

PART C – Decision under Appeal

The decision under appeal is the reconsideration decision by the Ministry of Social Development (the ministry) dated 27 December 2012 that denied the appellant a diet supplement for a high protein diet under the Employment and Assistance for Persons with Disabilities Regulation, section 66 and Schedule C, section 6. The ministry held that the appellant's medical condition, post sleeve gastrectomy, does not fit any of the medical conditions for which a high protein diet is necessary, as listed in section 6 (2) of Schedule C.

PART D – Relevant Legislation

Employment and Assistance for Persons with Disabilities Regulation, section 66 and Schedule C, section 6.

PART E – Summary of Facts

A hearing was convened on 25 January 2013. Prior to the hearing, the appellant was given permission by the Tribunal to attend by teleconference. At the outset of the hearing, she stated that she was ill with the flu and requested an adjournment. The ministry did not object. After due consideration, the panel granted the requested adjournment.

The appellant did not appear at the rescheduled hearing on 20 March 2013. After confirming that the appellant was notified of the hearing, the hearing proceeded in accordance with section 86(b) of the Employment and Assistance Regulation.

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

- From the ministry's files: the appellant is a recipient of disability assistance.
- A letter from the appellant's family physician, dated 09 November 2012, stating that the appellant requires a dietary allowance for a high protein diet for adhering to guidelines for post bariatric sleeve surgery. This allowance should be for one year in duration and assessed on a yearly basis.
- A letter from a registered dietitian (RD) at a health authority outpatient nutrition counseling office, dated 10 December 2012. This letter states that the appellant's specific medical condition is post sleeve gastrectomy for morbid obesity and that the appellant needs a post bariatric surgery diet. In particular, the appellant requires: 1) whey protein isolate powder -- to ensure 60 g protein/day; 2) chewable adult multi mineral/vitamin daily; 3) vitamin B-12 -- to be monitored by labs; 4) iron supplementation -- as needed -- monitored by labs; and 5) liquid calcium citrate. The RD states that the supplements are required to prevent the onset of nutritional deficiencies.

In her Notice of Appeal dated 8 January 2013, the appellant wrote:

"I recognize I am not on your criteria list of diagnoses; however I am requesting an exception based on additional and more recent decline in health. As of January 2/2013 I was diagnosed by a physician with anemia. A consult with a dietitian resulted in a recommendation for Glucerna @ \$14.95 for 6, taking 3 per day. On PWD income I cannot manage all of these expenses. I can provide complete details on my costs @ hearing."

At the hearing on 20 March 2013, the ministry noted the appellant's reference to her need for Glucerna in her Notice of Appeal. The ministry was of the view that this was new information not relevant to the issue under appeal. However, the ministry reported that discussions have been held with the appellant regarding the possibility of providing Glucerna as a short term nutritional supplement under section 67(3) of the EAPWDR, but the appellant has not followed through with submitting a request.

The panel finds that the information provided by the appellant in her Notice of Appeal regarding her new diagnosis of anemia and her need for Glucerna, and the testimony of the ministry regarding the possibility of a short term nutritional supplement, are new matters that cannot be considered to be in support of information before the ministry at the time of the reconsideration decision. Therefore the panel does not admit this new information as evidence pursuant to section 22(4) of the Employment and Assistance Act.

PART F – Reasons for Panel Decision

The issue under appeal is the reasonableness of the ministry's decision to deny the appellant a diet supplement for a high protein diet under the EAPWDR, section 66 and Schedule C, section 6 because the appellant's medical condition, post sleeve gastrectomy, does not fit any of the medical conditions for which a high protein diet is necessary, as listed in section 6 (2) of Schedule C.

The applicable legislation is from the EAPWDR:

Diet supplement

66 (1) 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 and transition houses*] 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.

(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*.

(3) The minister may not provide a supplement under this section to or for a family unit for a person on account of whom the minister is providing a supplement under section 67 (1) or (3) [*nutritional supplements*].

And from Schedule C:

Diet supplements

6 (1) The amount of a diet supplement that may be provided under section 66 [*diet supplements*] of this regulation is as follows:

- (a) \$10 for each calendar month for a person who requires a restricted sodium diet;
- (b) \$35 for each calendar month for a person who has diabetes;
- (c) \$30 for each calendar month for a person who requires kidney dialysis if the person is not eligible under the kidney dialysis service provided by the Ministry of Health Services;
- (d) \$40 for each calendar month for a person who requires a high protein diet;
- (e) \$40 for each calendar month for a person who requires a gluten-free diet;
- (f) \$40 for each calendar month for a person who has dysphagia;
- (g) \$50 for each calendar month for a person who has cystic fibrosis;
- (h) \$40 for each calendar month for which a person requires a ketogenic diet;
- (i) \$40 for each calendar month for which a person requires a low phenylalanine diet.

(2) 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:

- (a) cancer that requires nutritional support during

- (i) radiation therapy,
- (ii) chemotherapy,
- (iii) surgical therapy, or
- (iv) ongoing medical treatment;
- (b) chronic inflammatory bowel disease;
- (c) Crohn's disease;
- (d) ulcerative colitis;
- (e) HIV positive diagnosis;
- (f) AIDS;
- (g) chronic bacterial infection;
- (h) tuberculosis;
- (i) hyperthyroidism;
- (j) osteoporosis;
- (k) hepatitis B;
- (l) hepatitis C.

(3) A person who is eligible for a supplement under subsection (1) (d) or (f) is also eligible for a \$30 payment towards the purchase of a blender.

(4) If a person has more than one of the medical conditions set out in subsection (1), the person may receive only the amount of the highest diet supplement for which he or she is eligible.

The position of the ministry is that the legislation clearly indicates that, to be eligible for a high protein diet, a medical practitioner must confirm that the diet is necessary for one of the medical conditions listed in section 6(2) of Schedule C of the EAPWDR. As the appellant's diagnosis of morbid obesity requiring a post sleeve gastrectomy does not fit into any of these conditions, the appellant is not eligible for the requested supplement.

The position of the appellant is that an exception to the provisions of the legislation is warranted in her case, as she now has much higher nutritional expenses resulting from her recently diagnosed anemia and the consequent need to take Glucerna.

The panel's mandate is limited to the reasonableness of the ministry's decision at reconsideration regarding the denial of high protein diet under section 6 of Schedule C of the EAPWDR. The panel has carefully reviewed the legislation and can find no provision that would give the minister the discretion to provide high protein diet in circumstances other than when medical practitioner confirms that the diet is necessary for one of the listed medical conditions. As the appellant's medical condition is not one of those listed, the panel finds that the ministry denial of the requested high protein diet was reasonably supported by the evidence. The panel therefore confirms the ministry's decision.