel has this information.

The deficiencies the ministry describe in terms of the appellant's situation were that :

- (a) the appellant's physician had not indicated that the appellant's medical condition results in his inability to absorb sufficient calories to satisfy daily requirements through a regular dietary intake. The panel finds that in his answer in the Question and Answer document the appellant's physician does confirm that this is indeed the situation of the appellant.
- (b) the appellant's physician had not indicated that the appellant has a medical condition that results in the inability to absorb sufficient calories. The panel finds that the appellant's physician confirms this in the Question and Answer document, and,
- (c) The physician had not provided additional information to indicate that the appellant requires extra calories – caloric supplementation – over and above those found in the appellant's

regular diet. The panel finds that the appellant's physician provides this information in the Question and Answer document.

As these were the sole deficiencies noted by the ministry in their reconsideration decision the panel finds that it would be reasonable for the ministry now to agree that these deficiencies have been rectified by the information in the Question and Answer document. The evidence of the appellant's physician leads the panel to find that the ministry unreasonably found that the appellant did not meet the criteria set out in section 67 (1.1) and Schedule C, subsection 7 (a) of the *EAPWDR*. The panel finds that the ministry's decision at reconsideration is not a reasonable application of the applicable enactment in the circumstances of the appellant. Accordingly the panel rescinds the ministry's decision at reconsideration.