

**PART C – Decision under Appeal**

The decision under appeal is the Ministry of Social Development's (ministry) reconsideration decision dated January 7, 2013 which found that the appellant was not eligible for funding for tube feed-related products as she did not meet the criteria set out in the *Employment and Assistance for Persons with Disability Regulations* (EAPWDR) sections 67, 67.01, 66 and 69, Schedule C sections 2(1)(a) & 2(1)(f), 3-3.12, 6 and 7.

**PART D – Relevant Legislation**

*Employment and Assistance for Persons with Disabilities Act* (EAA), section 1

*Employment and Assistance for Persons with Disabilities Regulation* (EAPWDR), sections 67, 67.01, 66 and 69 and Schedule C, sections 2(1)(a) & 2(1)(f), 3-3.12, 6 and 7.

**PART E – Summary of Facts**

The evidence before the Ministry at the time of the Reconsideration Decision consisted of:

- 1) Letter from a psychiatrist dated January 3, 1989 stating that the appellant is not capable of managing her own affairs.
- 2) Funding Request Form for Tube Feed Pump & Supplies dated September 27, 2012 completed by a dietician.
- 3) Letter from the Ministry to the appellant dated November 28, 2012 denying her request for health supplements (tube feed pump and supplies) with attached Health Assistance Branch Tube Feed Supplement Decision Summary.
- 4) Facsimile from an advocate dated December 6, 2012 advising that the appellant will be getting a feed tube the week of December 13, 2013 and requires assistance with ongoing supplies.
- 5) Request for Reconsideration dated December 20, 2012 ("RFR") completed by the appellant's case manager who manages her financial and legal affairs (the "Case Manager") and attaching a statement of the appellant's assets and liabilities and monthly statement of income and expenses. The RFR states that the appellant cannot afford the ongoing costs associated with the tube feeding products. The statement of assets and liabilities indicates that the appellant has a trust fund managed by the Case Manager with cash assets of \$5,680. The appellant has monthly income of \$1,261 per month and her expenses are \$1,111 per month.

In her Notice of Appeal dated January 29, 2013, the appellant's Case Manager states that the appellant cannot afford the ongoing costs associated with the feeding pump as she is in receipt of basic pensions only. The Notice of Appeal states that the "...*legislation seems to be discriminatory against persons who are over 65 and in need of feeding tube supplies and clearly who are unable to afford these supplies*".

At the hearing, the appellant, through her advocate provided a written submission and itemized cost of the tube feeding pump and supplies as well as the appellant's updated monthly expenses (the "Submission")(3 pages). The panel finds that the submission is mainly argument but does also contain new evidence regarding the cost of the tube feeding supplies and the appellant's updated monthly expenses. The ministry did not object to the new evidence. The panel has admitted the Submission into evidence as being in support of information and records that were before the ministry at the time of reconsideration, in accordance with section 22(4) of the *Employment and Assistance Act* (EAA).

The appellant's advocate, stated that the appellant has been diagnosed with cerebral palsy, seizure disorder, developmental delay and gastro-esophageal reflux disease and dysphagia (difficulty swallowing) but has responded to these challenges with much spirit and determination. The appellant had previous periods where she was not able to eat orally and was supported by tube feeding but was, for some period, able to wean off the tube feed and able to eat orally but due to her health conditions now requires tube feeding again. The cost of the tube feeding is \$15.78 per day (formula \$7.10, feeding spoke \$8.11, syringe \$0.58) or \$489.18 per month. The appellant receives pension income of \$1,287.11 but after her shelter and support costs of \$ 958.90 she is left with \$328.21, which means that she is \$160.97 short of being able to pay for the cost of the tube feed products that

she requires. The appellant requests that the ministry provide the tube feeding services as they are necessary for her to live.

The appellant's advocate also states that the EAPWDR sections 61.1, 62 and 67.01 are discriminatory with respect to funding for tube feeding supplies for adults with a disability over age 65 and asks the tribunal to request a judicial review of the EAPWDR in this regard. For example, the appellant's advocate stated that if the appellant required a wheelchair she would qualify for that while receiving MSO assistance but not the tube feed supplies which does not make any sense. The appellant's advocate states that the ministry really needs to take a good look at the legislation as it is "...woefully lacking when the appellant can't get nutrition re her feeding tube to keep her alive".

The ministry did not provide any further written submissions and relied on the Reconsideration Decision. The ministry representative stated that while she cannot address the appellant's specific issues of whether the legislation is discriminatory or not, the ministry stated that typically when there is a gap in the legislation it usually means that the services are provided elsewhere such as federal supplements, Fair Pharmacare or other community resources.

The ministry stated that they are sympathetic to the appellant's circumstances but as she was not in receipt of a tube feed supplement on the day that she turned 65, as tube feed supplements are not available to her under the life threatening policy, the ministry is not authorized under the EAPWDR to provide the appellant with a tube feed related products supplement.

While the appellant's advocate states that the legislation is discriminatory and unfair, the panel's jurisdiction is limited to a determination of whether the ministry's Reconsideration Decision was reasonably supported by the evidence or was a reasonable application of the legislation in the appellant's circumstances. The panel does not have the jurisdiction to determine whether the legislation is discriminatory towards adults with disabilities over age 65 or unfair. The panel also notes that it does not have the jurisdiction to request a judicial review of the legislation.

The panel makes the following findings of fact:

- 1) The appellant was designated as a persons with disability (PWD) but was transitioned to Medical Services Only ("MSO") status with the ministry in August 2011 when she began receiving pension income from the federal government;
- 2) On September 27, 2012, a Funding Request form for Tube Feed Pump and Supplies Supplement was submitted to the ministry;
- 3) On November 26, 2012, the appellant's dietician submitted a request for tube feeding-related supplies and equipment; and
- 4) The appellant was not required to use a tube feed pump and supplies before she transitioned from PWD to MSO status but the appellant has required the tube feed pump and supplies since December 2012.

## PART F – Reasons for Panel Decision

The issue on the appeal is whether the ministry reasonably concluded that the appellant is not eligible for funding for tube feed-related products as she did not meet the criteria set out in the *Employment and Assistance for Persons with Disability Regulations* (EAPWDR) sections 67, 67.01, 66 and 69, Schedule C sections 2(1)(a) & 2(1)(f), 3-3.12, 6 and 7.

The relevant sections of the EAA as follows:

### (A) Interpretation

**1** (1) In this Act:

**"disability assistance"** means an amount for shelter and support provided under section 5 [*disability assistance and supplements*];

**"person with disabilities"** means a person designated under section 2 [*persons with disabilities*];

The relevant sections of the EAPWDR are as follows:

### General health supplements

**62** (1) Subject to subsections (1.1) and (1.2), the minister may provide any health supplement set out in section 2 [*general health supplements*] or 3 [*medical equipment and devices*] of Schedule C to or for a family unit if the health supplement is provided to or for a person in the family unit who is a recipient of disability assistance.

### 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.

(B.C. Reg. 64/2010)

(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, or

(a.1) a nurse practitioner, or (B.C. Reg. 317/2008)

(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*].

(B.C. Reg. 288/2003)

### **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 center,

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.

(B.C. Reg. 68/2010)

(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). (B.C. Reg. 68/2010)

(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

(B.C. Reg. 317/2008)

(i) surgery,

(ii) a severe injury,

(iii) a serious disease, or

(iv) side effects of medical treatment.

#### **Tube feed nutritional supplement**

**67.01** (1) In this section, "**tube feed nutritional supplement**" means a liquid nutritional product that is fed to a person via a tube to the stomach or intestines of the person and the pumps, tubes, bags and other medical equipment or supplies that are required to feed the nutritional product to the person.

(2) Subject to subsection (3), the minister may provide a tube feed nutritional supplement if the supplement is provided to or for a person in the family unit

(a) who is a recipient of disability assistance under section 2 [*monthly support allowance*], 4 [*monthly shelter allowance*], 6 [*people receiving room and board*], 7 [*people over 65 years of age*], 8 (3) [*persons in special care facility*] or 9 [*people in emergency shelters and transition houses*] of Schedule A,

(b) who is a dependent child of a recipient referred to in paragraph (a),

(c) who has ceased to be eligible for disability assistance, but

(i) on the date the family unit ceased to be eligible for disability assistance

(A) was eligible to receive a health supplement under section 62 (1) (b) (ii) or (c) or as a dependant of a person referred to in section 62 (1) (b) (ii), and

(B) was receiving a tube feed nutritional supplement, and

(ii) whose family unit is receiving premium assistance under the *Medicare Protection Act*,

(c.1) who has ceased to be eligible for disability assistance, but

(i) is eligible to receive a health supplement under section 62 (1) (b) (iii) or (g) or as a dependant of a person referred to in section 62 (1) (b) (iii), and

(ii) was receiving a tube feed nutritional supplement on the date the family unit ceased to be eligible for disability assistance,

(c.2) who has ceased to be eligible for disability assistance but

(i) is eligible to receive a health supplement under section 62 (1) (b) (i), (d.1), (d.3) or (f),

(ii) was receiving a tube feed nutritional supplement on the date the family unit ceased to be eligible for disability assistance, and

(iii) whose family unit is receiving premium assistance under the *Medicare Protection Act*,

(B.C. Reg. 67/2010)

(d) another member of which is receiving assistance under section 8 (2) of Schedule A.

(3) The minister may provide a tube feed nutritional supplement under this section if

(a) a medical practitioner, nurse practitioner or registrant of the College of Dieticians of British Columbia established under the *Health Professions Act* confirms in writing that the person's primary source of nutrition is through tube feeding,

(b) the person is not receiving a supplement under section 66 [*diet supplement*] or 67 [*nutritional supplement*], or a diet, nutritional or tube feed nutritional supplement under section 2 (3) of Schedule C, and

(c) there are no resources available to the person to pay for the tube feed nutritional supplement.

(B.C. Reg. 339/2008)

**Health supplement for persons facing direct and imminent life threatening health need**

**69** The minister may provide to a family unit any health supplement set out in sections 2 (1) (a) and (f) [*general health supplements*] and 3 [*medical equipment and devices*] of Schedule C, if the health supplement is provided to or for a person in the family unit who is otherwise not eligible for the health supplement under this regulation, and if the minister is satisfied that

(a) the person faces a direct and imminent life threatening need and there are no resources available to the person's family unit with which to meet that need,

- (b) the health supplement is necessary to meet that need,
  - (c) the person's family unit is receiving premium assistance under the *Medicare Protection Act*, and
  - (d) the requirements specified in the following provisions of Schedule C, as applicable, are met:
    - (i) paragraph (a) or (f) of section (2) (1);
    - (ii) sections 3 to 3.12, other than paragraph (a) of section 3 (1).
- (B.C. Reg. 61/2010) (B.C. Reg. 197/2012)

### **EAPWDR Schedule C**

#### **General health supplements**

**2 (1)** The following are the health supplements that may be paid for by the minister if provided to a family unit that is eligible under section 62 [*general health supplements*] of this regulation:

(a) medical or surgical supplies that are, at the minister's discretion, either disposable or reusable, if the minister is satisfied that all of the following requirements are met:

(i) the supplies are required for one of the following purposes:

- (A) wound care;
- (B) ongoing bowel care required due to loss of muscle function;
- (C) catheterization;
- (D) incontinence;
- (E) skin parasite care;
- (F) limb circulation care;

(ii) the supplies are

- (A) prescribed by a medical practitioner or nurse practitioner,
- (B) the least expensive supplies appropriate for the purpose, and
- (C) necessary to avoid an imminent and substantial danger to health;

(iii) there are no resources available to the family unit to pay the cost of or obtain the supplies.

(1.1) For the purposes of subsection (1) (a), medical and surgical supplies do not include nutritional supplements, food, vitamins, minerals or prescription medications.

#### **EAPWDR Section 67.01 Tube feed nutritional supplement**

The appellant's position is that tube feeding is her only option and she requires it to live. The appellant required tube feeding previously, had recovered the ability to eat without tube feeding for a period of time, but then had to return to tube feeding after she turned 65. The appellant's position is that if she had required the tube feeding as of the day before she turned 65 she would have qualified for the tube feed for the rest of her life, but as she did not need it until after she turned 65, she is now being penalized for her ability to recover her eating ability before age 65.



The appellant's position is that as the ministry would have covered these costs had the appellant required them before she turned 65 years of age and began receiving federal income supplement, the ministry ought to cover the costs now as there is no other means for the appellant to obtain the necessary feed tube products.

The appellant's advocate also states that as the appellant lives in a home where there are other disabled adults, at least some of whom are receiving disability assistance, the ministry ought to consider that the appellant is a member of a family unit in which another person is receiving assistance under the EAPWDR Schedule A, section 8(2) such that she meets the criteria of EAPWDR section 67.01.

The ministry's position is that as the appellant is not in receipt of disability assistance, is not a member of a family unit in which another person is receiving assistance and was not in receipt of a tube feed nutritional supplement on the date that she ceased to be eligible for disability assistance, the ministry is not authorized to provide the appellant with the tube feed nutritional supplement as she does not meet the legislative criteria of EAPWDR section 67.01.

The ministry's position is that to be a member of a family unit in which another person is receiving disability assistance, that means that the members of the family unit are all on the same ministry file. The ministry states that it is not sufficient to be living in another house where someone else is in receipt of disability assistance.

The panel finds that as the appellant is not in receipt of disability assistance and was not in receipt of tube feed nutritional supplement on the date she ceased to be eligible for disability assistance she does not meet the legislative criteria of EAPWDR section 67.01 to qualify for tube feed supplement. The panel also finds that although the appellant lives in a home where other disabled adults receive disability assistance, the appellant is not a member of a family unit in which another person receives disability assistance as per the EAPWDR legislative criteria of a family unit.

The panel finds that although the appellant requires tube feeding supplement she does not meet the legislative criteria of EAPWDR section 67.01 and the ministry's Reconsideration Decision denying the appellant's request was reasonably supported by the evidence and a reasonable application of the legislation in the appellant's circumstances.

#### **EAPWDR Schedule C, section 2(1)(a) - Medical supply**

The EAPWDR, Schedule C, section 2(1)(a)(i) sets out that the Ministry may provide either disposable or reusable medical or surgical supplies for wound care, ongoing bowel care, catheterization, incontinence, skin parasite care or limb circulation care if the supplies are prescribed by a medical practitioner, the least expensive supplies appropriate for the purpose and necessary to avoid an imminent and substantial danger to health, and there are no resources available to the family unit to pay the cost of or obtain the supplies.

The ministry's position is that the appellant is not eligible for the tube feed-related products as medical supplies as the request does not meet the legislated criteria. In particular, the ministry states that there is no information to establish that the feeding pump, feeding bag, emergency gravity bags

and catheter tip syringes, are required for any of the purposes set out in EAPWDR Schedule C, section 2(1)(a)(i).

The appellant's position is that she requires the tube feeding products to live, that they are prescribed by a dietician, that the tube feeding supplies are far less expensive than having the appellant in hospital or other more expensive care facilities, that the appellant cannot afford the supplies and that the ministry ought to cover the cost of the requested supplies.

The panel finds that there is no information to establish that the feeding pump, feeding bag, emergency gravity bags and catheter tip syringes are required for one of the legislated purposes of the EAWDR Schedule C, section 2(1)(a)(i) (i.e. wound care, ongoing bowel care required due to loss of muscle function, catheterization, incontinence, skin parasite care, or limb circulation care).

Accordingly, the panel finds that the ministry's Reconsideration Decision that the appellant has not met the legislated requirements to have the requested items funded as a medical supply pursuant to the EAPWDR Schedule C, section 2(1)(a)(i) was reasonable.

#### **EAPWDR Section 69 – Life-threatening health need**

The ministry was satisfied that the appellant faces a direct and imminent life-threatening health need for the requested products and that there are no resources available to meet that need. However, the ministry's position is that EAPWDR section 69 applies to the health supplements set out under the EAPWDR Schedule C, section 2(1)(a) (*medical supplies*), (f) (*medical transportation*) and section 3 (*medical equipment and devices*), but as the requested products are not medical supplies under the EAPWDR Schedule C, section 2(1)(a), (f) or section 3, the ministry is not authorized to provide funding for the requested products.

The appellant's position is that she faces a life threatening health condition as she can no longer eat sufficient nutrition orally due to her impaired oral tract, as she aspirates food and fluid into her lungs, causing life threatening pneumonia. The appellant has had a tube feed pump donated by a family and she has received some donations from a company and another family for some tube feed formula but she is going to run out of the formula soon and will not have enough money to purchase enough to cover her monthly needs.

The panel finds that the appellant's request does not meet the criteria for medical supplies pursuant to EAPWDR Schedule C, section 2(1)(a) in that they are not required for one of the prescribed purposes of wound care, ongoing bowel care required due to loss of muscle function, incontinence, skin parasite care, or limb circulation care. The tube feed products are not required for medical transportation so the request does not meet the criteria for EAPWDR Schedule C, section 2(1)(f).

Schedule C, section 3.1 to 3.12 lists various medical equipment and devices such as canes, crutches, walker, wheelchairs, wheelchair heating systems, scooters, bathing and toileting aids, hospital bed, pressure relief mattresses, floor or ceiling lift devices, positive airway pressure devices, orthoses, hearing instruments and diet supplements, but as the appellant's request for tube feeding supplies is not one of the listed medical equipment and devices the panel finds that the ministry's Reconsideration Decision that the ministry was not authorized to approve the appellant's request for funding under the legislative criteria was a reasonable application of the legislation in the appellant's circumstances.

**EAPWDR Sections 66, 67 and 67(3) - Other Nutritional Supplements**

The ministry's position is that they considered the appellant's requested under EAPWDR section 66 (diet supplements), section 67 (monthly nutritional supplement) and section 67(3) (short term nutritional supplement), but as the appellant is not a recipient of disability assistance she is not eligible to receive supplements under these sections of the EAPWDR.

The appellant's position is that she requires the requested items to live and that it would be far more economical for the ministry to fund the requested items than the costs associated with more extensive care facilities or hospitalization that will become necessary if the appellant does not obtain the tube feed supplies she requires.

The panel finds that as EAPWDR sections 66, 67 and 67(3) only authorize the ministry to provide the requested nutritional supplements to an applicant who is in receipt of disability assistance. As the appellant is not in receipt of disability assistance, the ministry's Reconsideration Decision denying the appellant's request for funding for the tube feed supplies was a reasonable application of the legislation in the appellant's circumstances.

EAPWDR section 66(1)(b) provides that the ministry may provide a diet supplement for a special diet described in section 6 of Schedule C and that Schedule C, section 6(1)(f) provides an allowance of \$40 per month for a person who has dysphagia. As the appellant has been diagnosed with dysphagia it may appear that the appellant is eligible for a monthly allowance of \$40 as per EAPWDR section 66(1)(b). However, as with all the legislative requirements for EAPWDR sections 66, 67 and 67(3), an applicant must be in receipt of disability assistance in order to qualify for any of the nutritional supplements and as the appellant is in receipt of MSO only, she does not meet the legislative criteria of EAPWDR section 66, 67 and 67(3).

**Conclusion:**

In conclusion, the panel finds that the ministry's Reconsideration Decision was reasonably supported by the evidence and was a reasonable application of the legislation in the appellant's circumstances and confirms the Reconsideration Decision.