

## PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (ministry) reconsideration decision dated July 16, 2013 which denied the appellant's request for a Monthly Nutritional Supplement for additional nutritional items. The ministry held 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:

-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.

## PART D – Relevant Legislation

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

## 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 April 15, 2013 signed by a medical practitioner and which states in part that the appellant's severe medical conditions are "seizure disorder (multiple seizures), brain injury (confirmed on MRI), and bi-polar (severe cognitive impairment)." The appellant is being treated for a chronic, progressive deterioration of health, specifically "...severe cognitive impairment causes poor nutrition."
  - 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 medical practitioner indicated the symptoms of significant neurological degeneration and significant deterioration of a vital organ (brain);
  - the appellant's height and weight are recorded;
  - in response to a request to specify the additional nutritional items required, the medical practitioner indicated "...Boost, Ensure, 'Life to Go', Carnation breakfast shake";
  - 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 medical practitioner wrote "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 medical practitioner noted "...brain deterioration would be worse without regular caloric supplementation";
  - in response to a request to describe how the nutritional items requested will prevent imminent danger to the appellant's life, the medical practitioner indicated "...by maintaining brain function and preventing further seizures and avoiding seizures due to hypoglycemia;"
  - for additional comments, the medical practitioner wrote: "...she has limited insight into her deterioration;"
- 2) Undated information letter from the advocate to the medical practitioner;
- 3) Visit Record for June 27, 2013 which states the reasons for the appellant's visit with the same physician who prepared the MNS application are a seizure disorder and difficulty eating after seizures. The appellant is a long-term epileptic and she describes between one and four epileptic seizures per month. After a seizure she is unable to eat solid food for 2 or 3 days. She can only take nutrition as a drink. This involves high calorie shakes and protein shakes. The assessment is that the appellant has a chronic condition which causes difficulty with ensuring adequate calorie intake on an unpredictable but ongoing basis; and,
- 4) Request for Reconsideration- Reasons dated July 8, 2013, prepared by the appellant's advocate.

Prior to the hearing, the appellant provided the following documents:

- 1) Written submission by an advocate and a print out of a page of "Epilepsy Facts" from Epilepsy Canada that includes highlighted statements that events that may trigger seizures include poor nutrition and skipping meals;
- 2) Nutritionist Assessment Form dated July 22, 2013 and completed by a registered dietician, which states in part that the appellant has a diagnosis of severe epilepsy and the recommendation is for Boost Plus Calories, 3 bottles a day ongoing. The reasons for the supplementation are stated as "...unable to consume adequate protein and calories to meet minimal nutritional requirements and stop continuing weight loss and malnutrition and muscle wasting. In response to the question whether the appellant can obtain adequate and sufficient nutrition through conventional food sources, it is stated that "weight loss of 20 lbs. past 6 months; significant effects on nutritional intake post epileptic seizure. Only tolerates liquid and soft foods"; and,
- 3) Request for Reconsideration- Reasons dated July 24, 2013.

The ministry did not object to the admissibility of the additional documents. The panel admitted the Epilepsy Facts page and the Nutritionist Assessment, pursuant to Section 22(4) of the Employment and Assistance Act, as providing further detail relating to the appellant's medical condition and being in support of information and records that were before the ministry on reconsideration. The panel assigned little weight to the information in the Nutritionist Assessment that was not confirmed by the medical practitioner as the Assessment was completed by a registered dietician who is not a medical or nurse practitioner. The written submission by the

appellant's advocate and the Request for Reconsideration were considered as argument.

In her Notice of Appeal, the appellant wrote that she disagrees with the ministry's reconsideration decision and believes that the ministry made a mistake in the decision to grant only the vitamin and mineral supplement and denying the nutrition supplement due to neurological brain disorder and auto-immune disorder too. In the Request for Reconsideration dated July 24, 2013, the appellant wrote that her request meets the legislative criteria and she also included (information from) another professional dietician at the hospital who agrees with the appellant's physician. The appellant wrote that she believes that her brain is a vital organ to recognize, to prevent more brain deterioration in regard to a lifetime disease called epilepsy and prevent imminent danger to her life.

In the Request for Reconsideration dated July 8, 2013 and prepared by an advocate on behalf of the appellant, the advocate wrote in part that the supporting note from the appellant's physician dated June 27, 2013 provides an assessment that the appellant has a chronic condition which causes difficulty with ensuring adequate calorie intake on an unpredictable but ongoing basis.

At the hearing, the advocate reviewed her written submission and stated that the dictionary definition of "supplement" is something added to complete a thing or make up for a deficiency. The advocate stated that the ministry's interpretation for a monthly nutritional "supplement" to be extra calories is not accurate. The advocate stated that the ministry policy sets out the purpose of the nutritional supplement as being for a recipient with Persons With Disabilities (PWD) designation who have a severe medical condition with symptoms of wasting. This supplement is intended to prevent imminent danger to the person's life by providing essential, specified items to supplement, or complete, regular nutritional needs. The advocate stated that the ministry's policy does not say that these supplements must be extra calories. The advocate stated that the EAPWDR does not indicate that these supplements must be to provide extra calories. The advocate stated that although a section of the MNS application appears to be in different handwriting from the rest, it is the physician's handwriting, and the comments have been initialed.

The appellant stated that she cannot eat anything and she cannot absorb calories when she is not taking anything into her body. The appellant stated that her doctor has said she has a brain injury and there is an imminent danger to her life. Epilepsy is a lifetime disorder and her seizures are ongoing and even though she takes three different drugs, she still has a variety of seizures. The appellant stated that she usually has the grand mal seizures when she is sleeping. There is a longer period of time to recover from a grand mal seizure. The appellant stated that she cannot be precise on the number of seizures that she has per month because many of them occur while she is sleeping. She lives alone and cannot be exact. Epilepsy is a complex disorder with four different types of seizures, including grand mal and "sleep-walking". The appellant stated that with the sleep-walking seizure she has woken up on the balcony and in her parking garage and another time she had put a piece of clothing into the microwave. The appellant stated that if she had turned the microwave on during her seizure she may have started a fire.

The appellant stated that her objective is to put off seizures by drinking the items requested. She is trying to be healthy and to take action to stand proud. The appellant stated that she believes she was granted PWD status in 2008 but she had been denied several times. The appellant stated that the seizures have now caused brain damage and her memory is not very good so she would have to check her records to be accurate about a date. The appellant said she does not remember getting a letter from the ministry outlining the benefits to which she would be entitled as a PWD.

The ministry relied on its reconsideration decision which included evidence that the appellant is a Person With Disabilities (PWD) in receipt of disability assistance. On May 10, 2013 the appellant submitted an application for the MNS, for additional nutritional items. The appellant is currently in receipt of the MNS for vitamins/minerals. At the hearing, the ministry stated that when the appellant was granted PWD status, she would have been sent a letter outlining the benefits available to her under the legislation.

## 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, 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.

### *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 symptom of a chronic, progressive

deterioration of health. The ministry argued that the medical practitioner notes that the appellant does not have a medical condition that results in the inability to absorb sufficient calories to satisfy daily requirements through a regular dietary intake. At the hearing, the ministry clarified that the additional nutritional items are meant to alleviate symptoms of wasting in particular, such as malnutrition or significant weight or muscle mass loss, caused by such medical conditions as cancer, Crohn's disease, or Hepatitis C. The ministry argued that the medical practitioner reports, with regards to alleviating the appellant's symptoms of her chronic, 'progressive deterioration of health that "...brain deterioration would be worse without regular caloric supplementation." The ministry argued that although the medical practitioner states that the appellant needs 'caloric supplementation', the medical practitioner reports that the appellant is "unable to eat solid food for 2 or 3 days" and she can "only take nutrition as a drink" and this does not show that the appellant requires extra calories over and above those found in her regular diet. The ministry argued that, rather, the information demonstrates that the appellant needs to have a liquid only diet on a periodic basis to meet her regular dietary requirements and the purpose of the MNS of additional nutritional items is to provide calories over and above a regular dietary 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 a symptom of a chronic, progressive deterioration of health, namely the symptoms of significant neurological degeneration and significant deterioration of a vital organ (brain). The advocate argued that the dictionary definition of "supplement" is 'something added to complete a thing or make up for a deficiency.' The advocate argued that neither the ministry's policy nor the EAPWDR indicates that these supplements must be "extra calories." The advocate argued that the ministry's interpretation for a monthly nutritional "supplement" to be extra calories is not an accurate interpretation of the legislation. The advocate argued that the ministry policy sets out the purpose of the nutritional supplement as being for a recipient with PWD designation who have a severe medical condition with symptoms of wasting. The appellant argued that this supplement is intended to prevent imminent danger to the person's life by providing essential, specified items to supplement, or to complete, regular nutritional needs. The advocate pointed to the "Epilepsy Facts" page that indicates that poor nutrition and skipping meals are events that may trigger seizures.

#### *Panel decision*

Section 67(1.1) 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 part of a caloric supplementation to a regular dietary intake. The advocate argued that the EAPWDR does not indicate that the additional nutritional items must be "extra calories" and that, rather, "supplement" means 'something added to complete a thing or make up for a deficiency' and not something extra. However, the panel finds that the ministry reasonably interpreted the legislation according to the ordinary meaning of the wording used. Section 7 of Schedule C specifies that "additional" nutritional items must be part of a caloric "supplementation," meaning 'an extra element,' to a regular dietary intake. Section 67(1.1) together with Section 7 of Schedule C stipulates that additional nutritional items are designed to be part of a supplement of calories beyond those foods already being consumed in the regular diet.

When asked in the MNS application whether the appellant has a medical condition that results in the inability to absorb sufficient calories to satisfy her daily requirements through a regular dietary intake, the medical practitioner wrote "NO." The panel finds that the medical practitioner provided a definitive answer that the appellant is able to absorb sufficient calories to satisfy daily requirements through a regular dietary intake and, therefore, does not require supplementation, or extra, calories to a regular diet. Rather, the evidence of the medical practitioner is that the appellant requires regular, consistent nutrition through a regular dietary intake to alleviate her symptoms. In the Visit Record for June 27, 2013 the medical practitioner indicated that the appellant describes between one and four epileptic seizures per month and after a seizure she is unable to eat solid food for 2 or 3 days and can only take nutrition as a drink such as high calorie shakes and protein shakes. The assessment of the medical practitioner in the Visit Record is that the appellant has a chronic condition which causes difficulty with ensuring adequate calorie intake on an unpredictable but ongoing basis

as a result of her inability to eat solid food for a few days after a seizure.

The panel finds that the evidence demonstrates the appellant experiences interruptions in her regular dietary intake for a period of time after she has a seizure and that she requires a substitution for solid food through a dietary intake in liquid form for a few days. As the advocate pointed out, skipping meals and poor nutrition, or ingesting less than a regular dietary intake, may trigger seizures according to Epilepsy Canada. The panel finds that the ministry reasonably concluded that there is not sufficient information from the medical practitioner to confirm that additional nutritional items are required 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.

#### *Imminent Danger to Life*

The ministry's position is that it is not satisfied that the appellant requires additional nutritional items to prevent an imminent danger to the appellant's life. At the hearing, the ministry argued that the word "imminent" means "immediate" and that there was no evidence that if the appellant does not obtain the extra calories her life will be in danger right now, or immediately.

The appellant's position is that the information from the medical practitioner confirms that failure to obtain additional nutritional items will result in imminent danger to the appellant's life. The advocate argued that the medical practitioner confirmed in the MNS application that the nutritional items will prevent imminent danger to the appellant's life "...by maintaining brain function and preventing further seizures and avoiding seizures due to hypoglycemia." The appellant argued that epilepsy is a complex disorder with four different types of seizures, including "sleep-walking" seizures, which have resulted in the appellant waking up in dangerous places and situations. The appellant argued that the seizures have now caused brain damage and her memory is poor.

#### *Panel decision*

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. The majority view of the panel is that when asked in the MNS application to describe how the nutritional items requested will prevent imminent danger to the appellant's life, the medical practitioner wrote "...by maintaining brain function and preventing further seizures and avoiding seizures due to hypoglycemia" and the ministry was reasonable in concluding there is insufficient evidence to show that failure to obtain the additional nutritional items will result in imminent danger to the appellant's life. While the medical practitioner indicated that the nutritional items will either prevent or avoid further seizures, the medical practitioner did not report that the appellant's seizures are life threatening. Also, although the medical practitioner stated that "brain deterioration would be worse" without the named nutritional items, there is no indication from the medical practitioner that there has been a deterioration of the appellant's brain to the point that if it gets worse her life will be in imminent danger. The panel previously found that the ministry reasonably concluded that the appellant does not require caloric supplementation to a regular dietary intake to alleviate her symptoms but that the appellant requires a regular dietary intake to alleviate her symptoms. The majority view of the panel is that the ministry reasonably interpreted the use of the word "imminent" in the Section 67(1.1)(d) to refer to an immediacy such that the danger to life is likely to happen soon and 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.

The dissenting view of the panel is that the ministry was unreasonable in concluding that there is insufficient evidence to show that failure to obtain the additional nutritional items will result in imminent danger to the appellant's life. The dissenting view is that when the response of the medical practitioner to the question how the nutritional items will prevent imminent danger to the appellant's life, specifically "...by maintaining brain function and preventing further seizures and avoiding seizures due to hypoglycemia," is considered with the identified symptom of significant deterioration of the brain, the comment by the medical practitioner that "...brain deterioration would be worse without regular caloric supplementation," and the appellant's description

of the danger caused by her "sleep-walking seizures," there is sufficient evidence from the medical practitioner to confirm that failure to obtain additional nutritional items will result in imminent danger to the appellant's life.

Section 67(1.1) of the EAPWDR stipulates that all of the requirements of the section must be met in order for a person designated as PWD to receive a MNS for additional nutritional items. While there are differing views of the panel on whether the ministry was reasonable in concluding that the requirements of sub-section (d) were not met, the panel was unanimous in finding that the ministry was reasonable in determining that the requirements of sub-section (c) and Section 7 of Schedule C were not met. Therefore, 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 all of the requirements of Section 67(1.1) of the EAPWDR were not met, was reasonably supported by the evidence and the panel confirms the ministry's decision.