

## PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development (ministry) reconsideration decision dated April 22, 2013 which denied the appellant's request for a Monthly Nutritional Supplement (MNS) 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 his 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 MNS dated February 21, 2013 (February Application) signed by the appellant's medical practitioner and stating in part that:
  - the appellant's severe medical conditions are Hepatitis C and liver cirrhosis;
  - 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 muscle mass loss- 20% and significant deterioration of a vital organ- liver;
  - the appellant's height and weight are recorded;
  - in response to a request to specify the additional nutritional items required, the medical practitioner has left this section blank;
  - 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 also left this section blank;
  - 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 indicated "...prevention of liver failure" and how the nutritional items will prevent imminent danger to the appellant's life, the medical practitioner left this section blank; and,
- 2) Request for Reconsideration- Reasons.

At the hearing, the appellant provided the following:

- 1) Application for MNS dated June 7, 2013 (June Application) signed by the same medical practitioner who signed the previous application and stating in part that:
  - the appellant's severe medical conditions are Hepatitis C, cirrhosis of the liver, and malabsorption with the description: "previous admission with acute hepatic failure;"
  - 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 malnutrition, with the comment "malabsorption", significant muscle mass loss "causing weakness and loss of tone," moderate to severe immune suppression with the comment "moderate immune suppression" and significant deterioration of a vital organ, "liver impairment";
  - the appellant's height and weight are recorded;
  - in response to a request to specify the additional nutritional items required, the medical practitioner wrote "life-long;"
  - 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 "liver impairment and prone to malabsorption;"
  - 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 indicated "...prevent weight loss and loss of tone/strength" and how the nutritional items will prevent imminent danger to the appellant's life, the medical practitioner wrote "reduce risk of liver failure." In the additional comments, the medical practitioner added that the appellant "...will require extra funds to supplement his diet;"
- 2) Partially used bottle of liquid milk thistle, with labeling attached;
- 3) Print-out from a website regarding living with Hepatitis C; and,
- 4) Print-out of an advertisement for a milk thistle product.

The ministry requested a recess to review the additional documents in detail. The appellant explained that he had tendered the June Application to the ministry office on June 7, 2013 and showed them the letter from the Tribunal, explaining that he needed the document for the hearing, and he was assured the document would be forwarded to the Tribunal, but it was not. The panel provided a recess to allow the ministry time to review the documents in detail, and the ministry did not object to the admissibility of the documents. The panel also reviewed the documents and the bottle of milk thistle and admitted them as relating to the appellant's

previously diagnosed medical conditions and his need for the MNS and being in support of information before the ministry on reconsideration, pursuant to Section 22(4) of the Employment and Assistance Act. The appellant required the bottle of milk thistle for his medical treatment and the panel did not retain the bottle.

In the Notice of Appeal, the appellant expressed his disagreement with the ministry's reconsideration decision. The appellant wrote that he is in need of nutritional funding in order to maintain a proper diet to assure liver health.

In the Request for Reconsideration, the appellant wrote that he requires some vitamins to stabilize his liver condition, and also fresh vegetables and grain products. The appellant wrote that he had a near-death episode with his liver in 2007 and it is extremely important to afford a proper diet.

At the hearing, the appellant stated that his family doctor completed the February Application and he is the same doctor who treated him in 2007 when he was in the hospital for 30 days. The appellant stated that he has already lived a year longer than they expected at that time. The appellant stated that his previous doctor treated him since he was a child, but he retired around 2002 and his current doctor took over the practice at that time. The appellant stated that he was approved for the MNS in 2007 but did not receive income assistance for a couple of months when he was in receipt of an inheritance. When he re-applied for the MNS, he was only approved for the vitamins but he needs the extra funds for the nutritional items. The appellant stated that his doctor "breezed over" the February Application and did not do it properly so he took in a new application form for him to complete.

The appellant stated that he sticks to what the doctor tells him to do to support his liver, including eating four smaller meals per day and keeping fresh food in the fridge. The cost of food has gone up and he tries to buy organic foods since they have less of the chemicals which can aggravate his liver but these organic foods are very expensive. The appellant stated that his weight fluctuates. He finds that the milk thistle helps relieve the pain that he experiences when his liver acts up but it costs around \$37 per bottle and he goes through about 2 bottles per month. In response to a question, the appellant stated that he considers milk thistle to be a vitamin. He used to get milk thistle at a reduced cost through his sister who worked at a health food store, but she passed away. The appellant stated that he has to read every label when he buys food to ensure that there is not too much sugar, fat, or protein. If he gets too much of any of these, he becomes very tired and listless and will stay that way for days. The appellant stated that he has been trying to take care of himself and to eat properly because he wants to get on a program for medication that is supposed to cure Hepatitis C. Because the medications are very expensive, the program will only admit candidates who are otherwise in good health. He has been clean and sober for several years.

The ministry relied on its reconsideration decision which included evidence that the appellant is a Person With Disabilities (PWD) in receipt of disability assistance. The appellant was approved for the vitamin and mineral supplements. At the hearing, the ministry highlighted the policy for MNS which states that a recipient of disability assistance must have a severe medical condition causing a chronic, progressive deterioration of health with symptoms of wasting. The supplement is intended to prevent imminent danger to the person's life by providing essential, specified items to supplement regular nutritional needs. The ministry provided a definition of "supplement" as 'added to complete a thing, to supply something that is missing' and a definition of "imminent" as '...impending, or likely to occur at any moment.' The ministry reviewed the June Application and stated that there is still insufficient information to establish that the criteria in the legislation are met. In response to a question, the ministry was not sure where the symptom of moderate to severe immune suppression was identified on the original, February Application.

## 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.

The ministry acknowledged that the medical practitioner confirmed that the appellant is being treated for a chronic, progressive deterioration of health on account of a severe medical condition, specifically Hepatitis C and liver cirrhosis, pursuant to Section 67(1.1)(a) of the EAPWDR. Section 67(1.1)(b) of the EAPWDR

requires that a medical practitioner confirm that as a direct result of the chronic, progressive deterioration of health, the person displays two or more of the symptoms listed. The ministry acknowledged that there is sufficient information from the medical practitioner to establish that the appellant displays two or more of the symptoms, namely significant muscle mass loss (20% loss), moderate to severe immune suppression and significant deterioration of a vital organ (liver).

*Section 67(1.1)(c) and Section 7 of Schedule C of the EAPWDR-Caloric Supplementation*

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 symptoms of a chronic, progressive deterioration of health. The ministry argued that, in the original February Application, the medical practitioner did not specify what additional nutritional items are required to alleviate symptoms and, in the June Application, he wrote "life-long." The ministry argued that the appellant stated that he needs fresh vegetables and grain products and this indicates a type of diet and not items needed for caloric supplementation in addition to a regular dietary intake. The ministry argued that while the appellant stated at the hearing that milk thistle helps relieve pain, he also considers it to be a vitamin which is part of the vitamin and mineral supplement for which he has been approved. The ministry highlighted the definition of nutritional "supplement" as 'added to complete a thing, to supply something that is missing', and that a specific type of diet involves choices of items and is not added to a regular diet, like a product such as Ensure which is a high calorie alternate to a regular diet for those who cannot properly consume a regular diet.

The ministry pointed out that, in describing how the nutritional items will alleviate one or more of the symptoms and provide caloric supplementation to the regular diet, the medical practitioner reported that it will prevent liver failure and this does not demonstrate a need for caloric supplementation to a regular dietary intake. The ministry argued that, in reply to this question in the June Application, the medical practitioner indicated "...prevent weight loss and loss of tone/strength," but there is no indication that the appellant has symptoms of malnutrition, underweight status or significant weight loss, and his current BMI is in the above normal range. The ministry argued that "malabsorption" is not a state of malnutrition, which is quite severe, and further argued that "moderate immune suppression" is not the same as moderate to severe immune suppression and the evidence does not establish that the appellant has symptoms of wasting. The ministry also pointed out that the appellant stated that it is "extremely important to afford a proper diet" and this indicates financial circumstances rather than a medical condition that requires additional caloric supplementation.

The appellant's position is that sufficient information has been provided by the medical practitioner, in both the February Application and the June Application, to establish that he requires additional nutritional items as part of a caloric supplementation to a regular dietary intake to alleviate the symptoms of a chronic, progressive deterioration of health. The appellant argued that he was approved before for the MNS based on the same health condition and he requires fresh vegetables and grain products to stabilize his liver condition. The appellant argued that he had a near-death episode with his liver in 2007 and it is extremely important to afford a proper diet.

*Panel decision*

Section 7 of Schedule C and Section 67(1.1)(c) of the EAPWDR stipulate that the medical practitioner must confirm that, for the purpose of alleviating a symptom referred to in sub-section (b), the appellant requires the additional nutritional items that are part of a caloric supplementation to a regular dietary intake as specified in the request. In the original February Application, in response to a request to specify the additional nutritional items required, the medical practitioner left this blank and in the June Application he indicated "life-long." The panel finds, therefore, that additional nutritional items have not been specified. While the appellant stated that he needs fresh vegetables and grain products and to purchase organic foods to avoid chemicals, the panel finds that the ministry reasonably determined that these items include appropriate food choices for a regular dietary intake, rather than caloric supplementation to a regular dietary intake. The appellant also described how milk thistle has successfully relieved pain from his liver. Although he described milk thistle as a vitamin, in

viewing the label on the bottle, the panel finds that there is not sufficient information regarding the characterization of milk thistle as a vitamin, mineral or nutritional item. The appellant has been approved for the vitamin and mineral supplement and additional nutritional items have not been specified by a medical practitioner in the request, as required by the legislation.

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 left this section blank in the February Application but indicated in the June Application that the appellant has liver impairment and that he is prone to malabsorption. The medical practitioner also wrote "malabsorption" as part of his diagnosis in the June Application and as a specific symptom under the listed category of malnutrition. Given that malabsorption means difficulty digesting and/or absorbing nutrients from food, the panel finds that there is sufficient evidence that the medical practitioner has confirmed the appellant has a medical condition a symptom of which results in the inability to absorb sufficient calories to satisfy daily requirements through a regular dietary intake.

In the February Application, the medical practitioner identified one of the appellant's symptoms as being significant muscle mass loss, with a loss of 20% and, in the June Application, that it is "...causing weakness and loss of tone." When asked to describe how the nutritional items will alleviate one or more of the symptoms and provide caloric supplementation to the regular diet, the medical practitioner stated in the June Application that it will prevent loss of tone/ strength. While the ministry pointed out that the appellant's BMI is currently in the above average range, the symptom identified is significant muscle mass 'loss' and the medical practitioner has confirmed that it is currently a loss of 20% from his baseline, which is indicative of a downward trend. The panel finds that the ministry's determination that the appellant does not have a symptom of wasting was not reasonable; however, since the nutritional items have not been specified in the request, the ministry reasonably determined that there is insufficient information to show that specified nutritional items will provide caloric supplementation and alleviate the identified symptom. In summary, the panel finds that the ministry reasonably concluded that there is not sufficient information from the medical practitioner to confirm that specified additional nutritional items are required by the appellant 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.

*Section 67(1.1)(d) 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. The ministry argued that the medical practitioner did not complete this section of the original February Application and when asked to describe how the requested nutritional items will prevent imminent danger to life in the June Application, the medical practitioner indicated that they will "...reduce risk of liver failure." At the hearing, the ministry argued that the word "imminent" is defined as '...impending, likely to occur at any moment' and that, even considering the June Application, there is not sufficient information to establish that the medical practitioner has confirmed that failure to obtain the (unspecified) items will result in imminent danger to the appellant's life.

The appellant's position is that the information from the medical practitioner confirmed that failure to obtain the additional nutritional items will result in imminent danger to his life. The appellant argued that he had a near-death episode with his liver in 2007 and had been hospitalized as a result and thus it is extremely important to afford a proper diet. In his Notice of Appeal, the appellant argued that he is in need of nutritional funding in order to maintain a proper diet to assure liver health.

*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. In the June Application, the medical practitioner responded to the question how the nutritional items will prevent imminent danger to the appellant's life, by stating they will "...reduce risk of liver failure." As the

medical practitioner has not confirmed any specific nutritional items required by the appellant as part of a caloric supplementation in either MNS application, the panel finds that it is difficult to establish that failing to obtain unspecified items will result in imminent danger to the appellant's life. The panel finds that the use of the words in the subsection "*will result in imminent danger*" indicates a requirement for more than a risk or possibility.

While the appellant stated that he had had a near-death episode with his liver 6 years ago, that he has already lived a year longer than the doctors expected at that time, and his weight "fluctuates", he also stated that he is hopeful of qualifying for a program of medications to cure his condition, for which candidates must be "otherwise healthy" and the ministry pointed out that the appellant's BMI is currently in the above average range. The medical practitioner has identified the symptom of significant muscle mass loss, with a loss of 20% from his baseline and, while the panel finds that the medical practitioner confirmed that the appellant has a symptom of wasting, information is not provided to establish the rate of the muscle mass loss. When specifying the nature of the symptom of significant deterioration of a vital organ, the medical practitioner wrote, in the June Application, "liver impairment." The panel finds that although liver failure poses a serious danger to the appellant's life, there is insufficient information provided by the medical practitioner to confirm that the risk of liver failure is currently high for the appellant or that there is a rapid rate of deterioration in the appellant's health that would indicate that the danger to the appellant's life without the unspecified nutritional items is "imminent," or likely to happen soon. The panel finds 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 Section 67(1.1)(d) of the EAPWDR.

#### *Conclusion*

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.