

APPEAL #

### PART C – Decision under Appeal

The appellant appeals the reconsideration decision of the Ministry of Social Development (Ministry) dated June 11, 2013, which denied her request for Monthly Nutritional Supplement ("MNS") for nutritional items on the basis that she did not meet the criteria set out in the *Employment and Assistance for Persons with Disabilities Regulation* (EAPWDR) section 67(1.1) and Schedule C, section 7(a). The Ministry determined that the appellant's medical practitioner did not confirm that as a result of her chronic, progressive deterioration of health (the appellant has Multiple Sclerosis – MS), she is displaying two or more of the symptoms set out in subs. 67(1.1)(b). The Ministry further determined that the appellant did not require the 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 an imminent danger to her life, as required under subsection 7(a) of Schedule C and subs. 67(1.1)(d) of the EAPWDR.

### PART D – Relevant Legislation

*Employment and Assistance for Persons with Disabilities Regulation* (EAPWDR) section 67 and Schedule C – Health Supplements, s. 7.

## PART E – Summary of Facts

At the reconsideration, the Ministry had its MNS decision summary dated April 29, 2013, the appellant's application for MNS signed by the appellant on November 22, 2012, with the portion completed by the appellant's physician (her neurologist) dated February 18, 2013, described below, as well as the appellant's written submissions on reconsideration.

On the first page of the MNS application form, the appellant's physician indicated that the appellant's severe medical condition (question #1) is multiple sclerosis ("MS"), which the appellant's physician described as "a chronic neurological disease without a known cure." In response to question #2, "As a direct result of the severe medical condition(s) ... is the applicant being treated for a chronic, progressive deterioration of health? If so, please provide details ...", the appellant's physician wrote, "Yes she is receiving a disease modifying drug (DMD) in an attempt to decrease number of relapses and slow progression."

On page 2 of the MNS form, in response to question #3 ("As a direct result of the chronic, progressive deterioration of health noted above, does the applicant display two or more of the following symptoms?"), the appellant's physician indicated that the appellant displayed the symptoms of underweight status and significant neurological degeneration – the appellant's physician did not check any of the other listed symptoms. In response to question #4, the appellant's physician provided the appellant's height and weight (5'4" and 130 lbs). The appellant's physician wrote "N/A" in response to question 5 regarding vitamin or mineral supplementation – the reconsideration decision notes that the appellant already receives the vitamin/mineral supplement.

In response to question 6 of the MNS form, which has 2 bullets on page 2 and 2 bullets on page 3, the additional nutritional items indicated are, "fresh meats, chicken, fish, vegetables, "Ensure", foods with no salt, soya milk, almond milk and unsalted nuts." In response to the second bullet 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? If yes, please describe", the answer is that the nutritional items "... will help with [illegible] kidney, [illegible] loss of weight – it has been 60 pounds already." The panel notes that the handwriting in the responses to the first 2 bulleted questions of MNS form question #6 is different from the handwriting in the rest of the answers completed by the appellant's physician.

On the third page of the MNS form, question #6 cont'd, in response to the question, "Describe how the nutritional items required will alleviate one or more of the symptoms specified in question 3 and provide caloric supplementation to the regular diet" (bullet 1), the appellant's physician wrote, "will improve her underweight status and improve general level of health - expect this will improve neurological functioning". In response to the second bulleted question, "Describe how the nutritional items requested will prevent imminent danger to the applicant's life", the appellant's physician wrote, "will improve her general level of health and nutrition – reflect in neurological functioning."

In her written submission on reconsideration, the appellant wrote that the medication she is taking "has affected my kidneys and liver which blood tests can prove." She wrote that she had lost 60 pounds in the last 2 years and she has lost muscle mass. She said that her eyesight has been greatly affected. She wrote that she felt that other items on the MNS form should have been checked, indicating that her physician should have checked the following, with her explanation: "underweight status" - "I am not underweight but have lost 60 lbs and muscle mass"; "sufficient muscle mass loss" - "I cannot even open my pill bottles, on many occasions I need to have someone open an energy drink for me"; "moderate to severe immune suppression" – "my immune system has been compromised greatly. I have 2 new [lesions] on my spinal cord as indicated in a recent MRI"; and "significant deterioration of a vital organ" – "MRI shows where the [lesions] are, it has affected my kidneys and bowels ... [the drug] can affect my liver."

Prior to the hearing, the appellant submitted additional information in two faxed bundles:

- Bundle #1 – 36 pages, including a copy of the notice of hearing from the tribunal, an 8-page printout from the internet site of the Public Health Agency of Canada “Immunization Schedules” (2 copies) and a copy of an 8-page pamphlet about the drug “Gilenya” produced by the pharmaceutical company (2 copies); and
- Bundle #2 – 2 pages, a fax cover sheet and an attached letter from the appellant’s neurologist (the same physician who completed the MNS form) dated June 26, 2013, in which the appellant’s neurologist has written, “Because of the severity of the patient’s MS, application has been made to change her from her current disease modifying drug to Gilenya. This is an immunosuppressant. Her second criteria [on the MNS form] would then be “moderate to severe immune suppression.”

The appellant told the panel that her physician will be switching her current medication to the drug, Gilenya, in the very near future and that this will affect her immune system, but she has not started taking Gilenya. She told the panel her neurologist provided the information about Gilenya to her and that she provided the information about immunizations to the panel as she wanted to show the panel that she won’t be able to be immunized for certain diseases once she is taking Gilenya.

The Ministry representative advised the panel that she had not had the opportunity to review the information in Bundle #1, and could not confirm the information in Bundle #1 as it was medical information. The Ministry did not oppose the admission of the additional information in Bundle #1, but told the panel that she did not think it was relevant. The Ministry did not oppose the admission of the physician’s letter in Bundle #2, which the Ministry representative had reviewed, but she submitted to the panel that it contained information that was not before the Minister when the decision to deny the appellant’s request for MNS was made.

The panel notes the appellant’s evidence that she is not yet taking the drug Gilenya, but that she expects to be on this drug in the near future. The appellant’s neurologist indicates in the letter in Bundle #2 that an application to switch the appellant’s medication has been made, and that the new drug, Gilenya, an immunosuppressant “would” then affect her immune system, once she is taking the drug. The information contained in the additional documents, Bundles #1 and #2, was not before the minister when the decision being appealed was made, it was not in support of the information and records before the minister when the decision being appealed was made, and further, is not relevant as the appellant has yet to take the drug referred to in the materials. Accordingly, the panel does not admit the additional evidence as it does not meet the requirements set out in subsections 22(4)(a) and (b) of the *Employment and Assistance Act*.

The appellant is a person with disabilities in receipt of disability assistance. The appellant receives the monthly vitamin/mineral supplement. At the hearing, the appellant repeated many of the submissions contained in her submissions on reconsideration. She referred to lesions on her liver and spine and that this was confirmed in an MRI. The panel notes that there is no MRI report in the materials and the appellant did not produce an MRI report at the hearing to confirm this information. The appellant told the panel she needs to eat fresh, organic, or “clean” “raw” foods to maintain her health and cannot eat processed foods. The appellant told the panel she used to be overweight, and she attributes her weight loss of 60 pounds over the past 2 years to changing her diet, coupled with not being able to eat as much when she is suffering an MS attack – she told the panel when her MS is severe, she cannot feed herself as she lacks strength.

## PART F – Reasons for Panel Decision

The issue on this appeal is whether the Ministry's decision to deny the appellant's request for the MNS on the following bases is reasonably supported by the evidence: 1) that the appellant's medical practitioner did not confirm that as a result of her chronic, progressive deterioration of health on account of a severe medical condition (her MS) she displays two or more of the symptoms set out in subs. 67(1.1)(b); and 2) that the appellant's medical practitioner did not confirm that the appellant requires the requested additional nutritional items to as part of a caloric supplementation to a regular dietary intake, as set out in s. 7(a) of Schedule C, and to prevent imminent danger to life, as required by subs. 67(1.1)(d).

### Legislation

#### EAPWDR

### 67. Nutritional Supplement

- (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.

....

## Schedule C – Health Supplements

### 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
- (c) For vitamins and minerals, up to \$40 each month.

The appellant told the panel she disagrees with the Ministry's decision to deny her request for MNS and she referred to a friend of hers who she feels is less disabled than she is, but who receives the MNS. The appellant says she needs to eat very healthy, organic foods – that she cannot eat processed foods – in order to keep herself healthy and to alleviate the symptoms of her MS. The appellant told the panel that when she begins taking the new drug, Gilenya, it will affect her heart and she must be monitored at a health care centre while the drug is administered. She says that this will affect her immune system further and that because her immune system is already affected – as demonstrated by the lesions she says she has on her liver and spine – the Ministry should not deny her the MNS on the basis that she does not display two or more of the symptoms listed in the legislation. The appellant says that when she is having a severe MS attack, she cannot get out of bed, she cannot feed herself, and that if she doesn't have the food she requests, this will result in imminent danger to her health as she will not be able to eat, she will starve herself.

The Ministry says that the decision to deny the appellant's request for MNS is made on an individual basis (the Ministry cannot comment about the appellant's friend who receives the MNS) and is made according to the information available to the Ministry at the time it makes the decision. The Ministry pointed to the appellant's MNS form, acknowledging that the appellant displays the symptom of neurological degeneration, but that her physician did not check the other categories she alleges should be checked in her submissions, and that her height and weight do not put her in an underweight category. The Ministry says that a weight loss of 60 pounds over 2 years is not significant, but is gradual and does not show she is underweight. The Ministry also pointed to the MNS form and said that the appellant's physician did not indicate that she requires MNS to supplement caloric intake, and that her physician did not indicate that failure to receive MNS will result in imminent danger to her health.

### Analysis

Under subs. 67(1)(c) of the *EAPWDR*, in order to qualify for the MNS, the appellant's medical practitioner must confirm that the appellant meets *all* of the requirements set out in subs. 67(1.1)(a) through (d). Under s. 7(a) of Schedule C of the *EAPWDR*, additional nutritional items may be provided if they "are part of a caloric supplementation to a regular dietary intake." The Ministry determined that the appellant's physician confirmed that she is being treated by him for MS, a chronic, progressive deterioration of health on account of a severe medical condition, meeting the criterion set out in subs. 67(1.1)(a).

The panel finds that the Ministry's determination that the appellant's medical practitioner did not confirm that she displays 2 or more of the listed symptoms as a result of her MS is reasonable based on the evidence. The panel notes that on the MNS form, the appellant's physician indicated that the appellant is underweight and suffers significant neurological degeneration, but did not check any of the other boxes. The panel finds that

the Ministry's determination that the appellant is not underweight based on the indicated height and weight (5'4" and 130 pounds) in the MNS form is reasonable. The appellant's physician's reference to the appellant's suppressed immune system was not before the minister at the time the decision was made and, further, is in reference to the effect of a drug the appellant has yet to take. Accordingly, the panel finds that the Ministry's determination that the appellant's physician had not confirmed that as a result of her MS, she displays two or more of the symptoms listed in subs. 67(1.1)(b) is reasonable based on the evidence.

*Additional Nutritional Items*

The panel finds that the Ministry's determination that the appellant's physician had not indicated that the appellant requires the requested MNS to provide caloric intake to supplement her regular diet is reasonable based on the evidence. The appellant told the panel that she will take "Ensure" as a meal replacement when her MS flares up and she is unable to prepare or eat a regular meal. In the MNS form, the appellant's physician wrote in response to the request to describe how the requested MNS will alleviate the appellant's listed symptoms and provide caloric supplementation to her regular diet, "will improve her underweight status and improve general level of health - expect this will improve neurological functioning." However, the panel notes that the appellant's physician made no reference to how the requested MNS will provide caloric supplementation to her regular diet, as required by subs. 67(1.1)(c) and section 7(a) of Schedule C.

The panel further finds that the Ministry's determination that the appellant's physician has not confirmed that failure to receive the requested MNS will result in imminent danger to her health is reasonable based on the evidence. In the appellant's physician's response to the question, "Describe how the nutritional items requested will prevent imminent danger to the applicant's life", he wrote, "will improve her general level of health and nutrition - reflect in neurological functioning." The panel finds that the Ministry's determination that this evidence does not confirm the requirement of subs. 67(1.1)(d) is reasonable.

Accordingly, the panel confirms the Ministry's decision to deny the appellant's request for MNS.