

PART C – Decision under Appeal

This is an appeal of a reconsideration decision of the Ministry of Social Development ("the ministry"), dated October 2, 2012, in which the ministry denied the appellant a Monthly Nutritional Supplement (MNS). The ministry relied on section 67(1) of the Employment and Assistance for Persons with Disabilities Regulation (EAPWDR), finding that the appellant was not experiencing two of the symptoms set out in 67(1.1) (b). Nor was the ministry satisfied that he required the nutritional items as part of a caloric supplementation to a regular dietary intake to alleviate symptoms of his chronic progressive deterioration and to prevent an imminent danger to his life pursuant to Schedule C, section 7(a) EAPWDR. It also denied vitamins/mineral supplements under Schedule C, section 7(c) EAPWDR, finding that the appellant did not meet the criteria of a medical practitioner confirming that he had two of the symptoms in section 67(1.1)(b) EAPWDR, that he required the vitamin/mineral supplementation to alleviate a symptom, nor that failure to receive the supplements would result in imminent danger to his life.

PART D – Relevant Legislation

Section 67, EAPWDR
Schedule C, section 7, EAPWDR

PART E – Summary of Facts

The following information was before the ministry at the time of reconsideration:

- A ministry Monthly Nutritional Supplement Decision Summary, dated August 23, 2012, which found that:
 - The appellant is in receipt of Employment and Assistance for Persons with Disabilities allowance.
 - The appellant is not receiving a supplement under the Employment and Assistance for Persons with Disabilities Regulation
 - There are no resources available to the family unit (the appellant) to pay for the requested items.
 - The requested nutritional items are prescribed by a medical practitioner or nurse practitioner.
 - The medical practitioner or nurse practitioner did not describe a severe medical condition.
 - The minister was not satisfied that the appellant was being treated for a chronic progressive deterioration of health
 - The appellant did not display two or more symptoms as a result of a chronic, progressive, deterioration of health.
 - The appellant did not have vitamins/minerals approved.
 - The minister was not satisfied that failure to obtain the requested items would result in imminent danger to the appellant's life.
 - The nutritional items were not approved
- An application for a Monthly Nutritional Supplement, signed by the appellant on May 25, 2011, which contained the following information:
 - The appellant's physician, Dr P, diagnosed major depression, hypothyroid, malnutrition and weight loss.
 - He is 73" tall and weighs 176 pounds.
 - Dr P opined that, as a result of the severe medical condition described above, that the appellant was 'not coping with life since marriage split, unemployable.'
 - Dr P further opined that because of his condition, the appellant's weight dropped from 194 to 176 pounds, he is underweight, has significant muscle weight loss and periods of confusion and anger.
 - Dr P recommended one can of Ensure or equivalent per day as well as multi-vitamins. He opined that this will add calories. He prescribed a course of 6-12 months.
 - In reply to the question whether the appellant's condition results in an inability to absorb daily requirements through a regular dietary intake, DR P noted 'No unable to afford.'
 - In additional comments, Dr P wrote 'If supplied for a time should become employable again.'
- A noted dated September 14, 2012 from Dr P stating 'marked wt loss + loss of muscle mass since Oct 08 Diagnosis Chronic major depression + anxiety.'
- Undated photos of the appellant.
- A residential tenancy agreement for the appellant, showing rent of \$515.
- The reconsideration decision notes a body mass index (BMI) of 23.2, which it considered to be

within the normal range.

- A letter dated September 19, 2012 from the appellant stating that:
 - He is afflicted with chronic, major depression and anxiety. He takes several medications including Paxil.
 - His severe anxiety causes him to have episodes of frequent diarrhea and stomach pains, which make it difficult to carry out daily activities and maintain nutritional balance.
 - He has experienced significant muscle mass loss, atrophy of deltoid muscles and generalized muscle loss and weakness. While he acknowledges the ministry's comment about his BMI it does not mean he is not in need of additional nutritional supplements and supports to be able to maintain his health and alleviate further deterioration.
 - There is no regular dietary intake which would alleviate further weight loss. His current weight stability is due to a short-term nutritional boost, supported by a temporary supplement provided by a relative. The short-term support is restricted due to distance. Without a long-term plan in place, he feels that weight and muscle loss will continue.
 - Vitamin, mineral and caloric supplementation to his regular diet would alleviate or improve weight and reduce muscle loss.
 - His housing costs are high relative to the amount provided by with his assistance payment for housing, leaving insufficient funds left to feed himself nutritionally. He cannot share accommodations because of his disorders.

Information received subsequent to the reconsideration decision and prior to the hearing

- A letter dated November 19, 2012 from the appellant's advocate requesting an extension, noting the difficulty meeting the appellant because, as a result of his medical and psychological conditions, he rarely leaves his home, not travel more than a few blocks from his residence or take public transit.
- A letter dated December 16, 2012 from the appellant's sister stating:
 - She has fed him and supplied him with meals, which has stabilized him. Had she not done this she feels he would have ended up in the hospital for malnutrition.
 - She is no longer able to help him with food or meals and asks that the cost of supplements be covered by the ministry.
- A letter dated December 14, 2012 from Dr P stating that the appellant 'would lose weight and muscle mass to a further degree if he is unable to keep his diet at the present level as his sister is no longer able to supply his needs. He needs the \$200.00 nutritional supplement to maintain his present health state.'

The ministry did not respond to this additional information.

PART F – Reasons for Panel Decision

The issue to be decided is whether the ministry's decision to deny nutritional items in the form of Ensure or equivalent and vitamin/mineral supplements in the form of multi-vitamins for the appellant was reasonably supported by the evidence, or a reasonable application of the applicable enactment in the circumstances of the person appealing the decision.

Section 67 of the EAPWDR states:

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, or
 - (b) section 8 [*people receiving special care*] of Schedule A, if the special care facility is an alcohol or drug treatment centre,
- 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,
 - (d) the person is not receiving a supplement under section 2 (3) [*general health supplement*] of Schedule C,
 - (e) the person is not receiving a supplement under subsection (3) or section 66 [*diet supplements*],
 - (f) the person complies with any requirement of the minister under subsection (2), and
 - (g) the person's family unit does not have any resources available to pay the cost of or to obtain the items for which the supplement may be provided.
- (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).

(3) 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 short term need for caloric supplementation to a regular dietary intake to prevent critical weight loss while recovering from

- (i) surgery,
- (ii) a severe injury,
- (iii) a serious disease, or
- (iv) side effects of medical treatment.

Schedule C, section 7 EAPWDR states:

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.

Appellant's submission

Through his advocate the appellant argued:

- In its reconsideration decision, the ministry did not consider the appellant's information, specifically the his letter [dated September 19, 2012] detailing his health circumstances and their effect on his life, the photos of himself and the note from Dr P [dated September 14, 2012] reporting marked weight loss and muscle mass since October 2008, which included the diagnosis of chronic major depression and anxiety.
- In *Hudson v, the Employment and Assistance Appeal Tribunal*, the court instructed that significant weight must be placed on the evidence of the applicant, unless there is a legitimate reason not to do so. As the MNS has 'eligibility' as a criterion, the ministry has an obligation to give weight to the applicant's submissions or provide reasons as to their exclusion.
- The ministry breached its own policy regarding the consideration of all evidence provided by the appellant.
- The appellant's mental and physical difficulties make it difficult to be mobile beyond a brief walk away from his home, or assemble medical and supporting evidence.
- The nutrition supplied by the appellant's sister buoyed his health.
- Without these additional nutrients the appellant's health will deteriorate and create a danger to his life.
- By relying exclusively on the physician's evidence and failing to consider the appellant's submissions the ministry did not understand his health circumstances and the chronic progression of his illness.
- The advocate included copies of the ministry policy regarding reconsiderations, the relevant

portion of the *Hudson* decision and copies of Dr P's September 14, 2012 note and the December 16, 2012 note from the appellant's sister.

Ministry's submission

The ministry argued in its reconsideration decision that Dr P did not confirm the necessary requirements of the regulation, i.e. his deterioration has resulted from socio-economic conditions, not a medical condition; there was no evidence from Dr P that he is displaying symptoms of malnutrition, underweight status, significant muscle loss or significant neurological degeneration due to a progressive deterioration of health due to a medical condition; the minister wasn't satisfied that the appellant required nutritional items as part of a caloric supplementation to a regular diet to alleviate the symptoms of his chronic, progressive deterioration of health and to prevent an imminent danger to his life.

Reasoning

The first finding of the ministry was that the appellant did not display two symptoms contained in section 67(1.1)(b) EAPWDR as a result of 'a progressive deterioration of health due to a medical condition (and confirmed by a medical/nurse practitioner in accordance with 67(1.1)):

- (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;

In his note dated September 14, 2012, Dr P noted 'Marked wt loss + loss of muscle mass since Oct/08.' The panel accepts that the term 'marked' is sufficiently equivalent to 'significant,' as found in subparagraphs (iii) and (iv) in the above list of symptoms. The panel also accepts that 'marked' could be applied to 'wt loss' and 'muscle mass.'

The second part of the test requires that the person with disabilities is being treated by the practitioner for a chronic, progressive deterioration of health on account of a severe medical condition. In the same note, Dr P diagnosed 'Chronic major depression and anxiety.' In the original application Dr P diagnosed major depression, hypo-thyroid, malnutrition and weight loss.

The appellant's self-report, contained in his September 19, 2012 letter, states 'With my severe anxiety at times it causes me to have episodes of frequent diarrhea and stomach pains, which makes it difficult to carry out daily activities and maintain a nutritional balance.' The appellant argues that, in accordance with the *Hudson* decision, the panel should accept this self-report.

The MNS provisions require that '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...'

With respect to the admissibility of the appellant's self-report, the court's view in *Hudson* was that:

'...while s 2(2) of the EAPDA makes it clear that certain eligibility criteria for PWD status need to be confirmed by the applicant's physician or assessor, nothing in the EAPDA prevents the Ministry or Tribunal from placing considerable weight on the Petitioner's evidence, provided the statutory eligibility criteria are met. Indeed, it would be illogical for the Application to demand of the petitioner to describe her disabling condition if the situation were otherwise.'

The panel notes that the MNS provisions do not have a similar self-reporting component as do those found in the Persons With Disabilities (PWD) provisions. Rather, section 67(1.1) requires confirmation by a medical or nurse practitioner of all of the criteria contained therein.

Dr P provided the diagnosis (depression and anxiety) and the result (marked weight and muscle loss) and the appellant provided the reason that the former results in the latter. The panel notes that in the original application Dr P replied to the question 'as a result of the severe medical condition(s) noted above is the applicant being treated for a chronic, progressive deterioration of health?' he replied 'not coping with life since marriage split, unemployable.' It is not reasonable to ask the ministry to accept this lack of evidence in reply to the questions posed in the form in light of the requirements of confirmation by a medical/nurse practitioner in section 67(1.1). Nor do these provisions permit the ministry to rely on a self-report for such essential information. Therefore the ministry was reasonable to conclude that these tests were not met.

Secondly, the ministry was not satisfied that the appellant required nutritional items as a 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, as per section 67 (1.1) EAPWDR.

The ministry pointed to the fact that his BMI is in the normal range (23.2) and that there is no information over what period of time he sustained the weight loss of 18 pounds. These are reasonable observations for the ministry to make.

The panel notes that the appellant's sister was providing him with meals but can no longer do so. The appellant's submission states 'There is no regular dietary intake which would alleviate further weight loss. His current weight stability is due to a short-term nutritional boost, supported by a temporary supplement provided by a relative. The short-term support is restricted due to distance.'

Schedule C, section 7 requires 'for additional nutritional items that are part of a caloric supplementation to a regular dietary intake...'

It appears that the 'short-term nutritional boost, supported by a temporary supplement provided by a relative' is the meals provided by his sister, which she can no longer afford. Therefore the requested supplements appear to be a substitute for these meals, rather than 'a caloric supplementation to a regular dietary intake.' The appellant argues that his housing costs are too high and prevent him from affording proper nutrition. The panel notes however, that MNS is primarily a medical need with strict tests requiring the confirmation from a medical/nurse practitioner.

The panel finds the ministry reasonable in concluding that the requested nutritional items are not a caloric supplementation to a regular dietary intake and that a medical/nurse practitioner did not confirm the criteria required in the regulations.

Finally, the ministry found that the appellant did not require vitamin/mineral supplementation to alleviate the symptoms of his chronic, progressive deterioration of health and to prevent imminent danger to life.

C, section 7 also addresses vitamin/mineral supplements but does not require that they be a supplementation to a regular dietary intake. In addition to the lack of confirmation by Dr P on the appellant's medical conditions, the question remains of whether the appellant's life is in imminent danger without these vitamins as required in 67(1.1)(d). Dr P is silent on this aspect in the original form. Dr P's December 14, 2012 note states that the appellant 'would lose weight and muscle mass to a further degree if he is unable to keep his diet at the present level...' Again, the ministry was reasonable that it not provide this benefit in the absence of evidence which meets the strict test contained in the regulation in terms of confirmation from a medical professional about imminent danger to the appellant's life.

In summary, the panel finds the decision a reasonable application of the applicable enactment in the circumstances of the person appealing the decision. The decision is confirmed.