

## PART C – Decision under Appeal

The decision under appeal is the reconsideration decision of the Ministry of Social Development (the ministry) which denied the appellant's request for a monthly nutritional supplement (MNS) for nutritional items because it had not been established that all the required criteria set out in the Employment and Assistance for Persons with Disabilities Regulation, section 67 (1.1) and Schedule C section 7, have been met. Specifically, the ministry determined that the appellant's medical practitioner had not confirmed that:

- The requested nutritional items are required for alleviating one or more of the prescribed symptoms.
- The requested items are part of a caloric supplementation to a regular dietary intake, and
- Failure to obtain the items will result in imminent danger to the person's life,

## PART D – Relevant Legislation

Employment and Assistance for Persons with Disabilities Regulation (EAPWDR), section 67 and Schedule C, section 7

## PART E – Summary of Facts

The appellant did not attend the hearing. After confirming that the appellant was notified of the hearing, the hearing proceeded in accordance with section 86(b) of the EAR.

The evidence before the ministry at reconsideration consisted of the following:

1. The appellant's Application for Monthly Nutritional Supplement (MNS Application), dated 01 August 2012, completed by the appellant's physician.
2. A "To whom it may concern" note from the appellant to the ministry dated 10 August 2012 regarding transmittal of the MNS application documentation.
3. A letter from ministry to the appellant dated 18 October 2012 attaching the Health Assistance Branch MNS Decision Summary, indicating the approval of a request for a vitamin and minerals supplement and denying the request for nutritional items.
4. The appellant's Request for Reconsideration dated 19 November 2012. (See below) The appellant attaches separate notes to the ministry dated 19 and 23 October 2012 and an Allergy Summary dated 23 March 1993 from a university medical center in another country, indicating numerous allergies including to milk.

In the MNS Application, the physician provides the following information:

- Diagnoses of severe medical conditions: Systemic a) Lupus Erythematosus, b) Mixed Connective Tissue Disorder and c) Chronic Neutropenia.
- In answer to the question: "As a result of the severe medical conditions noted above, is the applicant being treated for a chronic progressive deterioration of health?" the physician answers "Yes". As to treatments, the physician writes: "Both of these conditions are chronic and are partially treated through high quality diet /vitamin & mineral therapy.
- Asked to identify and describe in detail whether as a result of the chronic, progressive deterioration of health, the applicant displays any of the prescribed symptoms, the physician identifies significant muscle mass loss (comment: deconditioned muscle atrophy), moderate to severe immune suppression (comment: yes – chronic neutropnia) and significant deterioration of an organ (comment: hepatic involvement with lupus).
- The physician reports the appellant's height and weight as 5' 9" and 160 lbs.
- In terms of additional nutritional items required and duration of need, the physician lists: "High protein fish, meats, non-allergic nuts, nut butter and organic fresh fruit and vegetables." In answer to the question whether the applicant has a medical condition that results in the inability to absorb calories to satisfy daily requirements through a regular dietary intake, the physician responds: "Lactose intolerant. Requires lactose-free or – reduced food. The physician describes how the required nutritional items will alleviate one or more of the symptoms and provide caloric supplementation to the regular diet, the physician states: "Immune boost/production. Anti-oxidant benefits. Liver/gut friendly foods with maximum nutrition."
- With reference to the requested vitamins and minerals, the physician states: "Immune system support. Mitigate muscle loss. Part of multi-pronged treatment for auto immune disease."
- The physician does not give, in the space provided, any description or explanation as to

how the nutritional items will prevent imminent danger to the applicant's life. There are no additional comments.

In her Request for Reconsideration and in her attached notes, in addition to argument, the appellant provides the following factual information:

- The weight reported by her physician in the MNS application (160 lbs.) was a "guesstimate." Before that she weighed 145 lbs, having only gained weight due to being ill at home in bed.
- She has severe food allergies: to wheat, yeast, oranges, white peanuts and also has several lesser allergies.
- She has been ill all year, with an abscess in her jaw spreading and coming back, then going to her lungs too in September 2012, then a month later interfering with her colon on one side, causing food to pass through and blood loss. This issue has not been resolved.
- She states that the ministry does not have on its records that she also has primary biliary cirrhosis (pbc) and Sjogren's syndrome.
- She has been assessed as being at risk for osteoporosis, due to height and slight bone structure.

In her Notice of Appeal dated 19 December 2012, the appellant referred to argument made in her Request for Reconsideration.

At the hearing, the ministry stood by its position at reconsideration.

## PART F – Reasons for Panel Decision

The issue under appeal is whether the ministry reasonably determined that the appellant was not eligible for a monthly nutritional supplement (MNS) because it had not been established that all the required criteria set out in the Employment and Assistance for Persons with Disabilities Regulation, section 67 (1.1) and Schedule C section 7, have been met. Specifically, the ministry determined that the appellant's medical practitioner had not confirmed that:

- The requested nutritional items are required for alleviating one or more of the prescribed symptoms.
- The requested items are part of a caloric supplementation to a regular dietary intake.
- Failure to obtain the items will result in imminent danger to the person's life.

The ministry did determine that the ministry had received a request in which a medical practitioner has confirmed that the appellant is being treated for chronic, progressive deterioration of health on account of a severe medical condition and that as a direct result she displays two or more of the prescribed symptom

The relevant legislation is from the EAPWDR:

### Nutritional supplement

**67 (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.

(2) In order to determine or confirm the need or continuing need of a person for whom a supplement is provided under subsection (1), the minister may at any time require that the person obtain an opinion from a medical practitioner or nurse practitioner other than the practitioner referred to in subsection (1) (c).

And from Schedule C of the EAPWDR:

### 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;

The panel will consider each party's position regarding the reasonableness of the Ministry's decision under the applicable MNS criteria at issue in this appeal.

*Relieving a prescribed symptom and caloric supplementation to a regular dietary intake*

The panel notes that paragraph (c) of subsection 67 (1.1) of the EAPWDR reads "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." Substituting the relevant words from section 7(a) of Schedule C provides the following criterion:

The person requires additional nutritional items that are part of a caloric supplementation to a regular dietary intake and specified in the request for the purpose of alleviating a symptom referred to in paragraph (b).

In its reconsideration decision, the ministry addressed the appellant's MNS eligibility using the combined legislative wording above. The panel notes that this criterion, formulated this way, contains two issues: Under the legislation, has a medical practitioner confirmed that

1. the requested items are required the purpose of alleviating a prescribed symptom? and
2. the requested items are additional nutritional items that are part of a caloric supplementation to a regular dietary intake?

The panel notes that the appellant's physician has identified one of her symptoms as moderate to severe immune suppression (comment: yes – chronic neutropnia). The physician has stated that one of the benefits of the requested items is "immune boost/production." On careful reading of the reconsideration decision, it appears to the panel that the ministry does not dispute that a medical practitioner has confirmed that the requested items would alleviate one of the prescribed symptoms. What the ministry does dispute under this combined criterion relates to the second issue noted above: has a medical practitioner confirmed that the requested items are additional nutritional items that are part of a caloric supplementation to a regular dietary intake?

The position of the ministry, as set out in the reconsideration decision, is that the appellant's physician does not confirm that she is displaying the symptoms of malnutrition, underweight status, or significant weight loss, which would demonstrate that she requires caloric supplementation to a regular dietary intake. The height and weight recorded in her application indicates that she has a BMI of 23.6, which is within the normal range. Even taking the 145 pounds reported by the appellant in her request for reconsideration that BMI would be 21.4, still within the normal range. The ministry takes the position that the physician makes recommendations (high protein fish, meats, non-allergic nuts, nut butter and organic fresh fruit and vegetables) that involved appropriate food choices within her regular dietary intake rather than caloric supplementation to her dietary intake. With reference to the appellant's lactose intolerance, the ministry noted that lactose intolerance is a common disorder for which alternative products and remedies been developed. At the hearing, the ministry stated that caloric supplementation is usually in the form of a prepared product, such as the proprietary drink.

The position of the appellant is that the ministry has ignored her physician's statement that she needs the requested high protein items to mitigate muscle loss and that they are part of a multipronged treatment for her autoimmune disease. As she is lactose intolerant, she cannot get the protein she needs that might otherwise be available from such products as cheese, cottage cheese and yogurt.

The panel notes that the physician has not described how the requested items would be used to supplement the appellant's regular dietary intake -- that is, be in addition to her current diet. Without this information, it is difficult not to conclude that the requested items are meant to replace a large part of her current diet with alternative, albeit healthier, foodstuffs. Accordingly, the panel finds that the ministry reasonably determined that this combined criterion had not been met.

*Failure to obtain the items will result in imminent danger to life.*

The position of the ministry is that, although the physician's dietary recommendations would be beneficial to the appellant's health, the physician did not provide any information to establish the failure to provide requested items will result in imminent danger to life.

The position of the appellant is that the ministry should apply the same reasoning it used in approving the requested vitamin and mineral supplements: she requires the nutritional supplement in order to alleviate established symptoms and to improve immune systems support and although the physician did not indicate whether the nutritional supplements will prevent imminent danger to life, it is reasonable to conclude that the supplement will reduce the risk of further deterioration of health.

The panel notes that the physician has described how the requested items would alleviate one or more of the prescribed symptoms (Immune boost/production. Anti-oxidant benefits. Liver/gut friendly foods with maximum nutrition). However, the section in which the physician is asked to describe how the nutritional items will prevent imminent danger to the applicant's /appellant's life has been left blank. The panel considers the legislation clear: that failure to obtain the requested items will result in imminent danger to life must be explicitly confirmed by a medical practitioner. The legislation does not provide that this conclusion can instead be reached by inference. The panel therefore finds that the ministry reasonably determined that this criterion had not been met.

### *Conclusion*

Having reviewed and considered all of the evidence and the relevant legislation, the panel finds that the ministry's decision that the appellant was not eligible for the requested MNS supplement was reasonably supported by the evidence and therefore confirms the ministry's decision.