

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development (ministry) reconsideration decision dated October 31, 2012 which found that the appellant is required, pursuant to Section 27 of the Employment and Assistance Act (EAA), to repay \$1,535 for a diet supplement issued to her that she was not eligible to receive under Section 73 of the Employment and Assistance Regulation (EAR).

PART D – Relevant Legislation

Employment and Assistance Regulation (EAR), Sections 26 and 73

Employment and Assistance Act (EAA), Section 27

PART E – Summary of Facts

The evidence before the ministry at the time of the reconsideration decision consisted of:

- 1) Print out of the ministry Statement of Account for the appellant for the period January 17, 1997 through June 21, 2012, indicating an amount of \$25.00 deducted from her account each month from January 1998 to February 2000, the amount of \$10.00 deducted from her account for every month from November 2001 to September 2007, the amount of \$20.00 deducted each month from October 2007 to October 2011, with the final balance as the "debt sent for collection" of \$1,389.70;
- 2) Diet Supplements Request Form for the appellant signed by a physician on "Jan. 11/10", with a fax stamp of January 11, 2011, for a diagnosis of gastric bypass surgery and prescribing a high protein diet with the duration of need set out as one year,
- 3) Letter dated October 14, 2010 from the ministry to the appellant stating in part that an overpayment chart and reconsideration brochure are enclosed, that the diet allowance on her file was set up for gestational diabetes and was continued after her gestational period until October 2010. "The diet allowance came up for review and renewal again and this error was just discovered." Contact the third party administrator with any questions or concerns and the third party will address the issues with the ministry. "If upon consultation with your doctor you find that your diabetes continued for a period after your pregnancy, please submit this information to the [third party] as we may be able to reduce the debt with this new information;";
- 4) Overpayment Chart setting out an overpayment amount of \$15.00 each month for February and March of 2007 for administrative error and an overpayment amount of \$35.00 each month for April 2007 through October 2010 for administrative error and the accompanying note is the diabetic diet was only for gestational diabetes;
- 5) Unsigned Overpayment Notification dated October 14, 2010;and,
- 6) Request for Reconsideration- Reasons.

The appellant did not attend the hearing. After confirming that the appellant was notified, the hearing proceeded under Section 86(b) of the Employment and Assistance Regulation. The appellant's advocate attended the hearing to make representations on behalf of the appellant as she had no instructions from the appellant to seek an adjournment and she had expected the appellant to attend the hearing.

In her Notice of Appeal, the appellant stated that she is in no way responsible for the ministry's administrative error. In her Request for Reconsideration, the appellant stated that while she was on income assistance, she was diagnosed with gestational diabetes in 2006 when she was 3 months pregnant. The appellant applied for the diabetes diet supplement, was approved, and started receiving the supplement. The appellant's child was born on December 31, 2006. The ministry continued to pay this supplement in error until October 2010. The appellant stated that new applications for diet supplements are supposed to be filled out by a doctor every 12 months and not automatically added to the file. The appellant stated that the ministry renewed the diet supplement several times that should have had a doctor confirmation and should have expired after 12 months. The appellant stated that she was unable to pick up the error since her monthly cheque amount changed due to her having a child added to her file. The appellant stated that the ministry has calculated an overpayment of \$1,535 for the ministry's error and no error made by the appellant. The appellant stated that she was never informed of her right to reconsideration until September 6, 2012 when she called the ministry to enquire what the debt was for and how it was calculated. The appellant stated that in 2010 she went through gastric bypass surgery and she was eligible for a \$40 per month high protein diet supplement from January 2010 to October 2010.

At the hearing, the advocate added that the appellant was not aware that she continued to receive the diet supplement after her daughter was born since she received more in assistance with a child. The advocate stated that the appellant was having to deal with the ministry through a third party during this time and that communication was not reliable. The advocate stated that appellant did not get a decision on the Diet Supplement Request Form for a high protein diet submitted in January 2010 since she was told that she was already receiving the diet supplement and that she could not receive two supplements. The advocate pointed

out that the Request is dated January 2010, so it is not clear why the ministry stated in its decision that this Request was submitted in October 2010. The advocate confirmed that the appellant has stated that she did not receive the letter from the ministry dated October 14, 2010. The advocate stated that the appellant did not find out about the ministry error until late, until September 2012, and there was not much the advocate could do to help resolve the account at that point. The advocate stated that the diet supplement was renewed every year without the form being filled out by a medical practitioner. The advocate pointed to the ministry's notes for December 8, 2006 that a diabetic diet was added to the appellant's file for a two-year period. On October 1, 2008 the ministry approved the diet supplement for an additional two years. The advocate pointed to the Statement of Account and stated that the amount of the appellant's cheque changed over time so that she could not tell what she was getting or not getting, that she assumed it was shelter and support. The advocate stated that the appellant's file with the ministry closed in March 2012. The advocate stated that the appellant applied for a student loan and discovered that there was a debt lodged with the ministry, and a letter was sent to her on July 9, 2012. The advocate clarified that the appellant did not have the Statement of Account as these are not typically provided by the ministry.

The evidence of the ministry is that the appellant file closed in March 2012 and she is not currently in receipt of assistance. On December 8, 2006, the appellant submitted a doctor's note confirming that she had gestational diabetes, and a diabetes diet allowance was added to her file. The appellant received \$15 per month for the diet allowance for December 2006 through March 2007. The diet supplement was increased to \$35 per month in April 2007 and the appellant received the diet supplement from April 2007 through October 2010. On October 13, 2010, the appellant contacted the ministry to request a diet supplement for an unrelated issue and the appellant was advised that she was already in receipt of a diet supplement. The appellant explained that she had only requested a supplement for her gestational diabetes that had ended after her daughter was born on December 31, 2006. The ministry determined that the appellant had only been eligible for the diabetes diet supplement for December 2006 and January 2007 and that she had been issued the diabetes diet supplement for February 2007 through October 2010 in error.

On October 14, 2010, a letter was sent to the third party to advise the appellant of the funds issued in error and the resulting overpayment of \$1,535. The appellant states that she did not receive this letter and that she was never advised of this decision. On July 9, 2012, the appellant contacted the third party stating that she had recently received a letter stating that she had an overpayment with the ministry and the ministry forwarded a print-out of her outstanding debt to the third party. On August 30, 2012, the appellant contacted the ministry to state that she wanted to dispute the overpayment. On September 6, 2012 it was determined that the ministry could not confirm that the appellant was advised of the overpayment decision in October 2010.

At the hearing, the ministry added that the usual procedure for a third party administrator is that all cheques and mail for the clients are picked up from the ministry and the third party delivers these to the ministry clients and that mail that cannot be delivered will be returned to the ministry. However, the ministry cannot confirm or deny that the third party did or did not provide the letter dated October 14, 2010 to the appellant. The ministry stated that the Diet Request Form for a high protein diet is actually dated January 2011, as this conforms with the fax stamp on the page, and, it has been determined from a review of the appellant's file, that the appellant was found eligible for a high protein diet supplement in January 2011 for \$40 per month which was paid to the appellant until her file closed in March 2012. The ministry referred to the Statement of Account and clarified that the change in the amount deducted from the appellant's account which occurred in October 2007 was a result of a legislative change to standardize the amount that could be deducted to \$20 per month. The ministry stated that these amounts were being deducted for another matter with the appellant. The ministry stated that even where odd amounts are shown on the Statement of Account, for example in October 2009 and February 2011, the total amount deducted is still \$20 for the month, so that the total remains consistent. The ministry stated that the Statement of Account would not typically be provided to the client, unless a request was made by the client. The ministry stated that when the appellant had her child in December 2006, she would be asked to provide a Registration of Live Birth or other proof of the birth as well as the name of the child so the child could be added to the appellant's file and that would increase the appellant's benefit amount. The

ministry stated that the amount of the diet supplement would not be set out separately on the appellant's cheque and that she would need to inquire about the breakdown of the additional amounts that she received. In response to a question, the ministry stated that the original Diet Supplement Request Form that the appellant submitted is not available as it is from 2006 and so it is not known if the Request set out a specified duration of the need for the supplement. The ministry clarified that the standard review for eligibility for the diet supplement is one year but if the medical condition is chronic, or long-term, it would be reviewed every 2 years.

The advocate objected to the admissibility of the oral testimony regarding approval of the Request for a high protein diet and payment of the supplement as this information was not disclosed at the time of the ministry's reconsideration and there is no documentary evidence provided to confirm that these amounts were paid to the appellant. The panel finds that the Diet Supplement Request Form and the fact that the appellant had made a request for a high protein diet were before the ministry on reconsideration and the oral testimony clarifying the result of the request is in support of that information and is, therefore, admissible pursuant to Section 22(4) of the Employment and Assistance Act.

PART F – Reasons for Panel Decision

The issue on appeal is whether the ministry's decision, which found that the appellant is required, pursuant to Section 27 of the Employment and Assistance Act (EAA), to repay \$1,535 for a diet supplement issued to her that she was not eligible to receive under Section 73 of the Employment and Assistance Regulation (EAR), was reasonably supported by the evidence or a reasonable application of the applicable enactment in the circumstances of the appellant.

Section 27 of the EAA provides as follows:

Overpayments

- 27 (1) If income assistance, hardship assistance or a supplement is provided to or for a family unit that is not eligible for it, recipients who are members of the family unit during the period for which the overpayment is provided are liable to repay to the government the amount or value of the overpayment provided for that period.
- (2) The minister's decision about the amount a person is liable to repay under subsection (1) is not appealable under section 17 (3) [reconsideration and appeal rights].

Section 73 of the EAR provides that:

Diet supplement

- 73 (1) The minister may pay for a diet supplement in accordance with section 8 of Schedule C for a recipient of income assistance under 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 a dependant if the recipient or dependant requires
- (a) a special diet for a specific medical condition described in section 8 of Schedule C, or
- (b) a special diet described in section 8 of Schedule C.
- (2) 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,
- (a.1) a nurse practitioner, or
- (b) a registrant of the College of Dietitians of British Columbia established under the Health Professions Act.

Section 26(1) of the EAR provides as follows:

Effective date of eligibility

- 26 (1) Except as provided in subsection (2), (2.1) or (3.1), a family unit is not eligible for income assistance or supplements in respect of a period that occurred before the date the minister determines the family unit is eligible for the income assistance or supplements, as applicable.

The ministry's position is that the appellant has an overpayment of \$1,535 which she is required to repay to the ministry. The ministry argues that Section 73 of the EAR states that a person is not eligible for a diet supplement unless the need is confirmed in writing by a medical practitioner and the appellant provided confirmation in writing that she had gestational diabetes and therefore required a diabetic diet. The ministry argues that there is no confirmation that the appellant required the diabetic diet allowance after her child was born on December 31, 2006. The ministry argues that the appellant was not eligible for the diabetic diet allowance after January 2007. The ministry argues that Section 27 of the EAA states that if a supplement is provided to a recipient that is not eligible for it, the recipient is liable to repay to the government the amount or value of the overpayment provided. The ministry argues that as the appellant was issued a diabetic diet supplement for which she was not eligible from February 2007 through October 2010, she is required to repay the supplement and the total amount issued to her for this period is \$1,535. The ministry argues that the amount a person is liable to repay due to an overpayment is not appealable.

The ministry also argues that Section 26 of the EAR states that a recipient is not eligible for a supplement in respect of a period before the date the ministry determines the recipient eligible for it. Although the appellant submits that she should have been eligible for a high protein diet allowance from January 2010 through October 2010, the ministry is unable to assess her eligibility for the high protein supplement retroactively.

The appellant's position is that she is in no way responsible for the ministry's administrative error. The appellant argues that she was diagnosed with gestational diabetes in 2006 when she was 3 months pregnant, that she applied for the diabetes diet supplement, was approved by the ministry, and started receiving the supplement. The appellant argues that the ministry continued to pay this supplement after her child was born in December 2006 until October 2010. The appellant argues that new applications for diet supplements are supposed to be filled out by a doctor every 12 months and not automatically added to the file. The appellant argues that the ministry renewed the diet supplement several times that should have had a doctor confirmation. The appellant argues that she was unable to pick up the error since her monthly cheque amount changed due to her having a child added to her file. The appellant argues that the ministry has calculated an overpayment of \$1,535 for the ministry's error and no error made by the appellant. The appellant argues that she was never informed of her right to reconsideration until September 6, 2012 when she called the ministry to enquire what the debt was for and how it was calculated. The appellant argues that in 2010 she went through gastric bypass surgery and she was eligible for a \$40 per month high protein diet supplement from January 2010 to October 2010. The appellant argues that she should not have to pay back the months of January 2010 to October 2010 as she was eligible for a higher supplement at this time. The appellant argues that this supplement should erase at least \$315 of her debt which is the last 9 months in question at the regular diet supplement rate of \$35 per month.

Section 27 of the EAA requires that If a supplement is provided to or for a family unit that is not eligible for it, recipients who are members of the family unit during the period for which the overpayment is provided are liable to repay to the government the amount or value of the overpayment provided for that period. To determine eligibility for a diet supplement, Section 73 of the EAR specifies that a person is not eligible for a supplement unless the need for the special diet is confirmed in writing by a medical practitioner. The panel finds that it is not disputed that the appellant submitted the appropriate request for a special diet supplement which was confirmed in writing by a medical practitioner and that the appellant was found eligible for the diet supplement in December 2006. The ministry stated that since the original Diet Supplement Request Form is no longer available, being from 6 years ago, it is not known whether an expected duration of the medical condition was identified at that time. The ministry argues that the error with issuing the diet supplement to the appellant commenced in February 2007 because the appellant had her child in December 2006 and since the medical condition was for "gestational" diabetes, the medical condition would presumably resolve when the appellant's pregnancy ended. However, the ministry also suggests, in the letter to the appellant dated October 14, 2010, that the diabetes may have continued for a period after the appellant's pregnancy and that if the appellant is able to have that fact confirmed by her doctor the ministry may be able to reduce her debt with this new information. As the appellant stated that she did not receive the October 14, 2010 letter from the third party administrator and the ministry could not confirm that she received it, the panel finds that the appellant was not provided with an opportunity to submit written confirmation from a medical practitioner of her medical condition in February 2007. The panel finds further that the ministry did not make a decision in February 2007 that the appellant was not eligible for the diet supplement as there is no evidence of a review being conducted by the ministry at that time and there was no evidence of notice being provided to the appellant of the ministry's denial, which would have allowed an opportunity for the appellant to effectively dispute a denial at that time.

The panel finds that the ministry reviewed the appellant's eligibility for the diet supplement in October 2008 and found the appellant eligible for the diet supplement without requiring that the appellant provide further information from a medical practitioner. Although the ministry argues that this decision was made in error, the appellant was again not provided with an opportunity to seek an update from a medical practitioner based on

her medical condition at that time, and was not provided notice of the ministry's denial which would have allowed an opportunity for the appellant to effectively dispute this decision.

The panel finds that the ministry reviewed the appellant's eligibility for the diet supplement again in October 2010 and found that she was not eligible for the diet supplement based on the appellant's statement to the ministry that her gestational diabetes ended after her daughter was born in December 2006. The ministry discontinued payment of the diet supplement of \$35 per month in October 2010 and charged the appellant's account with an overpayment of \$1,535 for the diet supplement received by her from February 2007 through October 2010. The ministry argues that it addressed a letter to the appellant dated October 14, 2010 that stated that the error was just discovered and enclosing the Overpayment Chart detailing the monthly amounts received by the appellant for the period February 2007 through October 2010 that results in the total overpayment of \$1,535. The ministry acknowledges that it cannot be confirmed that the appellant received this letter, and the panel finds that the appellant was not provided with an opportunity to submit written confirmation from a medical practitioner to show that her diabetes continued after her child was born either in February 2007, in October 2008, or in October 2010, and she has been foreclosed from the ability to do so as the overpayment has been charged to her account with the ministry and forwarded for collection. The panel finds that the ministry's conclusion that the appellant was found not eligible for a diet supplement during the period from February 2007 through October 2010 was not reasonable and, therefore, there is no overpayment of \$1,535 for that period, pursuant to Section 27 of the EAA.

Although the appellant also argued that she went through gastric bypass surgery in 2010 and she applied for high protein diet supplement of \$40 per month from January 2010 to October 2010, which should be offset from the amount of the overpayment, the panel finds that the ministry discovered from a review of the appellant's file that a diet supplement for a high protein diet was approved and she was paid \$40 per month from January 2011 until her file with the ministry closed in March 2012. As well, the panel finds that the question of an offset in payments for a period of time goes to a determination of the amount that the appellant is liable to repay, which is not appealable according to sub-section 27(2) of the EAA.

The Panel finds that the ministry decision was not a reasonable application of the applicable enactment in the circumstances of the appellant and rescinds the decision. Therefore, the ministry's decision is overturned in favour of the appellant.