

## PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development (the ministry) reconsideration decision of September 14, 2012 wherein the ministry decided that the appellant was not eligible for a monthly nutritional supplement (MNS) – neither in the form of vitamins and minerals nor for caloric supplementation. The basis for the decision was that the appellant did not satisfy the eligibility criteria set out in section 67(1.1) and Schedule C, section 7 of the Employment and Assistance for Persons with Disabilities Regulation (EAPWDR). In particular, the ministry found that the appellant's physician did not confirm that the appellant satisfied the following legislative criteria:

- That the appellant was being treated for a chronic, progressive deterioration of health on account of a severe medical condition as set out in EAPWDR s. 67(1.1)(a);
- That the appellant displayed two or more of the symptoms prescribed in EAPWDR section 67(1.1)(b);
- That the appellant required a MNS for the purpose of alleviating one or more of the prescribed symptoms as set out in EAPWDR section 67(1.1)(c); and
- That failure to obtain a MNS will result in imminent danger to the appellant's life as required by EAPWDR section 67(1.1)(d).
- That the appellant required caloric supplementation to a regular dietary intake as specified by EAPWDR Schedule C section 7(a).

## PART D – Relevant Legislation

Employment and Assistance for Persons with Disabilities Regulation (EAPWDR)  
Section 67 [*nutritional supplement*]  
Schedule C, section 7 [*monthly nutritional supplement*]

## PART E – Summary of Facts

The evidence before the ministry at the time of the reconsideration decision included the following:

- An Application for Monthly Nutritional Supplement form signed by the appellant on April 18, 2012 and by the appellant's physician on April 16, 2012 (the application form).
- The ministry's original decision denying the MNS, dated July 10, 2012.
- A supporting letter from the appellant's physician, dated August 10, 2012 (the August 10 letter).
- A second letter from the appellant's physician dated August 13, 2012 (the August 13 letter), which is an amended version of the August 10 letter.
- A Request for Reconsideration form signed by the appellant on September 7, 2012, along with the appellant's written submission.

The appellant is a person with disabilities in receipt of disability assistance.

In the application form the appellant's physician diagnosed the appellant with "severe irritable bowel syndrome" (IBS) and "anxiety". In response to the question in section 2 of the application form as to whether the appellant is being treated for a "chronic, progressive deterioration of health" the physician wrote that the appellant is at risk as she is unable to get appropriate minerals, vitamins and nutrients from diet alone and that she is at risk of osteoporosis. Section 3 of the application form lists the 7 symptoms prescribed in EAPWDR section 67(1.1)(b) and asks the physician "... does the applicant display two or more of the ... symptoms? If so, please describe in detail." The physician has identified one symptom - "malnutrition"- with the comment "Yes – is at risk. Anemia in the past and vitamin deficiency." No other symptoms were indicated by the physician. Section 4 of the application form, which asks the physician to specify the appellant's height and weight so that the appellant's Body Mass Index (BMI) could be determined, was left blank. In section 5 of the application form the physician identified the appellant's need for vitamins B12 and D, along with calcium and iron supplements. Asked to describe how these items will alleviate symptoms the physician wrote "prevent vitamin deficiency and anemia" and "prevent osteoporosis". Asked to describe how these items will prevent imminent danger to the applicant's life the physician wrote "as above". In section 6 of the application form the physician indicated that the appellant's IBS results in the inability to absorb sufficient calories to satisfy daily requirements through a regular dietary intake and stated that the appellant requires high dose probiotics, protein supplements, and fibre/bulking medications. In response to the question as to how these items would alleviate one or more of the specified symptoms the physician wrote "will improve bowel function and abdominal pain so patient will be able to maintain diet and absorb necessary nutrients." The physician indicated that the nutritional items would prevent imminent danger to the appellant's life by preventing weight loss and deficiencies.

In preparation for the reconsideration decision the appellant had her physician produce the August 10 letter, in which the physician wrote that the appellant is virtually disabled with severe anxiety and that she suffers from severe IBS which is a chronic illness giving rise to severe diarrhea and trouble with absorption of vitamins and minerals. The IBS also limits the foods that the appellant can eat which "also can lead to malnutrition and weight loss". The physician noted "Her IBS symptoms are severe

and chronic and put her at risk of progressive deterioration of health”, and clarified that at the time of the application form being completed the appellant was underweight, with a “less than healthy” BMI of 18.5. Since then, in anticipation of being approved for MNS, the appellant had increased her protein and fresh food intake, thereby gaining 10 pounds and getting back to a healthy BMI of 19.6. The physician expressed concern that without the MNS, the appellant would drop into the lower BMI limit again which “will put her at risk of malnourishment, muscle wasting and generalized muscle weakness...mental health would also suffer.”

The appellant subsequently had the physician produce the August 13 letter by modifying the August 10 letter to specify that without the requested MNS, the appellant will experience progressive deterioration of her health with weight loss and vitamin deficiencies which would put her at risk of malnutrition, reduce her immune function, open her up to infections, and lead to osteoporosis, which could put her life in imminent danger. The appellant advised the panel that both the August 10 letter and the August 13 letter were provided to the ministry for the reconsideration decision, though the reconsideration decision refers only to the August 10 letter. The panel finds that both letters were before the ministry at the time of reconsideration.

In her written submission to the reconsideration officer, the appellant noted that she had been a recipient of disability benefits – including “monthly dietary/nutritional supplements” - for many years. She wrote that it was only after being recently reinstated for disability benefits after a brief period of denial that she was found ineligible for MNS. The appellant requested reinstatement of MNS retroactively to the date of submission of the application form on April 18, 2012.

At the appeal hearing the appellant submitted a two page document for the panel’s consideration. The ministry did not object to the document’s submission. On reviewing the document, the panel determined that it consisted of written argument and accepted it on that basis.

The appellant provided oral evidence on appeal, both on her own behalf and through a representative. The appellant said that her anxiety makes it very difficult for her to leave her home or to talk to people. She finds going to the doctor and to the store very difficult and embarrassing. This difficulty is made worse by the fact that her IBS sends her rushing to the bathroom usually 18 times a day. In anticipation of being approved for MNS the appellant purchased additional nutritional items and vitamins/minerals using funds amounting to hundreds of dollars that had been earmarked for other purposes such as car and utility expenses, thereby managing to gain weight. The appellant said that she is heavier now than she has been in 10 years. She realizes now how weak she had been. When she is in such a weakened state she is always cold, wearing a coat and hoodies even in the summer and getting dizzy if she moves too quickly. The appellant made a real effort to gain weight and she sees a real benefit. Through her representative the appellant said that she would like to start a business doing a little yard work to earn some additional income within the statutory limits for persons with disabilities, but she can’t do so without the additional strength she would gain from being on MNS. On questioning by the panel, the appellant clarified that the MNS she had previously been receiving was the \$40 supplement for vitamins and minerals.

The panel assessed the appellant’s oral testimony as providing more detail regarding her medical condition, thereby being in support of the information and records that were before the ministry at the time of reconsideration. The panel accepted the appellant’s oral testimony into evidence in accordance with s. 22(4) of the *Employment and Assistance Act*.

The ministry relied on its reconsideration decision with respect to the issue on appeal and did not introduce any new evidence on that issue.

In a "note to applicant" included in the reconsideration decision the ministry had indicated that the appellant might be eligible for a diet supplement under s. 6 of Schedule C of the EAPWDR. At the appeal hearing the ministry submitted a copy of the ministry's "diet supplement" policy dated September 2012, indicating that the appellant's medical condition does not likely qualify her for a diet supplement under that provision. The panel subsequently decided not to accept the policy document into evidence as it is not relevant to the issue that is before the panel.

## PART F – Reasons for Panel Decision

The issue on appeal is whether the ministry's reconsideration decision, which held that the appellant is not eligible for a MNS, is reasonably supported by the evidence or whether it is a reasonable application of the applicable enactment in the circumstances of the appellant.

The applicable legislation is as follows:

### EAPWDR

#### Effective date of eligibility

- 23** (3.1) If the tribunal rescinds a decision of the minister refusing a supplement, the family unit is eligible for the supplement from the date of the minister's decision on the applicant's request under section 16 (1) of the Act [*reconsideration and appeal rights*] in relation to the supplement.

#### Nutritional supplement

- 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, ...

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,

...

(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.

...

## Schedule C

### Monthly nutritional supplement

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;

(b) Repealed. [B.C. Reg. 68/2010, s. 3 (b).]

(c) for vitamins and minerals, up to \$40 each month.

\* \* \*

The appellant's position is that she fulfills the statutory criteria for both MNS. She contends, through her representative, that the panel should not be unnecessarily rigid in its assessment of the evidence and the application of the legislation, since physicians are busy professionals who often don't have the time or the understanding of the statutory criteria to ensure that every legislative "i" is dotted and "t" crossed. The appellant says that she is being treated by a physician for IBS, which is a severe medical condition which causes a chronic, progressive deterioration of health. Reading the application form and the August 13 letter together, the appellant says the physician identified three prescribed symptoms: malnutrition, weight loss, and significant deterioration of a vital organ – the intestine. With respect to alleviating these symptoms, the appellant points out that the physician has specifically stated that she requires and would benefit from vitamin and mineral supplements as well as a diet that provides extra calories. The appellant says that she cannot afford these items without both the caloric MNS and the vitamin/mineral MNS. She also points out that the physician has clearly stated that without these MNS, the appellant will experience progressive deterioration of her health which would put her at risk of malnutrition, weight loss, infection and osteoporosis, all of which could put her life in imminent danger. The appellant requested that the MNS be granted effective the submission date of the application form on April 18, 2012.

The ministry's position, as expressed at the hearing and in the reconsideration decision, is that MNS are to address "catastrophic" progressive health conditions such as cancer or ALS. In the ministry's view the proper interpretation of the physician's evidence is that the appellant is at risk of experiencing a chronic, progressive deterioration of health rather than that she is experiencing such deterioration at present as required by the legislation. The ministry also says that the appellant is not exhibiting the necessary two or more symptoms, since the physician has indicated only that the appellant is "at risk of malnutrition" and that she currently is not underweight and is in a healthy BMI zone. Regarding alleviation of symptoms, the ministry's position is that the vitamin/mineral MNS would not alleviate the risk of developing underweight status or malnutrition. With respect to nutritional items, the ministry says merely that they also would not alleviate the symptoms. Further, the ministry contends, the evidence does not establish that these items are required to prevent imminent danger to the appellant's life. The ministry stated no position on when the effective date of

eligibility should be in the event of rescission of the reconsideration decision.

### *Panel Decision*

With respect to the existence of a chronic, progressive deterioration of health on account of a severe medical condition, as prescribed in EAPWDR s. 67(1.1)(a), the physician has confirmed that the appellant suffers from severe IBS and severe anxiety, that the IBS is chronic, and that the appellant is being treated for these conditions. The evidence, however, falls short of showing that the IBS and anxiety are causing the appellant to experience a chronic, progressive deterioration of health for which she is being treated. The physician has stated that the appellant is "at risk" of osteoporosis, vitamin deficiency, and anemia, and has stated that the appellant has experienced anemia and vitamin deficiency in the past, but has not confirmed either in the application form or in the August 13 letter that the appellant is currently being treated for a chronic, progressive deterioration of health. Being treated "for" a condition is not the same as being treated "to prevent" a condition. The physician wrote in the August 13 letter that the appellant's IBS symptoms "put her at risk of progressive deterioration of health". The term "at risk" implies that the appellant is not currently experiencing or being treated "for" a progressive deterioration of health but rather to reduce the risk of one. Based on the foregoing analysis, the panel concludes that the ministry reasonably found that the legislative criterion in s. 67(1.1)(a) has not been satisfied.

Regarding the prescribed symptoms, EAPWDR s. 67(1.1) is clear that in order for a person to receive a MNS, 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..." that the person displays 2 or more of the symptoms listed in section 67(1.1)(b). The appellant's physician identified only 1 symptom on the application form – malnutrition – but then qualified her response by saying "at risk", thereby indicating that the appellant does not currently exhibit that symptom. The panel is of the view that the August 13 letter can be read together with the application form to provide evidence of other prescribed symptoms, but this approach does not help the appellant. Regarding the symptom of "underweight status", the August 13 letter confirms that at the time of reconsideration the appellant was not underweight, and the appellant's evidence at the appeal hearing was that she is heavier than she has been in 10 years. Regarding the third symptom identified by the appellant – significant deterioration of a vital organ – the intestine is clearly not functioning as a normal intestine would, so it likely did deteriorate at some point in the past. However, the physician has not confirmed that the intestine has deteriorated recently or is currently deteriorating. In fact, the physician has indicated in the application form that while the appellant has at some time in the past suffered from anemia and vitamin deficiency she is not suffering from those things now. In the context of the legislation where the appellant must be exhibiting a chronic, progressive deterioration of health, the panel is of the view that the physician must confirm a recent or ongoing deterioration of the organ. There is no evidence that that is the appellant's situation. Accordingly, the panel concludes that the ministry reasonably found that the legislative criterion in section 67(1.1)(b) is not satisfied.

Regarding the criterion in section 67(1.1)(c) that the practitioner must confirm that the requested MNS will alleviate at least one of the confirmed symptoms, the application form contains spaces in section 6 labeled specifically for the physician to describe how the requested items will alleviate symptoms. If the symptom "significant deterioration of a vital organ" had been confirmed, the physician's observation "will improve bowel function and abdominal pain so patient will be able to maintain diet

and absorb necessary nutrients” would satisfy this criterion. In the circumstances of the appellant, however, where that symptom has not been confirmed, the panel concludes that the ministry reasonably found that the legislative criterion in section 67(1.1)(c) is not satisfied.

Regarding the criterion in section 67(1.1)(d), that the practitioner must confirm that failure to receive the requested MNS will result in imminent danger to the person’s life, the appellant’s physician indicated in the application form that the vitamin/mineral MNS will prevent vitamin deficiency, anemia and osteoporosis. She also indicated that the caloric supplementation MNS will prevent weight loss and deficiencies. In the August 13 letter the physician wrote that without both MNS items a chain of events would be initiated that could culminate in reduced immune function, infections including pneumonia, and osteoporosis. In the panel’s view, the word “imminent” denotes a sense of immediacy. The speculative chain of events identified by the physician does not provide evidence that failure to obtain either the vitamin/mineral MNS or the caloric supplementation MNS would immediately endanger the appellant’s life. Accordingly, the panel concludes that the ministry reasonably found that the legislative criterion in section 67(1.1)(d) is not satisfied.

Regarding the criterion in Schedule C, section 7(a), that the nutritional items must be part of a caloric supplementation to a regular dietary intake, the application form in section 6 asks the specific question as to whether the applicant (the appellant) has a medical condition that results in the inability to absorb sufficient calories to satisfy daily requirements through a regular dietary intake. The appellant’s physician answered “Yes – severe irritable bowel with prior vitamin/mineral deficiencies.” In the panel’s view, the physician’s response doesn’t answer the question as to whether the appellant is unable to absorb calories – it addresses vitamin and mineral absorption which is relevant to the vitamin/mineral MNS provided in Schedule C, section 7(b). Even taking into account the August 13 letter, the physician wrote that the appellant is limited in what she can eat which can lead to malnutrition and weight loss, and indicated that the appellant managed to gain weight by eating more protein and fresh food. This indicates that the appellant benefits from different dietary choices than she was otherwise used to. It does not confirm that the appellant requires caloric supplementation in addition to what is provided by a regular dietary intake.

Given the panel’s conclusions on the foregoing criteria, the appellant’s request for eligibility from the date of submission of the application form is moot. However, the panel notes that s. 23(3.1) of the EAPWDR provides that in the event an appeal panel rescinds a ministry decision denying a supplement, the eligibility date will be the date on which the rescinded reconsideration decision was made.

The panel acknowledges that the appellant has some serious health concerns. However, given the foregoing analysis, the panel finds that the ministry’s decision that the appellant is ineligible for MNS is reasonably supported by the evidence.

Accordingly, the ministry’s reconsideration decision is confirmed.