

PART C – Decision under Appeal

The decision under appeal is the Reconsideration Decision dated March 19th, 2013 in which the Ministry of Social Development and Social Innovation (the “ministry”) declared that the appellant was not eligible for a Monthly Nutritional Supplement (“MNS), specifically the “caloric supplementation to a regular dietary intake” as provided for in section 7(a), Schedule C to the *Employment and Assistance for Persons with Disabilities Regulation*. The ministry held that the appellant was ineligible for MNS because, pursuant to section 67(1.1)(c) and (d) of the said Regulation, respectively, his doctor:

- (a) did not report how MNS would help prevent malnutrition, significant muscle mass loss or significant deterioration of a vital organ, and
- (b) did not describe how MNS would prevent imminent danger to life.

PART D – Relevant Legislation

Employment and Assistance for Persons with Disabilities Regulation (EAPWDR), sections 67(1) and (1.1) and Schedule C, section 7

PART E – Summary of Facts

The written evidence before the ministry on reconsideration was comprised of the following documents:

- 1) Ministry form titled "Application for Monthly Nutritional Supplement" (the "Application") completed by the appellant's family doctor (the "Family Doctor") to which was attached a December 10, 2011 letter from a cardiologist who had treated the appellant, a letter dated December 3, 2012 from an urologist who had treated the appellant and a Consent form dated November 21, 2012 for testing that had been ordered by the urologist. The relevant evidence provided by the Family Doctor in the Application includes:
 - a) that the appellant is suffering from a number of chronic, progressive deterioration of health conditions including coronary arterial disease, hypercholesterolemia and obesity,
 - b) these conditions render the appellant "at risk for sudden death",
 - c) the appellant "needs to lose weight by caloric restriction",
 - d) the appellant requires a "high protein, low carb diet, high vegetable/low meat/low gluten diet",
 - e) 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", and
 - f) the ministry's inquiry regarding how the required nutritional items would alleviate one or more of the appellant's significant symptoms and provide caloric supplementation to the appellant's regular diet was "not applicable" to the appellant.
- 2) Ministry form titled "Monthly Nutritional Supplement Decision Summary" (the "Original Summary") dated January 30, 2013 which indicated that the ministry was satisfied that the appellant met the legislative criteria to be eligible for the MNS except that:
 - a) according to the information confirmed by the Family Doctor, the appellant displayed only one symptom (the significant deterioration of the appellant's heart) that was a "direct result of a chronic, progressive, deterioration of health" whereas, pursuant to section 67(1.1.) (b), EAPDWR, the appellant had to display two or more such symptoms;
 - b) the minister was not satisfied that, pursuant to section 67(1.1.) (c), EAPDWR, to alleviate the appellant's said symptoms he required the MNS; and
 - c) the minister was not satisfied that, pursuant to section 67(1.1.) (d), EAPDWR, the failure to obtain the MNS would place the applicant's life in imminent danger.
- 3) A copy of the Original Summary which, on March 11, 2013, had been annotated (the "First Annotated Summary") by another of the appellant's doctors (the "Second Doctor"). In the annotation the Second Doctor identified an additional two of the symptoms listed in section 67(1.1.) (b), EAPDWR – malnutrition and significant muscle mass loss – from which the appellant suffers. The Second Doctor also noted that the testosterone replacement drugs the appellant is taking help to minimize muscle mass loss.
- 4) Section 3 of the Request for Reconsideration (the "Request") in which the appellant also identified the two additional symptoms referred to in item 3, above.

Subsequent to the reconsideration decision the appellant provided the ministry with four additional documents as follows:

- 1) Letter dated May 8, 2013 (the "Advocate's Letter") from the appellant's advocate to the Second Doctor to which the Second Doctor responded on May 17, 2013 by answering three questions posed by the advocate as follows:
 - a) the caloric supplementation the appellant requires is in the form of "whole foods (vs. cheaper, processed foods" and these "would help weight loss ... lower cardiovascular risk",
 - b) the particular nutritional items recommended were "more fruits/vegetables and whole grains, lean meat/fish", and
 - c) were the appellant to follow these dietary recommendations and were he to modify his lifestyle and lose weight, he would "presumably decrease risk of death".
- 2) Letter dated May 21, 2013 from the appellant's social worker to the appellant's advocate in which the social worker advised the advocate that the appellant had mental health issues and was on anti-psychotic drugs which made it difficult for him to lose weight but, at the same time, his weight put him "at very high risk for cardiac failure". It was important for the appellant to be on a healthy diet.
- 3) Another copy of the Advocate's Letter, this one to the Family Doctor, to which the Family Doctor responded on May 24, 2013 by answering the three questions as follows:
 - a) the caloric supplementation the appellant requires is in the form of "quality food with high calories but less in carbohydrates ... he needs protein to build muscle mass and avoid gaining weight from the sugar",
 - b) the particular nutritional items are "fresh vegetables and fruits, whole grain, good quality meat, with less fat, organic variety preferred ... avoid processed food, and
 - c) were the appellant to follow these dietary recommendations his congestive heart, chronic fatigue and chronic pain symptoms "would be helped".
- 4) Two-page document titled "Medication Review" listing the medications obtained by the appellant from a pharmacy from mid-April to late May, 2013.

The ministry was asked to comment on the admissibility of these documents. The ministry agreed that the three letters contained evidence in support of the evidence that was before the ministry on reconsideration but thought that the Medication Review was not pertinent. The advocate observed that there were several references to the appellant's medications in the materials before the ministry on reconsideration. These references were to manner in which some of the appellant's medications interfered with the appellant's ability to absorb nutrition and the negative effect they had on muscle mass loss and malnutrition. The panel allowed the four documents into evidence pursuant to s. 22(4) of the *Employment and Assistance Act* as being in support of the information and records that were before the minister at the time of reconsideration.

The appellant was accompanied by an advocate. The appellant, with the assistance of the advocate, led oral evidence which included the following:

- 1) The appellant suffered from severe cardiac arterial disease. He had required three stents several years ago and expected a further stent would be required in the near future. He also has high blood pressure and high levels of cholesterol. He takes medications for these conditions.

- 2) The appellant had prostate cancer and recently underwent a prostate operation. Whether or not all the cancerous tissue had been removed was not yet known. For several years he has been taking testosterone replacement drugs.
- 3) Additionally, the appellant had a number of other medical complications - some physical and others relating to his mental and emotional health - as a result of which he has been prescribed a number of medications. Some of these medications seem to work at cross purposes such as by interfering with vitamin absorption or contributing to loss of muscle mass.
- 4) The obstacle to the appellant eating a diet of fresh vegetables and fruit and lean meat, that is a diet high in proteins and low in carbohydrates, is primarily financial. He tried some such foods, such as beans and spinach, but he found they created other medical problems to the extent that he now has to avoid them. His financial circumstances were such that after he had paid his shelter costs the funds he had left for purchasing food were such that he was largely compelled to purchase processed food because these items were less expensive than the foods his doctors recommended.
- 5) The appellant is significantly overweight and has had little or no success in losing weight.
- 6) The appellant was in receipt of the nutritional supplement for vitamins and minerals and had been previously denied the nutritional items MNS.

The ministry raised no objection to any of the oral evidence of the appellant that he led directly or through the advocate. The panel admitted this oral evidence in accordance with s. 22(4), *Employment and Assistance Act* as it was in support of the information and records that were before the ministry on reconsideration.

The panel noted that, while in the Original Summary the ministry had determined that the appellant suffered from only one of the symptoms listed in section 67(1.1)(b), EAPDWR, in the reconsideration decision the ministry concluded that the appellant suffered from three such symptoms. Accordingly, the ministry now agreed that the appellant had satisfied that criterion for eligibility for MNS and it was not in issue on this appeal.

PART F – Reasons for Panel Decision

The issue

The issue on this appeal is whether, pursuant to section 67 and Schedule C, section 7, EAPWDR, the minister reasonably denied the appellant's request for MNS. In particular, was it a reasonable application of the applicable legislation for the ministry to state that it was not satisfied that the appellant required nutritional items as part of a caloric supplementation to a regular dietary intake to alleviate the symptoms of the appellant's chronic, progressive deterioration of health and to prevent imminent danger to his life.

The relevant legislation**EAPWDR****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 centre,

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.

EAPWDR, Schedule C

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.

The appellant's position

The position of the appellant on appeal was that his medical conditions were such that without MNS he would be unable to afford the dietary items that the Family Doctor and the Second Doctor had advised him were essential to his health. Three of those medical conditions (referred to in section 67(1.1)(b), EAPDWR as "symptoms"), were malnutrition, significant muscle mass loss and significant deterioration of his heart.

The appellant contended that the dietary items that the doctors recommended – food high in proteins and low in carbohydrates such as vegetables, fruit, lean meat and fish – were "caloric supplements" (as that term is used in section 7, Schedule C, EAPDWR). The appellant argued that were his diet largely comprised of these caloric supplements, the significant chronic, progressive deterioration of his health in respect to the symptoms enumerated above would be alleviated or even arrested. Further, the inclusion of these caloric supplements in his diet would result in a reduction in the imminent danger to his life that his symptoms posed. He could not afford these caloric supplements unless he were receiving MNS.

The ministry's position

The position of the ministry on appeal was that the legislation set out criteria which the appellant had to satisfy before he was eligible for MNS. While he satisfied several of the criteria, he failed to satisfy all of them. Clearly the appellant's doctors had recommended that the appellant should alter his diet in the manner described in the preceding paragraph but that was insufficient to bring the appellant within the ambit of the legislative criteria. To do that the appellant had to show that a medical

practitioner had confirmed that the recommended diet, to use the language of section 7, Schedule C, EAPWDR, was comprised of nutritional items that are part of a "caloric supplementation to a regular dietary intake". In the opinion of the ministry, the appellant had failed to provide any such confirmation.

Additionally the appellant had failed to identify any caloric supplementation that would result in a reduction of imminent danger to his life.

Alleviating a symptom [s. 67(1.1)(c), EAPDWR]

The evidence of both the Family Doctor and the Second Doctor was to the effect that the recommended diet would alleviate the appellant's symptoms, particularly those relating to the significant deterioration of his heart. The Family Doctor wrote in his annotations to the Advocate's Letter that by following his dietary recommendations the appellant's "congestive heart ... would be helped". Similarly, the Second Doctor, in his annotations to the Advocate's Letter wrote that following his dietary recommendations (which were essentially identical to those of the Family Doctor) "would help weight loss ... lower cardiovascular risk".

The panel agrees with the appellant that the evidence of his doctors is that the recommended diet would ameliorate the appellant's heart condition. But that is not sufficient to satisfy the criterion set out in this section of the EAPDWR. This section does not refer to dietary items that are contemplated by the diet recommended by the appellant's doctors. Rather it refers to "the items set out in section 7 of Schedule C", that is "additional nutritional items that are part of a caloric supplementation to a regular dietary intake".

There is no evidence from the appellant much less either of his doctors, that the recommended diet contains any "caloric supplementation". Indeed, it appears to the panel that it is part of a regular diet, not something to supplement such a diet. The only evidence with respect to this issue is found in the Application. In response to the ministry's inquiry regarding how the required nutritional items would alleviate one or more of the appellant's significant symptoms and provide caloric supplementation to the appellant's regular diet the Family Doctor responded "not applicable".

To further buttress the conclusion that the recommend diet is not a caloric supplementation, the panel noted that in the Application the Family Doctor stated that the appellant "needs to lose weight by caloric restriction". That is, the Family Doctor has recommended a reduction, not a supplementing, of the appellant's caloric intake.

The panel finds that the decision of the ministry with respect to this criterion for determining the appellant's eligibility for MNS was reasonable.

Imminent danger to life [s. 67(1.1)(d), EAPDWR]

The evidence of both the Family Doctor and the Second Doctor with respect to the issue of imminent danger to the appellant's life if he did not follow the recommended diet was that he would greatly increase his likelihood of dying. In the Application the Family Doctor said the appellant's symptoms, if not dealt with, rendered him "at risk for sudden death". The evidence of the Second Doctor was similar.

But the criterion established by this section of the EAPDWR is not whether the recommended diet will reduce the risk of imminent death. Rather, the question is whether the failure to obtain "nutritional items that are part of a caloric supplementation to a regular dietary intake" will result in imminent danger to the appellant's life. Again the appellant is faced with the same difficulty as in the previous section of this decision. The recommended diet is not a caloric supplementation. It is a regular diet, not a supplement to it.

The panel finds that the decision of the ministry with respect to this criterion for determining the appellant's eligibility for MNS was reasonable.

Conclusion

The panel found that the decision of the ministry to deny the appellant's request for MNS was a reasonable application of the relevant statutory provision in the circumstances of the appellant. The March 19, 2013 reconsideration decision is confirmed.