

PART C – Decision under Appeal

The decision under appeal is the reconsideration decision of the Ministry of Social Development (the ministry) dated 25 March 2013 which denied the appellant's request for a monthly nutritional supplement (MNS) for nutritional items. The ministry held that 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 appellant's application had also requested a monthly nutritional supplement for vitamins and minerals, and the ministry had approved that request.

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 23 January 2013, completed by the appellant's medical practitioner (physician).
2. Attached to the appellant's application, several medical reports relating to hospital stays by the appellant in late 2011 and early 2012.
3. The appellant's Request for Reconsideration, dated 05 March 2013, attached to which were a submission from the appellant's advocate, that went to argument, and a letter from the appellant's physician dated 27 February 2013.

In the MNS Application, the physician reports:

- The appellant's severe medical conditions are diagnosed as psoriatic arthritis and rheumatoid arthritis. Description: severe involvement of knee and limited mobility.
- As a result of these conditions, the appellant is being treated for a chronic, progressive deterioration of health, with the explanation: "Reduced ROM of both knees with associated pain & swelling. Ambulation is a big problem. Has been on many different medications and currently has Rx which impact his immune status. Multiple admissions to hospital."
- As a result of the chronic, progressive deterioration of health, the appellant is displaying 2 of the listed symptoms, namely significant muscle mass loss (physician's comment: because of wheelchair use/lack of use – knee & leg breakdown from arthritis) and moderate to severe immune suppression (physician's comment: due to medications needed for arthritis).
- The appellant's height and weight are 5'10" and 385 lbs.
- Additional nutritional items required are specified as "calcium rich foods which [have] low fat & low glycemic index."
- The physician answers "No" to the question "Does this applicant have a medical condition that results in the inability to absorb sufficient calories to satisfy daily requirements through a regular dietary intake?"
- How the nutritional items will alleviate one or more of the listed symptoms and provide caloric supplementation to the regular diet is described as: "Improve bone strength & muscle strength. Reduce some of the inflammation associated with joints and muscles."
- How the nutritional items will prevent imminent danger to life is described as: "By improving overall strength this will reduce the significant risk of falls."
- Additional comments: "Morbid obesity impacts the inflammatory arthritis of the affected joints especially the knees."

In his letter attached to the Request for Reconsideration, the physician writes:

"This is to confirm that [the appellant] has severe psoriatic arthritis which severely impacts his mobility (he usually requires a motorized wheelchair) particularly as both knees are

affected. [The appellant] also suffers from morbid obesity which impacts upon the inflammatory arthritis of the affected joints especially the knees. As treatment for his inflammatory arthritis the appellant has been placed upon medications which significantly impact his immune system making him more susceptible to multiple infections. His immobility has increased his risk for softening and weakening of the bones and as well results in further muscle weakness and deconditioning.

Consequently [the appellant] requires additional supplements and foods which will help immensely in reducing the three major symptoms associated with inflammation, bone weakness and muscle weakness which have occurred as a direct result of his severe inflammatory arthritis and morbid obesity. In other words the symptoms requiring improved nutrition are a direct result of his chronic, progressive deterioration of his health. The supplements and improved nutritional requirements are medically essential and will help reduce the risks placed upon him by the loss of muscle mass and strength as well as improve his immune status which is been seriously compromised by the medications he is required to take for his medical conditions.

They will certainly reduce the imminent risk for [the appellant] of falls and the resulting risk for fractures and other injuries.”

The appellant's Notice of Appeal was dated 17 April 2013. There was a mix-up in the documentation submitted by the appellant, and the substance of the Reasons for Appeal related to another appeal.

At the hearing, the appellant's advocate read from the Notice of Appeal meant for this appeal:

“I disagree with the decision because my physician has confirmed the supplement is for two of the symptoms listed under sec (1.1)(b). Also he confirmed that it will result in imminent danger (risk) to my life without having the supplement.”

At the hearing, the appellant and his advocate reviewed how the MNS request for nutritional items met the legislative criteria. (Their argument is summarized in Part F below.) In support of his argument, the appellant stated that where he lived has a concrete floor, so if he fell and hit his head, the outcome could be fatal. Recently, he has had 3 falls, all of which resulted in hospitalization. He reviewed what constituted a low glycemic diet – including fruits, vegetables and whole grain breads, describing how these are more expensive than he can afford on an ongoing basis on regular disability assistance. He stated that when he has been able to be on a low glycemic diet for even a couple of weeks, he feels much better and steadier on his feet, but he can't afford such a diet for long.

The ministry presented a written submission summarizing the reconsideration decision. The panel accepted this submission as argument.

The panel finds the testimony of the appellant at the hearing is in support of the information that was before the ministry at reconsideration, as it clarifies some of the appellant background related to his 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): he is being treated for a chronic, progressive deterioration of health on account of a severe medical condition, specifically psoriatic arthritis and rheumatoid arthritis.; and a medical practitioner has confirmed that he is displaying the symptoms of significant muscle mass loss and moderate to severe immune suppression.

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 for 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?

In the reconsideration decision, the ministry noted that in describing how the nutritional items requested would alleviate one or more of the symptoms, the physician wrote that the items will improve bone and muscle strength and reduce some of the inflammation of joints and muscles. On careful reading of the reconsideration decision, it appears to the panel that the ministry did not dispute, and at the hearing the ministry acknowledged, 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 he is displaying the symptoms of malnutrition, underweight status, or significant weight loss, which would demonstrate that he requires caloric supplementation to a regular dietary intake. The height and weight recorded in her application indicates that his BMI falls above the

normal range. Noting that that the physician recommends a diet of calcium rich foods and low fat and low glycemic index foods, the ministry takes the position that these involve appropriate food choices within his regular dietary intake rather than caloric supplementation to his dietary intake.

The position of the appellant is that his physician has confirmed that he is suffering from a severe medical condition which is causing a chronic, progressive deterioration of health and as a result is displaying 2 of the symptoms listed the legislation, namely significant muscle mass loss and moderate to severe immune suppression. He refers to the letter from his physician, which states that he requires additional supplements and foods which will help immensely in reducing inflammation, bone weakness and muscle weakness which have occurred as a direct result of his severe inflammatory arthritis and morbid obesity. The physician also wrote that the supplements and improved nutritional requirements are medically essential and will help reduce the risks placed upon him by the loss of muscle mass and strength as well as improved his immune status compromised by the medications he is required to take for his medical conditions.

The appellant argues that without the \$165 MNS supplement he would be unable to afford the low glycemic index foods (such as fruit, vegetables and less refined products) that are essential to his diet. Higher glycemic index foods, which are generally less expensive, tend to aggravate the debilitating effects of his medications. He acknowledges that the recommended diet would not lead to "caloric supplementation," but his physician has confirmed that the recommended diet is "medically essential" and as he meets the "chronic, progressive deterioration of health" and "symptoms" criteria, it is unreasonable for the ministry to deny him the supplement on the basis of the "caloric supplementation" technicality.

The panel notes that the legislation restricts the MNS supplement for nutritional items to only those items that are part of a caloric supplementation to a regular dietary intake. The legislation is not more open-ended, such as if it read "items that are medically essential to meet the dietary requirements of a person displaying the prescribed symptoms," or language to that effect, under which the appellant's request might qualify. The panel notes that there is no provision in the legislation that would give the minister the discretion to make exceptions or to approve the supplement under special or unique circumstances for nutritional items that did not meet the "caloric supplementation" criterion. The panel finds that the requested nutritional items are for a diet that would replace "not so good" calories with "better" calories and that the ministry reasonably determined that as there was no caloric supplementation involved, this combined criterion had not been met.

Failure to obtain the items will result in imminent danger to life.

The ministry noted that the appellant's physician had written that the requested nutritional items "will certainly reduce the imminent risk for [the appellant] of falls and the resulting risk for fractures and other injuries." The position of the ministry is that while the physician's dietary recommendations would be beneficial to the appellant's health, the information provided does not demonstrate that failure to obtain the nutritional items requested would result in imminent danger to the appellant's life.

The position of the appellant is that his physician has confirmed that the requested nutritional items "will certainly reduce the imminent risk for [the appellant] of falls and the resulting risk for fractures and other injuries." Indeed, he has had 3 falls recently, all of which resulted in hospitalization. He lives in a place with a concrete floor and next time he falls he could hit his head, potentially causing death.

He submits that the evidence provided in the letter from his physician demonstrates that this criterion has been met.

While the appellant has presented compelling evidence and argument that the MNS supplement for a high calcium and low-fat, high glycemic diet would reduce the imminent danger to the appellant's life from falls caused by his severe medical condition, the panel notes that the "imminent danger to life" criterion does not relate to the failure to provide the items requested in the application, but to failure to provide the nutritional items specified in the legislation, namely those that are part of a caloric supplementation to a regular dietary intake. As the panel has found that the ministry reasonably determined that the requested items did not meet the "caloric supplementation" criterion, the panel finds that the ministry reasonably determined that this "imminent danger to life" criterion had also 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.