

PART C – Decision under Appeal

The decision under appeal is the reconsideration decision of the Ministry of Social Development (the ministry) dated 20 March 2013 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:

- For the purpose of alleviating a symptom referred to in paragraph (b) of section 67(1.1) of the Regulation, the requested items are required as part of a caloric supplementation to a regular dietary intake, as specified in paragraph (c) and Schedule C, section 7(a),
- failure to obtain the items will result in imminent danger to the appellant's life, as required under paragraph (d).

The ministry's decision reversed the original decision regarding a monthly nutritional supplement for vitamins and minerals, and approved the appellant's request in that respect.

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

As the ministry approved the appellant's MNS request for vitamins and minerals, the panel will summarize only the evidence related to the request for nutritional items. The evidence before the ministry at reconsideration included the following:

1. The appellant's Application for Monthly Nutritional Supplement dated 28 January 2013. The part completed by the appellant's medical practitioner (physician) was completed on 13 January 2013. The physician reports that:
 - The appellant is being treated for a chronic, progressive deterioration of health due to pernicious anemia and COPD.
 - As a result of the chronic, progressive deterioration of health, the appellant is displaying 1 of the listed symptoms, namely significant deterioration of a vital organ (lungs).
 - The appellant's height and weight are 5'2" and 220 lbs.
 - Additional nutritional items required are specified as "high protein diet."
 - How the nutritional items will alleviate the listed symptoms and provide caloric supplementation to the regular diet is described as: "requires ↑ protein due to lung disease."
 - How the nutritional items will prevent imminent danger to life is described as: "she requires ↑ protein due to lung condition."
2. The appellant's Request for Reconsideration, dated 08 March 2013. Under Reasons, the appellant refers to a number of attachments:
 - A list of prescriptions from a pharmacy.
 - A note from the appellant's physician dated 27 February 2013. He writes the appellant has severe COPD: she suffers from moderate immune suppression and deterioration of lung function as a result of it.
 - A letter dated 05 March 2013 from respiratory therapist at a health authority Home Oxygen Program, The letter states that the appellant has known COPD which is categorized as "severe" based on pulmonary function testing. COPD is a progressive condition. The appellant is oxygen dependent, particularly at night and with exertion. She has frequent flare-ups of her COPD requiring treatment with both antibiotics and another medication.

In her Notice of Appeal dated 08 April 2013 the appellant states that her doctor has told her that he would clarify in writing the exact explanation needed in order for her to obtain the MNS. All that's needed is to tell her what is required.

At the hearing, the appellant's advocate reiterated the request set out in the notice of appeal, stating that the appellant's physician would truthfully provide the explanation needed to justify the MNS, but he needed guidance as to what exactly was required. The only new evidence provided was the appellant stating that in addition to the other symptoms identified by her doctor, she is also suffering from muscle mass loss. The remainder of the presentation by the appellant and her advocate went to argument. (See Part F below where this is summarized)

The ministry stood by its position at reconsideration.

The panel finds the testimony of the appellant at the hearing is in support of information that was before the ministry at reconsideration, as it clarifies the background to her request. The panel therefore admits this new information as evidence pursuant to section 22(4) of the Employment and Assistance Act.

PART F – Reasons for Panel Decision

The issue in this appeal is whether the ministry reasonably 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 EAPWDR, section 67 (1.1) and Schedule C section 7, had been met. Specifically, the issue is whether the following ministry determinations are reasonably supported by the evidence or are a reasonable application of the legislation in the circumstances of the appellant:

- that a medical practitioner has not confirmed that for the purpose of alleviating a symptom referred to in paragraph (b) of section 67(1.1) of the EAPWDR, the requested items are required as part of a caloric supplementation to a regular dietary intake, as specified in paragraph (c) and Schedule C section 7(a), and
- that a medical practitioner has not confirmed that failure to obtain the items will result in imminent danger to the appellant's life, as required under paragraph (d) of section 67(1.1) of the EAPWDR,

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 ministry determined that the appellant's request met the criteria set out in section 67(1.), paragraphs (a) and (b): she is being treated for a chronic, progressive deterioration of health on account of a severe medical condition, specifically pernicious anemia and COPD; and a medical practitioner has confirmed that she is displaying the symptoms of moderate to severe immune suppression and significant deterioration of a vital organ (lungs).

The panel will consider each party's position regarding the reasonableness of the Ministry's decision under the remaining 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 significant deterioration of a vital organ (lungs). The physician has described how the nutritional items will alleviate the listed symptoms as "requires ↑ protein due to lung disease." 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 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 her BMI falls above the normal range.

The ministry also notes that the appellant's physician does not confirm that the appellant has a medical condition that results in the inability to absorb sufficient calories to satisfy daily requirements through a regular dietary intake. Noting that the physician recommends a high protein diet, the ministry takes the position that high protein foods represent a recommended component of regular dietary intake rather than caloric supplementation to her dietary intake. 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, in addition to the symptoms identified by her doctor, she is also suffering from muscle mass loss and needs the recommended high protein diet to alleviate that symptom as well as the deterioration of her lungs. In her view, all this would have become clear if the ministry had provided her with feedback on what information was missing in her application.

The panel notes that when asked in the application to specify the additional nutritional items required, the appellant's physician wrote: "High protein diet." No further information is provided, such as what exactly would constitute a high protein diet, whether such a diet would substitute higher protein foods for those of lower protein content or would instead be in addition to her current diet, though the latter appears unlikely given the information respecting the appellant's height and weight. The panel further notes that the physician does not answer the question: "Does this applicant have a medical condition that results in the ability to absorb sufficient calories to satisfy daily requirements through a regular dietary intake? If yes, please describe." Without such information, 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 while the appellant's physician has reported that the appellant requires increased protein due to her lung condition, this does not constitute confirmation that failure to provide items for caloric supplementation to a regular dietary intake will result in imminent danger to life

The position of the appellant is that she is dying; all she asks is that the ministry provide the requested supplement to help her comfortably prolong her life.

The panel notes that the physician has described how the requested items would prevent imminent danger to the appellant's life as: ""she requires ↑ protein due to lung condition." 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 available evidence does not demonstrate imminent danger to life or how additional a high protein diet would prevent such danger. 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.