

## PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development (ministry) reconsideration decision dated April 23, 2013 which denied the appellant's request for a Monthly Nutritional Supplement for additional nutritional items. The ministry found 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 to establish that:

- as a direct result of the chronic, progressive deterioration of health, the appellant displays two or more of the listed symptoms; and,
- 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.

The ministry also refused to grant a reconsideration pursuant to Section 16 of the Employment and Assistance for Persons With Disabilities Act (EAPWDA) regarding the appellant's eligibility for the vitamins and minerals supplement since the ministry did not make a decision regarding eligibility for these items.

## PART D – Relevant Legislation

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

Employment and Assistance for Persons With Disabilities Act (EAPWDA), Section 16

## PART E – Summary of Facts

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

- 1) Application for Monthly Nutritional Supplement (MNS) dated December 4, 2012 signed by the appellant's physician and stating in part that:
  - the appellant's severe medical condition is morbid obesity;
  - as a direct result of the severe medical condition, the applicant is being treated for a chronic, progressive deterioration of health due to diabetes, congestive heart failure and (illegible);
  - in response to the question whether as a direct result of the chronic progressive deterioration in health, does the appellant display two or more symptoms, the physician indicated the symptom of significant deterioration of a vital organ, being congestive heart failure;
  - the appellant's height and weight are recorded;
  - in response to a request to specify the vitamin or mineral supplements required and the other questions relating to vitamins or mineral supplements, the physician left this section of the application blank;
  - in response to a request to specify the additional nutritional items required, the physician stated "...increase protein intake without increasing calorie intake";
  - 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 noted "...patient wants to increase her protein intake, to increase her muscle mass";
  - in response to a request to describe how the nutritional items requested will prevent imminent danger to the appellant's life, the physician has left this section blank;
- 2) Letter dated March 11, 2013 from the ministry to the appellant denying her request for the MNS and enclosing a copy of the decision summary which sets out the basis for denial of the nutritional items and states that the vitamins/minerals had not been requested;
- 3) Letter dated April 8, 2013 from the physician 'To Whom It May Concern' stating in part:
  - in response to the question whether the appellant suffers from diabetic neuropathy, retinopathy and significant deterioration to her heart and eyes resulting from diabetes 2, congestive heart failure, heart murmur, the physician indicated "yes";
  - in response to the question whether the appellant requires daily intake of multivitamin and mineral supplements including iron-free multivitamin and mineral tablet/capsule, vitamin D, and vitamin B complex, omega 3 intake to prevent or alleviate further wasting and deterioration and subsequent health risks resulting from diabetic neuropathy, retinopathy and significant deterioration to her heart and eyes caused by diabetes 2, congestive heart failure, heart murmur, the physician indicated "...yes";
  - in response to the question whether the appellant's medical condition is at a stage where nutritional intervention, specifically increased calorie intake and vitamin and mineral supplementation is required to prevent or alleviate further health deterioration or to reduce the rate of further deterioration and prevent imminent danger to life, the physician wrote "yes";
  - in response to the question whether the appellant's \$35 diet allowance is sufficient to meet her nutritional needs, the physician wrote "No"; and,
- 4) Request for Reconsideration dated April 5, 2013.

At the hearing, the appellant's advocate, her husband, requested an adjournment as he did not have a copy of the Reconsideration decision with him at the hearing. The panel confirmed that the appellant had received the Appeal Record on July 16, 2013 but she stated that they could not find the Appeal Record when they looked for it the day before the hearing. The appellant's advocate confirmed that he had copies of documents other than the Reconsideration decision with him and that he had previously reviewed the Appeal Record. The ministry objected to the request for an adjournment on the basis that the materials had been provided to the appellant in advance of the hearing. The panel denied the request for an adjournment with the accommodation that the Reconsideration decision was read at the hearing and the appellant and her advocate were given an opportunity to respond to the ministry's position on each criterion.

In her Notice of Appeal, the appellant expresses her disagreement with the ministry's reconsideration decision.

At the hearing, the appellant's advocate stated that the letter dated April 8, 2013 from the appellant's physician is an addendum to the Application for MNS and should be considered as such by the ministry. The advocate stated that the appellant's physician is a medical doctor and he is not familiar with the ministry's forms or the full requirements in filling them out. The physician is more concerned with treating his patient. The physician has admittedly missed details in the Application but he has attempted to supply those details in his additional letter and the ministry received a copy of that letter. The advocate stated that the information that the ministry has stated is lacking in the Application can be found in the physician's letter. The advocate stated that the additional comments in the Application for the MNS also provide further details. For example, the physician wrote that the appellant is "starting to show (?) organ damage." Seen together with the April 8, 2013 letter which confirms that the appellant suffers from diabetic neuropathy, retinopathy and significant deterioration to her heart and eyes resulting from diabetes 2, congestive heart failure and heart murmur establishes that the appellant displays the symptoms of significant muscle mass loss, significant neurological degeneration, and significant deterioration of a vital organ. The advocate stated that without nutritional supplements, blindness may occur as a result of the retinopathy. The advocate stated that the physician has set out a request for specific vitamins and minerals in the April 8, 2013 letter, namely: iron-free multivitamin and mineral tablet/capsule, vitamin D and vitamin B complex, and omega 3 intake.

The ministry relied on its reconsideration decision which included evidence that the appellant is a Person With Disabilities (PWD) in receipt of disability assistance. The appellant is currently receiving a \$35.00 per month diet supplement for a diabetic diet.

## 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, and refused to grant a reconsideration regarding eligibility for vitamins and minerals since no decision was made, 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.

Section 16 of the Employment and Assistance for Persons With Disabilities Act (EAPWDA) provides:

**Reconsideration and appeal rights**

- 16 (1) Subject to section 17, a person may request the minister to reconsider any of the following decisions made under this Act:
- (a) a decision that results in a refusal to provide disability assistance, hardship assistance or a supplement to or for someone in the person's family unit;
  - (b) a decision that results in a discontinuance of disability assistance or a supplement provided to or for someone in the person's family unit;
  - (c) a decision that results in a reduction of disability assistance or a supplement provided to or for someone in the person's family unit;
  - (d) a decision in respect of the amount of a supplement provided to or for someone in the person's family unit if that amount is less than the lesser of
    - (i) the maximum amount of the supplement under the regulations, and
    - (ii) the cost of the least expensive and appropriate manner of providing the supplement;
  - (e) a decision respecting the conditions of an employment plan under section 9 [employment plan].
- (2) A request under subsection (1) must be made, and the decision reconsidered, within the time limits and in accordance with any rules specified by regulation.
- (3) Subject to a regulation under subsection (5) and to sections 9 (7) [employment plan], 17 and 18 (2) [overpayments], a person who is dissatisfied with the outcome of a request for a reconsideration under subsection (1) (a) to (d) may appeal the decision that is the outcome of the request to the tribunal.
- (4) A right of appeal given under subsection (3) is subject to the time limits and other requirements set out in the Employment and Assistance Act and the regulations under that Act.
- (5) The Lieutenant Governor in Council may designate by regulation
- (a) categories of supplements that are not appealable to the tribunal, and
  - (b) circumstances in which a decision to refuse to provide disability assistance, hardship assistance or a supplement is not appealable to the tribunal.

*Vitamins and Minerals*

The ministry's position is that a reconsideration regarding eligibility for vitamin/mineral supplements cannot be granted because no ministry decision has taken place with respect to eligibility for this item. The ministry argued that in the letter the ministry sent to the appellant dated March 11, 2013 denying the MNS, the ministry noted that the physician had not completed a request for the vitamins and minerals in that portion of the MNS Application.

The appellant's position is that sufficient information has been provided in the April 8, 2013 letter from the physician to establish that vitamin/mineral supplementation is required to alleviate the appellant's symptoms of her chronic, progressive deterioration of health and to prevent imminent danger to life. The advocate argued that the April 8, 2013 letter is an addendum to the MNS Application, that the ministry received a copy of the letter, and that it should be considered as a request for the vitamins and minerals on behalf of the appellant. The advocate argued that the physician has set out a request for specific vitamins and minerals in the April 8, 2013 letter, namely: iron-free multivitamin and mineral tablet/capsule, vitamin D and vitamin B complex, and omega 3 intake.

*Panel decision*

Section 16(1) of the EAPWDA provides that a person may request the ministry to reconsider a decision that results in a refusal to provide a supplement [sub-section (a)] or a decision in respect of the amount of a supplement provided to or for someone in the person's family unit [sub-section (d)]. In the ministry's letter to the appellant dated March 11, 2013, a copy of the decision summary is enclosed which sets out the basis for denial of the nutritional items and that there is neither an approval nor a denial of the vitamins/minerals as these items had not been specified as required pursuant to Section 7 of Schedule C of the EAPWDR. The

panel finds that the ministry's conclusion that there was no decision to reconsider with respect to the vitamins and minerals items, pursuant to Section 16 of the EAPWDA, was reasonable.

#### *Two or more symptoms*

The ministry's position is that sufficient information has not been provided from the medical practitioner to establish that as a direct result of the chronic, progressive deterioration of health, the appellant displays two or more of the listed symptoms, pursuant to Section 67(1.1)(b) of the EAPWDR. The ministry acknowledged that the appellant's physician confirmed that she is being treated for a severe medical condition, specifically diabetes and heart failure. However, the ministry pointed out that the appellant's physician only confirmed that the appellant displays one symptom, being significant deterioration of a vital organ through congestive heart failure. The ministry argued that the legislation requires that the medical practitioner confirms that the person displays two or more symptoms and that the information in the physician's April 8, 2013 letter relates to diagnoses and not symptoms.

The appellant's position is that there is sufficient information from her physician, in the MNS application and the additional letter, to establish that as a direct result of the chronic, progressive deterioration of her health, the appellant displays two or more of the listed symptoms. The advocate argued that the physician's additional comments in the Application for the MNS that the appellant is "starting to show (?) organ damage" provides further details. The advocate argued that these comments, together with the April 8, 2013 letter which confirms that the appellant suffers from diabetic neuropathy, retinopathy and significant deterioration to her heart and eyes resulting from diabetes 2, congestive heart failure and heart murmur, establishes that the appellant displays the symptoms of significant muscle mass loss, significant neurological degeneration, and significant deterioration of a vital organ.

#### *Panel decision*

Section 67(1.1)(b) of the EAPWDR requires that a medical practitioner confirm that as a direct result of the chronic, progressive deterioration of health, the person displays two or more of the symptoms listed. In the MNS application, the medical practitioner responded to the question whether, as a direct result of the chronic progressive deterioration in health the appellant displays two or more symptoms, that the appellant displays the symptom of significant deterioration of a vital organ, being congestive heart failure. The advocate argued that the physician's agreement in the April 8, 2013 letter to the statement that the appellant suffers from diabetic neuropathy, retinopathy and significant deterioration to her heart and eyes resulting from diabetes 2, congestive heart failure and heart murmur confirms at least one additional symptom. However, the panel finds that while diabetic neuropathy may, arguably, relate to the symptom of neurological degeneration, the requirement in the legislation is for the medical practitioner to confirm that the person displays a high degree, or "significant" neurological degeneration. The panel finds that the ministry's conclusion that there is not sufficient information to establish that as a direct result of the chronic, progressive deterioration of health, the appellant displays two or more of the symptoms listed, pursuant to Section 67(1.1)(b) of the EAPWDR, was reasonable.

#### *Additional Nutritional Items*

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 and to prevent an imminent danger to the appellant's life. The ministry argued that the medical practitioner did not specify what additional nutritional items are required or the expected duration of need. The ministry argued that the medical practitioner indicates that the appellant does not have a medical condition that results in an inability to absorb sufficient calories to satisfy daily requirements through a regular dietary intake. The ministry further argued that the medical practitioner does not describe how or what nutritional items will prevent imminent danger to the appellant's life. At the hearing, the ministry argued that listed vitamins and minerals cannot also be considered additional nutritional items as they are two different items that can be requested. The ministry argued that the medical practitioner reports that the appellant wants to increase her protein intake to increase her muscle mass but he has not indicated that significant muscle

mass loss is a symptom of the appellant's diabetic neuropathy, retinopathy, or significant deterioration to her heart and eyes resulting from diabetes 2, congestive heart failure and heart murmur. At the hearing, the ministry also argued that there is conflicting information in the application for MNS and the April 8, 2013 letter regarding the appellant's need for increased calorie 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 the symptoms of a chronic, progressive deterioration of health and to prevent an imminent danger to the appellant's life. The advocate argued that the medical practitioner agreed in the April 8, 2013 letter that the appellant requires daily intake of multivitamin and mineral supplements to prevent or alleviate "further wasting" and deterioration and subsequent health risks resulting from diabetic neuropathy, retinopathy, and significant deterioration to her heart and eyes. The advocate argued that multivitamin and mineral supplements provide nutrition to the organs and are also nutritional items.

*Panel decision*

Section 67(1.1)(c) of the EAPWDR and Section 7 of Schedule C require that the medical practitioner confirm that for the purpose of alleviating a symptom referred to, the appellant requires the additional nutritional items that are specified in the request as part of a caloric supplementation to a regular dietary intake. In response to a request to specify the additional nutritional items required, the medical practitioner stated "...increase protein intake without increasing calorie intake." In the additional comments, the medical practitioner also requests assistance from the ministry to help the appellant to lose weight. However, in the letter dated April 8, 2013 the medical practitioner agreed that the appellant's medical condition is at a stage where nutritional intervention, "specifically increased calorie intake" and vitamin and mineral supplementation are required. The panel finds that the evidence conflicts with respect to the appellant's need for caloric supplementation. The original MNS application provides a response in the medical practitioner's own words and handwriting and also diagnoses morbid obesity and reports the appellant's BMI [body mass index] as 57.2. There is no explanation by the physician for the change in his opinion in the April 8, 2013 letter regarding the appellant's need for increased calories, and the panel places more weight on the original MNS application. 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 noted that the appellant "...wants to increase her protein intake, to increase her muscle mass." The panel finds that it is not clear from this information whether the medical practitioner has confirmed that the appellant requires increased protein intake as the nutritional item.

While the advocate argued that the vitamin and mineral supplementation is also a nutritional item, the panel finds that Section 7 of Schedule C provides for different monthly amounts for separate items, either additional nutritional items (\$165) or vitamins and minerals (\$40), and that these must be individually specified as required. In response to the question in the MNS application 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 medical practitioner responded "No." The panel finds that the ministry reasonably concluded that there is not sufficient information from the medical practitioner to confirm that the appellant requires specified additional nutritional items 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.

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. In the MNS application, the medical practitioner responded to the question how the nutritional items will prevent imminent danger to the appellant's life, by leaving this section blank. As set out above, the panel placed more weight on the original MNS application in which the medical practitioner specified that the appellant requires "...increase protein intake without increasing calorie intake" and requested assistance from the ministry to help the appellant to lose weight. The medical practitioner diagnosed morbid obesity and reported the appellant's BMI [body mass index] as 57.2. In the April 8, 2013 letter, however, the medical practitioner agreed that the appellant's medical condition is at a stage where nutritional intervention,

specifically increased calorie intake and vitamin and mineral supplementation, is required to prevent or alleviate further health deterioration or to reduce the rate of further deterioration and prevent imminent danger to life. The panel also finds that the rephrasing of the question is problematic in providing options of one "or" the other with slightly different meanings and it is not clear to which option the medical practitioner agreed. While the medical practitioner may have agreed with the statement that caloric supplementation will "reduce the rate of further deterioration" of her health, there was no information provided to establish a rapid rate of deterioration of the appellant's health such that a failure to obtain the additional nutritional items will result in an 'imminent' danger to the appellant's life. The panel finds that the ministry reasonably concluded that the medical practitioner has not confirmed that failure to obtain the requested additional nutritional items will result in imminent danger to the appellant's life, as required by the legislation.

*Conclusion*

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, and refused to grant a reconsideration under Section 16 of the EAPWDA regarding eligibility for vitamins and minerals, was reasonably supported by the evidence and the panel confirms the ministry's decision.