

### PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development (ministry) reconsideration decision dated January 3, 2013 which denied the appellant's request for a Monthly Nutritional Supplement for additional nutritional items. The ministry held that the requirements of Section 67(1.1) of the Employment and Assistance for Persons With Disabilities Regulation (EAPWDR) were not met as:

-there is not sufficient information provided to establish that the appellant requires additional nutritional items as part of a caloric supplementation to a regular dietary intake to alleviate the symptoms of her chronic, progressive deterioration of health and to prevent imminent danger to life.

### PART D – Relevant Legislation

Employment and Assistance for Persons With Disabilities Regulation (EAPWDR), Section 67(1.1) and Schedule C, Section 7

## PART E – Summary of Facts

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

- 1) Two pages of a 3-page application for Monthly Nutritional Supplement (MNS) dated July 31, 2012 signed by a physician and stating in part that the appellant's severe medical conditions are viral hepatitis (chronic HCV hepatitis), osteoporosis (markedly decreased bone density), DJD hips (moderate bilateral hip arthritis), disc and spondylolisthesis (L4S, L5S, disc and joint degeneration), and diabetes, Type II (mild diabetes). The appellant is being treated for a chronic, progressive deterioration of health, specifically "...she has progressive general ability and mobility impairment. There is no effective treatments for her conditions. Osteoporosis is treated with (medication)." On page 3, asked to describe how the nutritional items required will alleviate one or more of the symptoms described and provide caloric supplementation to the regular diet, the physician indicates "...high protein, high vitamin, and high calcium content of diet will help to slow progression of her chronic disease." In response to the question how the nutritional items will prevent imminent danger to the appellant's life, the physician indicated "...poor nutrition would cause progressive liver failure and increase risk of life threatening bone fracture". Additional comments are that the appellant "...is markedly disabled and has no significant support other than the social safety net";
- 2) Application for MNS dated October 28, 2012 signed by the same physician who signed the earlier application and setting out the same medical conditions as in the first page of the July 31, 2012 form. On page 2, in response to the question whether as a direct result of the chronic progressive deterioration in health, does the appellant display any symptoms, the physician has noted underweight status (BMI 18), significant muscle mass loss (secondary to immobility and liver disease), and significant deterioration of a vital organ (liver is showing signs of early failure); in response to a request to specify the additional nutritional items, in addition to a normal dietary intake, required to alleviate the symptoms, it is indicated "...high protein, high vitamin, high calcium content foods," with no indication of the expected duration of the need. In response to the question whether 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 physician responded "no"; asked to describe how the nutritional items required will alleviate one or more of the symptoms described and provide caloric supplementation to the regular diet, the physician wrote "...high quality food is needed to assist her liver in manufacturing necessary proteins for body repair and to assist in bone metabolism." Asked to describe how the nutritional items will prevent imminent danger to the appellant's life, the physician stated "...poor nutrition will speed her liver failure and increase risk for bone fracture." Additional comments provided by the physician are "...she also has mild diabetes Type 2 which requires replacement of refined carbohydrates with complex starches and fresh vegetables;" and,
- 3) Request for Reconsideration- Reasons prepared by an advocate on behalf of the appellant.

The appellant did not attend the hearing as the advocate advised that she is feeling unwell. The advocate confirmed her instructions from the appellant to proceed with the hearing in the appellant's absence. The Release of Information signed by the appellant authorizes the advocate to attend the hearing and to make decisions on the appellant's behalf. The appellant's advocate provided a written submission which contained no new evidence and the panel accepted it as argument.

In her Notice of Appeal, the appellant states that she disagrees with the ministry's reconsideration decision since the ministry failed to adequately interpret the legislation as it relates to the application for MNS. There is sufficient information contained on the MNS application to prove the criteria for the MNS has been met.

In the Request for Reconsideration, the appellant's advocate adds that the MNS benefit is based on a specific dietary regime, namely calories above a regular diet intake. The physician indicated that high protein, high vitamin, high calcium content foods are required. He specified that these high quality foods are required to assist the appellant's liver in manufacturing necessary proteins for body repair and to assist in bone metabolism. He also stated that poor nutrition will speed her liver failure and increase risk for bone fracture. He added that she needs (replacement of) refined carbohydrates with complex starches and fresh vegetables. The advocate stated that all of the items listed are by their nature higher in calories. The physician has directly

related the need for those foods to the risk the appellant has for deterioration if she does not obtain these items. Physicians do not always have the exact wording that the ministry is seeking for completing these applications. When the physician stated that the appellant needs high calcium foods, it should be noted that these foods do have a higher calorie value than regular foods. Typical high calcium foods include milk, cheese, and yogurt. Complex carbohydrates are found in potatoes, corn, pasta, bread and cereals; foods which also contain higher calories. The physician noted that the appellant has underweight status and liver disease and that failure to consume the items will result in further deterioration of her liver as well as increased risk of bone fracture.

At the hearing, the appellant's advocate stated that the appellant was denied the MNS for nutritional items because the ministry does not consider them to be "over and above those consumed in a regular dietary regime" and that failure to obtain them will result in imminent danger to the appellant's life. The appellant's physician stated that "poor nutrition would cause progressive liver failure and increase risk of life threatening bone fracture." The physician stated that the appellant requires a "high protein, high vitamin and high calcium content diet to help slow progression of her chronic disease." The ministry interprets this as a "dietary regime." That does not mean that the dietary regime is separate from the requirement for a high calorie diet. The physician stated "...poor nutrition will speed her liver failure and increase risk for bone fracture." He further defines nutritional items as it relates to the appellant's Type 2 diabetes as "replacement of refined carbohydrates with complex starches and fresh vegetables." Some of the nutritional items listed are over and above a "regular" dietary regime. The need for nutritious high protein and calcium rich foods could not be afforded on a regular PWD income. Protein and dairy products are expensive. Consumption of larger quantities of milk, yogurt, cheese, meats, and legumes on a regular basis do have a higher calorie content. The physician stated that failure to obtain the items will speed the appellant's liver failure and increase the risk for life threatening bone fracture. The ministry stated in its decision that "this program was instituted for clients with malabsorption syndrome, cancer, AIDS, and other conditions that cause wasting even with consumption of a regular diet. The legislation does not include this list of conditions so a PWD recipient and her physician would not be privy to knowing the intent of the legislation. Decisions must be based on the legislation itself and, in this case, there is sufficient information provided by a medical practitioner to show that the appellant meets the criteria for the MNS.

At the hearing, the ministry relied on its reconsideration decision and clarified that the ministry did not consider the two pages of the 3-page MNS application dated July 31, 2012 because it was missing a page and was not complete. The appellant provided a second application dated October 28, 2012, and that is the request that the ministry considered and denied.

## PART F – Reasons for Panel Decision

The issue on the appeal is whether the ministry decision, which denied the appellant's request for a Monthly Nutritional Supplement for additional nutritional items because the requirements of Section 67(1.1) of the Employment and Assistance for Persons With Disabilities Regulation (EAPWDR) were not met, was reasonably supported by the evidence or is a reasonable application of the applicable enactment in the circumstances of the appellant.

Section 67(1.1) of the EAPWDR sets out the eligibility requirements which are at issue on this appeal for providing the additional nutritional supplement, as follows:

### **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.

Section 7 of Schedule C of the EAPWDR provides as follows:

### **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 ministry's position is that it is not satisfied that the appellant requires additional nutritional items as part of a caloric supplementation to a regular dietary intake to alleviate the symptoms of a chronic, progressive deterioration of health. The ministry argues that the medical practitioner reported that the additional nutritional

items required to alleviate symptoms are "high protein, high vitamin, high calcium content foods" and that the appellant does not have a medical condition that results in the inability to absorb sufficient calories to satisfy daily requirements through a regular dietary intake. The ministry argues that the information from the physician demonstrates that the appellant needs to eat high quality foods to assist her liver in manufacturing necessary proteins for body repair and to assist in bone metabolism, and to replace refined carbohydrates with complex starches and fresh vegetables to manage her Type 2 diabetes. The ministry argues that high quality food, complex starches, and fresh vegetables are all part of a specific diet plan and not food items over and above a normal dietary intake.

The appellant's position is that sufficient information has been provided by the medical practitioner to establish that the appellant requires additional nutritional items as part of a caloric supplementation to a regular dietary intake to alleviate a symptom of a chronic, progressive deterioration of health. The advocate argues that physician indicated that the appellant requires a "high protein, high vitamin and high calcium content diet to help slow progression of her chronic disease" and while the ministry interprets this as a "dietary regime," it does not mean that the dietary regime is separate from the requirement for a high calorie diet. The advocate argues that some of the nutritional items listed are over and above a "regular" dietary regime, that consumption of larger quantities of milk, yogurt, cheese, meats, and legumes on a regular basis do have a higher calorie content. The advocate argues that the need for nutritious high protein and calcium rich foods could not be afforded on a regular PWD income as protein and dairy products are expensive. The advocate argues that the ministry stated in its decision that this program was instituted for clients with malabsorption syndrome, cancer, AIDS, and other conditions that cause wasting even with consumption of a regular diet but the legislation does not include this list of conditions and decisions must be based on the legislation itself.

Section 67(1.1) of the EAPWDR requires that the medical practitioner confirm that for the purpose of alleviating a symptom referred to in sub-section (b), the appellant requires the additional nutritional items that are part of a caloric supplementation to a regular dietary intake, as set out in Section 7 of Schedule C. When asked to describe how the nutritional items required will alleviate one or more of the symptoms described and provide caloric supplementation to the regular diet, the physician indicates "...high quality food is needed to assist her liver in manufacturing necessary proteins for body repair and to assist in bone metabolism." The medical practitioner added that the appellant has mild diabetes Type 2 which requires replacement of refined carbohydrates with complex starches and fresh vegetables. However, the wording of Section 67(1.) together with Section 7 of Schedule C stipulates that the person must specifically require the nutritional items as part of a caloric supplementation to the person's regular dietary intake; in other words, the items are designed to be part of a supplement of calories beyond those foods being consumed in the regular diet. While the advocate points out that high calcium foods have a higher calorie value than 'regular' foods, the panel finds that the ministry reasonably determined that these foods are all part of a specific diet plan and not items above a dietary intake. The medical practitioner indicated that changes are required to the appellant's diet, or the foods that she ingests, to give priority to high quality foods and to replace refined carbohydrates with complex starches and fresh vegetables, and that these changes will assist with liver function, bone metabolism and managing her diabetes. The advocate argued that these items are over and above a regular dietary intake because nutritious, high protein and calcium rich foods are expensive and cannot be afforded on a regular PWD income. The panel finds that the cost of an item does not change its character from a food in a regular diet to an item that is part of a caloric supplementation to that diet.

The advocate also argued that the legislation does not state that the MNS is for those with medical conditions that cause wasting even with the consumption of a regular diet, such as malabsorption syndrome, cancer and AIDS, and, therefore, this cannot be part of the criteria to be satisfied. The panel finds that these medical conditions are provided by the ministry as examples of conditions in which the body's ability to absorb nutrition and calories has been compromised so that the calories available through the regular food sources in the diet are not sufficient, and for which a special supplement is required. In the appellant's MNS application, in response to the question whether 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 physician indicated "...no."

Based on all of the foregoing analysis, the panel finds that the ministry reasonably concluded that there is not sufficient information from the medical practitioner to confirm that additional nutritional items are required as part of a caloric supplementation to a regular dietary intake to alleviate a related symptom, as set out in Section 67(1.1)(c) of the EAPWDR.

The ministry's position is that it is not satisfied that the appellant requires additional nutritional items to prevent an imminent danger to the appellant's life. The ministry argues that the physician described how the requested nutritional items will prevent imminent danger to life by stating that "...poor nutrition will speed her liver failure and increase risk for bone fracture" and it has not been established that the appellant is poorly nourished as a direct result of a progressive deterioration of health; the impact on liver and bones is not an imminent factor but rather a future possibility. The ministry argues that the word "imminent" refers to an immediacy such that the danger to life is likely to happen soon whereas the physician notes that caloric supplementation will reduce the rate of further deterioration of health.

The appellant's position is that the information from the medical practitioner confirms that failure to obtain the items specified in the MNS application will result in imminent danger to the appellant's life. The advocate argues that the appellant's physician stated that "...poor nutrition would cause progressive liver failure and increase risk of life threatening bone fracture" and he also stated that poor nutrition will speed her liver failure and increase risk for bone fracture.

Section 67(1.1)(d) requires that the medical practitioner confirm that failure to obtain the nutritional items that are part of a caloric supplementation to a regular dietary intake will result in imminent danger to the person's life. The panel finds that the ministry reasonably considered the information from the medical practitioner as set out in the application dated October 28, 2012, which is the complete application that the appellant submitted in support of her request for the MNS. The medical practitioner responded to the question how the nutritional items will prevent imminent danger to the appellant's life by stating "...poor nutrition will speed her liver failure and increase risk for bone fracture." The medical practitioner also reported in the application that the appellant's liver is showing signs of early failure, that there is no effective treatments for her conditions and that her osteoporosis is currently being treated with a medication. The panel finds that the ministry reasonably concluded that the word "imminent" refers to an immediacy such that the danger to life is likely to happen soon and that the impact on the appellant's liver and bones as described by the medical practitioner is not an imminent factor but, rather, a possibility for the future. The panel finds that the ministry reasonably concluded that the information from the medical practitioner has not confirmed that failure to obtain the requested additional nutritional supplements will result in imminent danger to the appellant's life, as is required by the legislation.

The panel finds that the ministry's reconsideration decision, which denied the appellant's request for a Monthly Nutritional Supplement for additional nutritional items because the requirements of Section 67(1.1) of the EAPWDR were not met, was reasonably supported by the evidence and the panel confirms the ministry's decision.