

## PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (ministry) reconsideration decision dated October 1, 2013 which denied the appellant's request for a Monthly Nutritional Supplement for vitamins and minerals and 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:

- as a direct result of the chronic, progressive deterioration of health, the appellant displays two or more of the listed symptoms;
- the appellant requires vitamins and minerals to alleviate the symptoms of his chronic, progressive deterioration of health and to prevent imminent danger to life; and,
- 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 an Application for Monthly Nutritional Supplement (MNS) dated June 18, 2013 signed by a medical practitioner and stating in part that:

- the appellant's severe medical conditions are L4-L5, L5-S-1 disc degeneration and L5 radiculopathy, with a note: "sustained post work injury" and to see appended CT and X-Ray Reports;
- 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, with a note "muscle wasting thigh and leg", and significant neurological degeneration, with a note "muscle wasting and chronic pain";
- the appellant's height and weight are recorded;
- in response to a request to specify the vitamin or mineral supplements required, the medical practitioner noted multivitamins, calcium, iron, etc. and that he "needs these for long term use";
- in response to a request to describe how the vitamin or mineral supplement will alleviate the specific symptoms identified, the medical practitioner wrote "prevent osteoporosis, helps muscle strength and growth;"
- in response to a request to describe how the vitamin or mineral supplement will prevent imminent danger to the appellant's life, the medical practitioner wrote "prevents or slows progression of muscle wasting;"
- in response to a request to specify the additional nutritional items required, the medical practitioner wrote "fruit and vegetables and protein rich foods";
- 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 "unsure";
- 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 "high protein diet will help with muscle growth;"
- 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 "no imminent danger."
- the additional comments by the doctor are that the appellant has no family doctor and was seen at a walk-in clinic and the medical practitioner reviewed "few past medical notes."

As well as the following:

- 1) X-Ray Report dated August 18, 1986 of the appellant's lumbar spine;
- 2) X-Ray Report dated January 21, 1987 of the appellant's lumbar spine;
- 3) CT Report dated May 25, 1994 of the appellant's lumbar spine;
- 4) X-Ray Report dated November 18, 1994 of the appellant's lumbo-sacral spine;
- 5) X-Ray Report dated June 24, 1996 of the appellant's lumbo-sacral spine;
- 6) CT Report dated June 24, 1996 of the appellant's lumbar spine with contrast;
- 7) Operation Report dated February 4, 1997 to alleviate L4-5, L5-S1 disk degeneration and L5 radiculopathy, left side;
- 8) Page 2 of Report dated March 4, 2000 of a CT of the appellant's lumbar spine;
- 9) X-Ray Report dated February 1, 2000 of the appellant's lumbar spine;
- 10) X-Ray Report dated October 30, 2002 of the appellant's lumbar spine;
- 11) X-Ray Report dated June 12, 2003 of the appellant's lumbar spine; and,
- 12) Request for Reconsideration dated August 23, 2013.

Prior to the hearing, the appellant provided the following additional document:

Letter dated October 6, 2013 from the medical practitioner who completed the Application for MNS.

Requested to respond to the point that muscle mass wasting in the appellant's left leg thigh and calf does not describe how much muscle mass is lost and its significance in measurements, the medical practitioner wrote "right leg calf 37.5 cm, left leg calf 32 cm, 10 cm in from joint line (loose)." Asked to explain how the requested

vitamins and minerals will help alleviate the specific symptom of significant neurological degeneration and to prevent imminent danger to life, the medical practitioner wrote "it will definitely help."

The ministry did not object to the admissibility of the additional letter. The panel admitted the appellant's evidence as further detail of his condition and being in support of the information and records before the ministry on reconsideration, pursuant to section 22(4) of the *Employment and Assistance Act*.

In his Notice of Appeal, the appellant expressed his disagreement with the ministry's reconsideration decision.

The appellant consented to the attendance of a ministry observer at the hearing.

At the hearing, the appellant stated that in 1997 he had an L4-5, L5-S1 fusion operation and has had ongoing pain on the left side that radiates down his leg. He must take narcotic medications every day to relieve his pain. As a result of the chronic back pain, he has not worked since 1998. This injury has "crippled" his life and he has tried to find some enjoyment despite his limitations. The medications he takes cost \$150 per month and are not covered by the ministry. The appellant stated that with the vitamins and minerals and other nutritional items, he might not need to take as much medication because he will be stronger and have more energy. The appellant stated that the ministry accepted that he displays one of the listed symptoms, namely significant neurological degeneration. He also has significant muscle mass loss which has gotten worse over the past 5 years. He has weakness in his left side which makes it hard to keep his balance when he is walking, and he is concerned about falling. The appellant stated that the doctor has set out the benefits of the multivitamins, calcium and iron and the other nutritional items and, overall, it will strengthen his muscles and stop him from falling. The appellant stated that these items should reduce his chronic pain and also reduce the risk of organ failure due to use of strong narcotic medications. The appellant stated that organ failure could happen a year from now, or it could be 10 years from now. The appellant stated that he has taken multivitamins in the past and these have helped with his energy level and strength.

The appellant explained that, in the letter dated October 6, 2013, the doctor sets out the measurements of his right calf compared to his left calf, measured at the same point on his leg. The doctor drew a line on his legs to ensure the measurements were taken at the same place. His left leg is smaller by 5.5 cm, as compared to his right leg. This was the first time that measurements were taken since the appellant did not realize that this sort of detail was required. The appellant stated that on his left side he has no ankle reflexes, and he experiences tingling and weakness and these symptoms are getting worse. His right leg is healthy and normal. The appellant stated that he is not physically active compared to a normal person. He does things at a slow pace, with no recreational activities. He has pain and tenderness in both his back and his leg. The appellant stated that he has moved to a new community and has not yet found a family doctor, so the doctor who completed the MNS Application is at a walk-in clinic.

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 June 20, 2013 the appellant submitted an application for the MNS, for vitamins and minerals as well as for additional nutritional items. At the hearing, the ministry stated that to be satisfied that the symptom of significant muscle mass loss had been met, there would need to be more information about prior measurements of the appellant's leg in order to compare and to determine the change over a specified period of time.

## 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 and for vitamins and minerals 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. 63/2010, 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 disc herniation and L-5 radiculopathy, pursuant to Section 67(1.1)(a) of the EAPWDR.

*Two or more symptoms*

The ministry's position is that sufficient information has not been provided from the medical practitioner to establish that as a direct result of the chronic, progressive deterioration of health, the appellant displays two or more of the listed symptoms, pursuant to Section 67(1.1)(b) of the EAPWDR. The ministry argued that the medical practitioner reported that the appellant's symptoms are significant muscle mass loss and significant neurological degeneration; however, the comment "muscle wasting thigh and leg" does not describe how much muscle mass the appellant has lost and over what period of time this has occurred to establish that the loss is "significant." The ministry acknowledged that the appellant displays the symptom of significant neurological degeneration as a direct result of a chronic progressive deterioration of health. The appellant's position is that there is sufficient information from the medical practitioner to establish that as a direct result of the chronic, progressive deterioration of his health, he also displays the symptom of significant muscle mass loss and, therefore, two or more of the listed symptoms. The appellant argued that, in the letter dated October 6, 2013, the doctor sets out the measurements of his right calf compared to his left calf, measured at the same point on his leg and his left leg is smaller by 5.5 cm as compared to his right leg due to muscle wasting. The appellant argued that on his left side he has no ankle reflexes, and he experiences tingling and weakness and these symptoms have been getting worse over the past 5 years.

*Panel decision*

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. Although the ministry raised an issue with a lack of detail with respect to the nature and extent of treatments to support a diagnosis of a "significant" neurological degeneration, the ministry ultimately acknowledged that there is sufficient information from the medical practitioner, with the description "muscle wasting and chronic pain," to establish that the appellant displays one of the symptoms listed, being significant neurological degeneration. However, for the symptom of significant muscle mass loss, the ministry determined that the description "muscle wasting thigh and leg" was not sufficient to establish the symptom was "significant." In the letter from the medical practitioner dated October 6, 2013, in response to the point that muscle mass wasting in the appellant's left leg thigh and calf does not describe how much muscle mass is lost and its significance in measurements, the medical practitioner wrote "right leg calf 37.5 cm, left leg calf 32 cm, 10 cm inferior from joint line (loose)." At the hearing, the ministry stated that to be satisfied that the symptom of significant muscle mass loss had been met, there would need to be more information about prior measurements of the appellant's leg in order to compare and to determine the change over a specified period of time. However, the panel finds that the medical practitioner indicated in the MNS application that there has been an ongoing process of "wasting" of the muscles in the appellant's thigh and leg, rather than a completed process of 'wasted' muscles. The appellant stated the wasting has gotten worse over the past 5 years, and the left leg is now 5.5 cm smaller than the left. With the new information from the medical practitioner in the October 6, 2013 letter, the panel finds that the ministry's conclusion that there is not sufficient information to establish that as a direct result of the chronic, progressive deterioration of health, the appellant displays two or more of the symptoms listed, pursuant to Section 67(1.1)(b) of the EAPWDR, was not reasonable.

*Vitamins and Minerals*

The ministry's position is that sufficient information has not been provided from the medical practitioner to establish that the appellant requires specific vitamins and minerals to alleviate the symptoms of his chronic, progressive deterioration of health and to prevent imminent danger to life, as required by Section 67 (1.1)(c) and (d) of the EAPWDR. The ministry argued that the medical practitioner specifies that the appellant requires multivitamins, calcium and iron on a long term basis and these will help muscle strength and growth, but there is not a sufficient explanation for how these items will help alleviate the symptom of neurological degeneration. The ministry also argued that the medical practitioner indicates that multivitamins, calcium and iron will prevent imminent danger to the appellant's life as these items will "slow progression of muscle wasting" and there is not the immediacy present in the appellant's circumstances at the present time to show an "imminent" danger to life. The ministry argued that the threats of eventual muscle wasting may or may not occur at unspecified

future times. The appellant's position is that sufficient information has been provided to establish that the multivitamins, calcium and iron supplementation is required to alleviate one of his symptoms of his chronic, progressive deterioration of health and to prevent imminent danger to life.

*Panel decision*

Section 67(1.1)(c) of the EAPWDR requires that the medical practitioner confirm that, for the purpose of alleviating one of the symptoms referred to in sub-section (b), the appellant requires the vitamins and minerals as set out in Section 7 of Schedule C. In the Application for MNS dated June 18, 2013, the medical practitioner reported that the vitamins or mineral supplements required by the appellant are multivitamins, calcium, and iron "for long term use", and that these items will alleviate the specific symptoms identified by preventing osteoporosis and helping muscle strength and growth. In the letter dated October 6, 2013, when asked to explain how the requested vitamins and minerals will help alleviate the specific symptom of significant neurological degeneration and to prevent imminent danger to life, the medical practitioner wrote "it will definitely help." With the new information from the medical practitioner in the October 6, 2013 letter, the panel finds that the ministry's conclusion that there is not sufficient information to establish that the appellant requires multivitamins, calcium and iron for the purpose of alleviating an identified symptom, pursuant to Section 67(1.1)(c) of the EAPWDR, was not reasonable.

Section 67(1.1)(d) of the EAPWDR requires further that the medical practitioner confirm that failure to obtain the vitamins and minerals will result in imminent danger to the appellant's life. In the application for the MNS, in response to the request to describe how the multivitamins, calcium, and iron will prevent imminent danger to the appellant's life, the medical practitioner indicated that it "prevents or slows progression of muscle wasting." In the letter dated October 6, 2013, when asked to explain how the requested vitamins and minerals will help alleviate the specific symptom of significant neurological degeneration and to prevent imminent danger to life, the medical practitioner wrote "it will definitely help." While the evidence demonstrates that the multivitamins, calcium and iron would be beneficial to the appellant's health and prevent or slow progression of muscle wasting and help alleviate the neurological degeneration, there was no information provided to establish a rapid rate of muscle mass loss or neurological degeneration that would indicate a rate of deterioration in the appellant's health such that a failure to obtain the vitamins and minerals will result in an imminent danger to the appellant's life. Therefore, the panel finds that the ministry reasonably determined that there is not sufficient information currently available to establish that failure to obtain the vitamins and minerals will result in imminent danger to the appellant's life, pursuant to Section 67(1.1)(d) of the EAPWDR.

*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 symptoms of a chronic, progressive deterioration of health and to prevent an imminent danger to the appellant's life. The ministry argued that the medical practitioner reported that the additional nutritional item required to alleviate symptoms is fruit and vegetables and protein rich foods and this request is for healthy foods suggesting a specific dietary complement rather than a need for more calories. The ministry argued that the medical practitioner does not report that the appellant has a medical condition that results in the inability to absorb sufficient calories to satisfy daily requirements through a regular dietary intake as his response in the MNS application was "unsure." The ministry argued that the medical practitioner indicated the appellant's height and weight and that his Body Mass Index (BMI) is calculated at 30 and, therefore, he is not in need of caloric supplementation. The ministry argued that the medical practitioner reported that there is "no imminent danger" in the MNS Application and, therefore, has not confirmed that failure to obtain the nutritional items will result in imminent danger to life.

The appellant's position is that sufficient information has been provided by the medical practitioner 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 and to prevent an imminent danger to his life. The appellant argued that the doctor has set out the benefits of the nutritional items in the MNS

Application and in the October 6, 2013 letter and, overall, it will strengthen his muscles and stop him from falling. The appellant argued that these items should reduce his chronic pain and also reduce the risk of organ failure due to use of strong narcotic medications, and that organ failure could happen a year from now, or it could be 10 years from now.

*Panel decision*

Section 67(1.1)(c) of the EAPWDR requires that the medical practitioner 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 set out in Section 7 of Schedule C. In the Application dated June 18, 2013, in response to a request to specify the additional nutritional items required, the medical practitioner indicated "fruit and vegetables and protein rich foods." The medical practitioner identified a diet which includes fruit and vegetables and extra protein as the additional nutritional item, and the panel finds that the ministry reasonably determined that the medical practitioner makes a diet recommendation that involves appropriate food choices for a regular dietary intake, rather than caloric supplementation to a regular dietary intake. In the MNS application, 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 indicated "unsure" and that the "high protein diet will help with muscle growth." The medical practitioner indicated the appellant's height and weight in the Application and this facilitated a calculation of his BMI at a score of 30, which indicates a weight well above the normal range and suggests, as the ministry concluded, that the appellant is not in need of caloric supplementation to his regular dietary intake. Therefore, 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 related symptoms, as set out in Section 67(1.1)(c) of the EAPWDR.

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. While the evidence demonstrates that the protein rich diet would be beneficial to the appellant's health and help with muscle growth, in the application for the MNS, the medical practitioner responded to the question how the nutritional items will prevent imminent danger to the appellant's life, by stating "no imminent danger." At the hearing, the appellant argued that the muscle wasting in his left leg interferes with his balance and he risks falling and that his heavy use of narcotic medications could cause organ failure, which could happen in a year or 10 years from now. The panel finds that the use of the word "imminent" in the Section 67(1.1)(d) refers to an immediacy such that the danger to life is likely to happen soon and 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 the legislation.

*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 and vitamins and minerals 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.