

PART C – Decision under Appeal

The decision at appeal is the decision of the ministry at reconsideration on April 10, 2012. At that time the ministry denied the appellant's request for Ensure Plus as a Short Term Nutritional Supplement.

The ministry determined that the appellant's request does not meet the eligibility requirements set out in the *Employment and Assistance for Persons with Disability Regulation (EAPWDR)* section 67 (3) (b). The basis for their determination was that the evidence before them from the appellant's medical practitioner did not establish that: (a) the appellant has an acute short term need for caloric supplementation to a regular dietary intake and (b) that the appellant requires the requested supplement to prevent critical weight loss while recovering from (i) surgery, (ii) a severe injury, (iii) a serious disease, or (iv) the side effects of a medical treatment. Further the ministry found that the medical condition of hepatitis C is not described as an acute illness and the request is for 6 cans for 6 months. The legislation, wrote the ministry, allows for provision of a nutritional supplement for a period of 3 calendar months only.

Additionally, the ministry found that the appellant's request did not meet the eligibility criteria set out in the *EAPWDR*, subsection 66 (1) and (2) for Nutritional Supplements as a Diet Supplement. This was because the appellant is currently receiving a diet supplement in the amount of \$40.00 per month for a medical condition and this is the maximum amount that the minister is authorized to provide.

PART D – Relevant Legislation

Employment and Assistance for Persons with Disability Regulation (EAPWDR) Sections 67(3) (b) and 66 (1) and (2).

PART E – Summary of Facts

Documents before the ministry at reconsideration included the following:

- a letter dated February 10, 2012 from the Ministry denying the appellant's request for Nutritional Supplement Products together with a Short Term Nutritional Supplement Decision Summary;
- the appellant's Request for Reconsideration Form signed by him on March 13, 2012, and stating that he had not been able to eat solid food since November 15 and had lost significant weight and become progressively weaker. Attached to the Request was a note from a physician, stamped February 8, 2012 stating that the appellant needs Ensure Plus – 6 cans a day for 6 months because of poor appetite and malnutrition and Hep C – poor liver function, and another note from the same physician stamped March 7, 2012, stating that the appellant's weight had dropped from 200 lbs to 145 lbs in 4/12, and indicating "Hep C – liver failure – malnutrition-anemia-weakness – 6 a day for 6/12."

At the hearing the appellant presented other documents and sought to have them accepted into evidence. These documents were:

- a To Whom it May Concern note date-stamped April 20, 2012 from the appellant's physician regarding the appellant's medical complaints: Hep A, B and C, with compromised liver function, together with bad teeth which makes it hard for him to chew and eat solids and the physician's recommendation that the appellant take 6 cans a day for 3/12 of Ensure Plus or Boost;
- A Questionnaire completed by the appellant's physician and date-stamped by him on May 8, 2012 in which the physician described the appellant's diagnosis of Hep C as a chronic disease that can cause death, and stated that the appellant has an abnormal liver and further that the appellant has been under the care of another physician. In the Questionnaire the physician also stated that the appellant has an acute need for caloric supplementation to address his weight loss, and answered "Yes" to the question of whether the appellant requires caloric supplementation in the short term to address the immediate concern of his significant weight loss. This answer also refers to the possibility of "mal-absorption" in the case of the appellant possibly connected with the appellant's weight loss.
- A To Whom it May Concern note dated May 10, 2012 from the appellant's pharmacist stating that: the writer had noted the appellant's slow physical deterioration; that the appellant had lost significant weight over the last two years; that the appellant's appetite and "digestive" was upset so that he gets sick when taking in regular solid food and that he can only tolerate liquid meal replacements (Boost and Ensure). Further that the appellant seems to be averaging consumption of six bottles per day of Boost or Ensure.

The ministry did not object to these documents being accepted into evidence. Accordingly, and based on Section 22 (4) (b) of the *Employment and Assistance Act, (EAA)*, the panel accepted the documents into evidence as they are clearly supportive of materials that were before the ministry at the time of reconsideration.

At the hearing the evidence presented by the appellant was that he suffers from epilepsy, schizophrenia and a mood-disorder. He testified that his left knee is held together by screws because of an accident involving a taxi. Further, he stated that he suffers from Hep A, B and C, and

that since having been bitten by a spider in November of 2011 he has suffered severe weight loss and that also since that time he has not been able to keep down solid food, but rather has vomited when he attempted so to do. He said that his doctor had not been able to make any link between the spider bite and his condition since the bite. He said that he takes much medication for his complaints. He confirmed that he had had one meeting with a liver and intestinal specialist and was awaiting the result of tests. Regarding the physician who had provided written evidence, the appellant stated that he had been his patient since 2010. Regarding his diet he stated that he has milk shakes every day. But also that he had borrowed over \$300 in order to purchase Ensure. He said that his weight loss had lessened since he had been taking the Ensure and that although he was still somewhat lethargic he now has more energy.

The panel also heard from a hotel outreach worker who worked at the facility where the appellant has been living since March 2012. This worker read into evidence a letter from the appellant's Outreach Worker. This worker's evidence is that she has only seen the appellant able to ingest liquids such as water, pop and – when available- Ensure meal supplements. She comments on the appellant's weight loss and of providing him with a blender so that he could reduce solid food to an ingestible liquid form. However the appellant testified that the blender had exploded when he sought to use it and the witness testified that because of the electrical wiring in the facility that had indeed happened. The witness testified that nutrition is very important in terms of helping the appellant deal with his mental problems.

The representative from the ministry stated that the ministry had found that the appellant had not met the requirements set out in 67 (3) (b) of the *EAPWDR* and that the reconsideration decision had been reasonably based on the evidence. In answer to a question from the appellant's advocate as to whether the ministry accepted that the appellant suffered from serious disease, she responded in the affirmative but said that the ministry's decision was based on the requirement that the appellant's situation was one in which he was "recovering from" one of the enumerated medical conditions. She drew the panel's attention to the ministry's statement at reconsideration that the appellant's medical condition of hepatitis C was not described as an acute illness.

Based on the documents before it and the testimony at the hearing the panel's finding of facts is as follows:

1. The appellant is designated as a Person with Disabilities;
2. The appellant currently receives a diet supplement in the amount of \$40.00 per month for a medical condition.
3. The appellant suffers from Hepatitis A, B, and C with compromised poor liver function, malnutrition and poor appetite, and this is confirmed in writing by his physician.

PART F – Reasons for Panel Decision

The decision to be determined is whether the ministry's decision at reconsideration was a reasonable application of the applicable enactment in the circumstances of the appellant and reasonably supported by the evidence. The decision of the ministry at reconsideration was to deny the appellant's request for Ensure Plus as a Short Term Nutritional Supplement. The ministry determined that the appellant's request does not meet the eligibility requirements set out in the *Employment and Assistance for Persons with Disability Regulation (EAPWDR) section 67 (3) (b)*. The basis for the ministry's determination was that the evidence before them from the appellant's medical practitioner did not establish that: (a) the appellant has an acute short term need for caloric supplementation to a regular dietary intake and (b) that the appellant requires the requested supplement to prevent critical weight loss while recovering from (i) surgery, (ii) a severe injury, (iii) a serious disease, or (iv) the side effects of a medical treatment. Further the ministry found that the medical condition of hepatitis C is not described as an acute illness and the request is for 6 cans for 6 months. The legislation, wrote the ministry, allows for provision of a nutritional supplement for a period of 3 calendar months only.

Additionally, the ministry found that the appellant's request did not meet the eligibility criteria set out in the *EAPWDR*, subsection 66 (1) and (2) for Nutritional Supplements as a Diet Supplement. This was because the appellant is currently receiving a diet supplement in the amount of \$40.00 per month for a medical condition and this is the maximum amount that the minister is authorized to provide.

The relevant legislation is as follows. Section 67 (3) of the *EAPWDR*, is headed – “nutritional supplement” and reads, “*The minister may provide a nutritional supplement for a period of 3 calendar months to or for a family unit if the supplement is provided to or for a recipient of disability assistance or a dependent child of a recipient of disability assistance if (a) the recipient or dependent child is not receiving a supplement under subsection (1) of this section or section 2 (3) of Schedule C, and (b) a medical practitioner or nurse practitioner confirms in writing that the recipient or dependent child has an acute sort term need for caloric supplementation to a regular dietary intake to prevent critical weight loss while recovering from (B.C. Reg. 317/2008) (i) surgery, (ii) a severe injury, (iii) a serious disease, or (iv) side effects of medical treatment*”.

Section 66 (1) of the *EAPWDR*, reads, “*The minister may pay for a diet supplement in accordance with section 6 [diet supplements] of Schedule C for a recipient of disability assistance under section 2 [monthly support allowance], 4 [monthly shelter allowance], 6 [people receiving room and board, or 9 [people in emergency shelters] of Schedule A or a dependant of that person if the recipient or dependant requires (a) a special diet for a specific medical condition described in section 6 of Schedule C, or (b) a special diet described in section 6 of Schedule C. (B.C. Reg. 64/2010)*”

Section 66 (2) of the *EAPWDR* states that, “*A person is not eligible for a supplement under subsection (1) unless the need for the special diet is confirmed in writing by (a) a medical practitioner, or (a.1) a nurse practitioner, or (B.C. Reg. 317/2008) (b) A registrant of the College of Dieticians of British Columbia established under the Health Professions Act.*

Schedule C at 6 (1) (d) sets the amount of a diet supplement that may be provided at “\$40 for each calendar month for a person who requires a high protein diet.” And 6 (2) states that “*A diet supplement under subsection (1) (d) may only be provided if the diet is confirmed by a medical*

practitioner or nurse practitioner as being necessary for one of the following medical conditions: (k) hepatitis B; (l) hepatitis C”.

At reconsideration, the ministry's position was that the information provided by the appellant's medical practitioner does not (a) establish that the appellant has an acute short term need for caloric supplementation to a regular dietary intake, and (b) that the physician's information does not establish that the appellant requires the supplement to prevent critical weight loss while recovering from (i) surgery, (ii) a severe injury, (iii) a serious disease, or (iv) the side effects of a medical treatment as required by *EAPWDR* at section 67 (3) (b).

The response of the appellant and his advocate to the ministry's position on (a) above, is that documents from the appellant's physician which were before the ministry at reconsideration do establish that the appellant has an acute short term need for caloric supplementation to a regular dietary intake. They point to the physician's note date-stamped March 7, 2012 in which the physician wrote that the appellant suffers from mal-absorption which has led to anemia and weakness. The acuteness of the situation, the appellant's advocate points out, can be seen in that in this same note the physician stated that the appellant has gone from 200lbs in weight to 145 lbs in four months. They argue that the request for a six months supply clearly reflects a short term need of the appellant.

At the hearing the panel had further information from the appellant's physician regarding the appellant's need for Ensure Plus to supplement a regular dietary intake. In his note date-stamped April 20, 2012, the appellant's physician wrote that the appellant has bad teeth and it is hard for him to chew or eat solids.

Regarding the ministry's position on (b) above, the appellant and his advocate argue that information before the ministry at reconsideration does establish that the appellant requires the requested supplement to prevent critical weight loss while recovering from a serious disease. Regarding the weight loss they point to what they described as the dramatic weight loss suffered by the appellant over a four months period. They sought a response from the ministry's representative at the hearing as to whether in the reconsideration decision the ministry had found that the appellant did not suffer from a serious disease, given the diagnosis that was before the ministry that the appellant suffered from Hep - C leading to liver failure.

The response of the ministry's representative was that the ministry did not find that Hep-C was not a serious disease. Rather, she said, the ministry did not find that the appellant "was recovering" from a serious disease.

At the hearing the panel had the advantage of having before it more information from the appellant's physician. In his note, date stamped April 20, 2012 the physician diagnoses the appellant with not only Hep C, but also with Hep A and B with compromised liver function. They panel finds that it would not be reasonable for the ministry to determine that the appellant's medical condition was not a serious disease given the unchallenged written evidence of the appellant's physician.

The evidence of the appellant's physician makes it clear that the appellant has not recovered from his serious disease. Given that, the panel finds that it is not reasonable for the ministry to determine that

the appellant is not in a state of "still recovering," as was the position of the ministry's representative at the hearing. Such a finding cannot be seen to be reasonably supported by the evidence.

Continuing in their determination at reconsideration the ministry wrote that the appellant's medical condition of hepatitis C "is not described as an acute illness". The appellant's advocate pointed out that nowhere in the legislation is there a requirement that the appellant's medical condition be an "acute illness". The panel has carefully read the legislation and agrees that it is not a reasonable application of the applicable enactment in the circumstances of the appellant, namely the *EAPWDR*, for the ministry to require that the appellant's medical condition be an "acute illness".

Regarding the period for which Ensure Plus was requested the ministry wrote that the request was for six cans for six months, whereas the legislation allows for provision of a nutritional supplement for a period of 3 calendar months only. The argument of the appellant's advocate at the hearing is that it would have been a reasonable application of the applicable enactment, namely the *EAPWDR*, for the ministry to have granted a supply for the maximum allowed under the legislation, namely a 3 months supply; or half of the amount recommended by the physician. In the To Whom it May Concern document admitted into evidence at the hearing the appellant's physician recommended Ensure Plus or Boost, 6 cans a day for three months. The panel finds that it would be reasonable for the ministry to find that this request conforms to the applicable enactment, namely Section 67 (3), in the circumstances of the appellant.

Next, in terms of the eligibility requirements set out in the *EAPWDR* at section 67 (3) (b), the ministry at reconsideration found that the appellant's medical practitioner had not provided a clear description of the appellant's ability to consume a regular dietary intake (i.e. soft or blended foods), or a reason for the weight loss. Therefore, wrote the ministry, "it is not established that a medical practitioner has confirmed that you require caloric supplementation to a regular dietary intake or that you require the supplement requested to prevent critical weight loss while recovering from any of the conditions set out in the *EAPWDR* section 67 (3) (b)."

The legislation is silent regarding "soft or blended foods", and as such the panel finds it an unreasonable application of the applicable enactment for the ministry to use that description as a legislative test with which the appellant needs to meet.

In a document that was before the panel at the hearing but not before the ministry at reconsideration the appellant's physician does speak to the matter of the cause of the appellant's weight loss. In the Question and Answer document date stamped May 8, 2012, the physician was asked if he would characterize the appellant as having an acute need for caloric supplementation to address his weight loss. The physician answered in the affirmative, and went on to say that he was awaiting consultation with a gastroenterologist to determine the cause of the appellant's weight loss. So the ministry is correct in stating that they were not provided with a "clear description" of the appellant's ability to consume a regular dietary intake. The reason for the lack of clarity is that the link between appellant's medical condition and his weight loss is still under investigation as is stated in the physician's document of May 8, 2012. Nevertheless in the May 8, 2012 document and in answer to the same question, the appellant's physician does confirm that the appellant requires caloric supplementation to a regular dietary intake. And, in the physician's note that was before the ministry at reconsideration, namely the note date stamped February 8, 2012, the physician wrote, and the

ministry noted in their reconsideration decision, that the appellant had been diagnosed with hepatitis C – poor liver functions with symptoms of mal-absorption – anemia – weakness. Thus demonstrating to the ministry that the physician linked the appellant's hepatitis C/poor liver function with mal-absorption.

The next question posed to the appellant's physician in the Question and Answer document of May 8, 2012 was "in addition to any need for nutritional supplements to address chronic ongoing health issues, does the patient require caloric supplementation in the short term to address the immediate concern of his significant weight loss?" The physician's answer is, "Yes – as his weight drop has been dramatic. Possibly due to mal-absorption".

The Question and Answer document was not before the ministry at reconsideration, but the panel finds that the information in it could not lead the ministry to reasonably find that the appellant's physician had not provided the information required by the legislation in section 67 (3) (b) of the *EAPWDR*.

For the reasons given above the panel finds that in terms of section 67 (3) (b) of the *EAPWDR* the ministry's decision at reconsideration was neither a reasonable application of the applicable enactment in the circumstances of the appellant nor reasonably supported by the evidence.

In their decision the ministry also looked at the appellant's eligibility for Nutritional Supplements as a Diet Supplement. They found that as the maximum amount that the minister was allowed to authorize was \$40.00 per month, and that as the appellant was already receiving a diet supplement in the same amount per month for a medical condition, the minister was therefore not authorized to provide the requested nutritional supplements as a diet supplement.

The panel finds the ministry's decision on this matter to be a reasonable application of the applicable enactment, namely the *EAPWDR* section 66 and section 6 of Schedule C.

As a result of its finding above regarding the ministry's decision based on section 67 (3) (b) of the *EAPWDR*, the panel rescinds the ministry's decision at reconsideration. The ministry's finding based on this section of the legislation was not a reasonable application of the enactment in the circumstances of the appellant.