

**PART C – Decision under Appeal**

The decision under appeal is the Ministry of Social Development and Social Innovation (ministry) reconsideration decision dated July 16, 2014 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*

*Interpretation Act, Section 29*

## PART E – Summary of Facts

The evidence before the ministry at the time of the reconsideration decision included:

- 1) Application for MNS dated February 7, 2014 signed by the appellant's medical practitioner and stating in part that:
  - The appellant's severe medical conditions are chronic fatigue syndrome and chronic chest pain, described as "ongoing condition since at least 2006 and affects function, sleep and quality of life";
  - In response to the question whether, as a direct result of the severe medical condition, the appellant is being treated for a chronic, progressive deterioration of health, the medical practitioner wrote: "treatment is started and followed by his specialist in [city in another country], which includes medication, supplements and a special diet."
  - 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 and significant muscle mass loss, and wrote "patient is thin, tall and pale. He was thinner prior to the winter break and was able to regain some weight (illegible) with assistance from parents during this time according to patient";
  - The appellant's height and weight are recorded;
  - In response to a request to specify the additional nutritional items required, the medical practitioner wrote: "nuts, coconut oil, gluten [free] flour and soy products are needed for indefinite period; "
  - 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: "yes, decreased appetite from condition and food sensitivities makes regular diet inadequate";
  - 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 wrote: "high caloric foods like nuts and coconut oil helps to achieve calories in low volume. Soy and gluten free flour decreases his discomfort with eating";
  - Asked to describe how the nutritional items will prevent imminent danger to the appellant's life, the medical practitioner wrote: "leads to malnutrition and worsening of his conditions;" and,
  - Additional comments by the medical practitioner are: "patient has difficulties accessing his regular family physician [in another community] and has been followed by me for about a year while he is a student at [educational institution]."
- 2) Note dated July 8, 2014 from the appellant in which he wrote that he has been ill for some years. He was diagnosed with tick-borne illness and, since diagnosis, nutritional supplements have been prescribed by his Lyme specialist. A key component of his treatment protocol is the extensive use of supplements. Prior to his illness, he weighed 185 lbs. and, at the time of his diagnosis, he was 119 lbs. With the help of supplements, he raised his weight to the 150's. His experience suggests that he can expect weight fluctuation with his ongoing treatment of which supplements are an essential component. He is a student and it is a financial hardship to pay for these supplements. Attached to the appellant's note is a copy of notes from one of his appointments (June 12, 2014) with the specialist doctor in another country, which lists a number of "Meds", and also a Note from a physician dated July 8, 2014 stating in part that the appellant was weighed and his height and weight result in a BMI [Body Mass Index] of 19.5;

and,

3) Request for Reconsideration dated July 8, 2014.

In his Request for Reconsideration, the appellant wrote that he has been severely ill since 2006. He has experienced extreme weight loss as part of his chronic illness. His weight has fluctuated heavily and will worsen with the implementation of a gluten and dairy-free diet required with treatment. His condition has worsened over the last year and a half and he has had to defer his studies for the last 3 semesters. Nutritional supplements are a financial hardship.

In the Notice of Appeal dated August 6, 2014, the appellant expressed his disagreement with the ministry's reconsideration decision. The appellant wrote that he has a severe chronic illness that requires nutritional supplements as required by a doctor. He cannot afford these supplements.

At the hearing, the appellant provided the following additional documents:

- 1) File notes by the doctor in another country for November 8, 2011, December 14, 2012, July 12, 2013, and June 12, 2014 which list both supplements and "meds"; and,
- 2) Letter dated August 27, 2014 from the doctor in another country who wrote:
  - He has been treating the appellant since the summer of 2009 for Lyme and related diseases.
  - He confirms that the appellant is being treated for a chronic case of Lyme disease which will result in a progressive deterioration of health if not treated.
  - As a direct result of this condition, the appellant displays or has displayed the following symptoms: underweight status, significant weight loss, significant neurological degeneration, and moderate to severe immune suppression.
  - For the purposes of alleviating these symptoms, the appellant requires the following nutritional supplements that must be taken with the treatment: probiotics, Ashwaghandha, Lyme factor plus, NT factor, Superlipoic Acid, Dflucan Thyronine, Quericetin, Malarone, and mushroom immune builder.
  - Failure to obtain these nutritional supplements to maintain the immune system during treatment will result in imminent danger to the appellant's life.

At the hearing, the appellant and his father, who acted as the appellant's advocate, stated:

- The appellant became very ill in 2008 when he was living in another city and he ended up having to live with his parents for 2 years where he was either on the couch or in bed.
- He had tests for Lyme disease, which is a tick-borne illness, completed in another country because it is not generally recognized as a disease in Canada. There is controversy surrounding this disease and many doctors will treat the symptoms and not the cause.
- The medical practitioner who completed the application was given all the information about the appellant's health history but he was not helpful. The appellant found this doctor, at times, to be antagonistic towards his health concerns. The appellant is no longer seeing this doctor.
- They found a doctor in another country who is a specialist in Lyme disease and have been visiting with him 4 times each year since 2009. They have another appointment booked for September 8, 2014. These treatments have resulted in a significant financial cost to the appellant's family.
- The appellant "feels crappy" during treatment and he has to be careful because he quickly starts to lose weight and he needs the supplements to maintain his weight.
- When he was first diagnosed with Lyme disease, he had lost one third of his body weight,

going from 185 lbs. to 119 lbs. His weight still goes up and down depending on the stage of the treatment.

- This is a chronic disease and they have been able to get it to a certain level and maintain it, but it is also a progressive disease and some infected people have ended up in a wheelchair. The treatments have allowed the appellant to attend an educational institution half time.
- The appellant needs both the supplements and a specific diet.
- The appellant filled out the forms by himself and had some difficulties with the process. He felt he could not access an advocate at an agency as a result of his health concerns.
- The letter dated August 27, 2014 is from the specialist in another country who has been treating the appellant for several years. The doctor has listed both medications and supplements that the appellant must take. The appellant explained that Duflucan Thyronine and Malarone are medications; the other compounds listed are supplements.
- The “bugs” causing the Lyme disease reside in the body’s tissue and not the blood. The “bugs” were both in the appellant’s head and in the sac around his heart. Initially the appellant was treated with a 22-month anti-biotic therapy and now he is on an herbal regime.
- Asked about how the supplements prevent imminent danger to the appellant’s life, the advocate stated that the supplements support the treatment regime, which is like chemotherapy that goes on and on.
- The supplements keep the appellant from “being knocked down” in that they maintain his body weight and help flush out the debris from the drugs in his body. The supplements also build the appellant’s immune system, have anti-inflammatory properties, and improve his cognitive function.
- The appellant has weight-control problems as he can lose weight but he also has to restrict the foods that he consumes because of his sensitivities. His weight fluctuates quite a bit.

### ***Admissibility of New Information***

The ministry did not object to the admissibility of the additional documents and did not raise an objection to the admissibility of the information in the oral testimony on behalf of the appellant, which provided additional information regarding the appellant’s condition and his need for supplements. As this information provides additional detail with respect to issues addressed at reconsideration, the panel has admitted this additional information as being in support of information and records that were before the ministry at the time of reconsideration, in accordance with s. 22(4) of the *Employment and Assistance Act*.

The ministry relied on its reconsideration decision, as summarized at the hearing. The appellant is a Person With Disabilities (PWD) in receipt of disability assistance. At the hearing, the ministry stated that, in the past, the appellant has requested permission from the ministry for information to be provided by his doctor in another country and it has been granted for other purposes. The ministry noted that there was no permission provided for information to be supplied by the doctor in another country for the purposes of the appellant’s application for the MNS.

## 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.

Section 29 of the *Interpretation Act* provides, in part, as follows:

### **Expressions defined**

**29** In an enactment:

"medical practitioner" means a registrant of the College of Physicians and Surgeons of British Columbia entitled under the Health Professions Act to practise medicine and to use the title "medical practitioner"; . . .

### *Evidentiary Considerations*

The ministry pointed out at the hearing that, in the past, the appellant has requested permission from the ministry for information to be provided by his doctor in another country and the ministry has granted such permission, for other purposes. The ministry noted that there was no permission provided for information to be supplied by the doctor in another country for the appellant's application for the MNS.

The advocate pointed out that the appellant had the forms filled out without the assistance of an advocate and that the medical practitioner who completed the application was not helpful since he was, at times, antagonistic towards the appellant's health concerns. The advocate argued that Lyme disease is not generally recognized in Canada and, since there is controversy surrounding this disease, many doctors will treat the symptoms and not the cause. The advocate argued that they found a doctor in another country who is a specialist in Lyme disease and have been visiting with him 4 times each year since 2009. The advocate pointed out that this doctor is knowledgeable about the appellant's medical condition, his prescribed treatments have helped the appellant and his information should be considered and given more weight than that of the medical practitioner who completed the application form.

### *Panel decision*

Section 67(1.1) of the EAPWDR requires that specified information must be confirmed by either a "nurse practitioner" or a "medical practitioner." "Medical practitioner" is defined in the *Interpretation Act* to consist only of registrants of the College of Physicians and Surgeons of British Columbia entitled under the *Health Professions Act* to practice medicine and to use the title "medical practitioner." There was no information provided to show that the doctor who is a specialist in the appellant's medical condition and who practices in another country qualifies as a "medical practitioner" according to this definition. Although the ministry stated that approval has previously been granted by the ministry for information to be provided by the appellant's doctor in another country, this was for other purposes and no approval has been granted for the purpose of the appellant's application for the MNS. The information from the doctor in another country, set out in the letter dated August 27, 2014 and the file notes, includes the Lyme disease diagnosis, additional symptoms and a list of both supplements and medications; however, the panel finds that this information has not been confirmed by a medical practitioner according to the prescribed definition. Therefore, the panel placed more weight on the information from the medical practitioner as set out in the application form dated February 7, 2014, which is the form specified by the minister.

### *Section 67(1.1)(a) & (b)*

The ministry acknowledged that the medical practitioner confirmed in the application dated February 7, 2014 that the appellant is being treated for a chronic, progressive deterioration of health on account of a severe medical condition, specifically chronic fatigue syndrome and chronic chest pain, 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 in the application to establish that the appellant displays two or more of the symptoms, namely: significant muscle mass loss and malnutrition.

*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 stated that the medical practitioner specified that the additional nutritional items required are "nuts, coconut oil, gluten free flour and soy products" and these food choices represent a specific dietary regime involving specific food choices within a regular diet rather than caloric supplementation to a regular diet. The ministry stated that the medical practitioner also did not confirm 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 he wrote "yes, decreased appetite from condition and food sensitivities makes regular diet inadequate." The ministry stated that when describing how the specific food choices will alleviate one or more of the symptoms of malnutrition and muscle mass loss the medical practitioner wrote that "high caloric foods like nuts and coconut oil helps to achieve calories in low volume; soy and gluten free flour decreases his discomfort with eating." The ministry stated that the medical practitioner supplied information regarding the appellant's height and weight in the application and has confirmed that the appellant's BMI is 21.1 and this, along with the information about his weight recovery, does not demonstrate that he requires caloric supplementation to a regular dietary intake.

The appellant's position is that sufficient information has been provided by a medical practitioner, in both the original Application and the additional letter, 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. In his Request for Reconsideration, the appellant wrote that nutritional supplements have been prescribed by a doctor who is a specialist in his medical condition and a key component of his treatment protocol is the extensive use of supplements. The appellant argued that he lost about one-third of his body weight when he was diagnosed and, with the help of supplements, he increased his weight. The advocate argued that the medical practitioner who completed the application did not understand the nature of the appellant's illness but this does not negate the need for the supplements and the resulting financial hardship to his family.

*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 response to a request to specify the additional nutritional items required, the medical practitioner wrote in the original application: "nuts, coconut oil, gluten [free] flour and soy products are needed for indefinite period." 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 appellant's local doctor, who qualifies as a medical practitioner, wrote in the application: "high caloric foods like nuts and coconut oil helps to achieve calories in low volume; soy and gluten free flour decreases his discomfort with eating." 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: "yes" and explained: "decreased appetite from condition and food sensitivities makes regular diet inadequate." The panel considered the ordinary meaning of "supplementation" to be something added and finds that the ministry reasonably determined that the medical practitioner's recommendation is for food

choices that represent a specific dietary regime within a regular diet. The appellant's regular diet has been compromised by his lack of appetite and discomfort with eating, and not with an inability to absorb calories from a regular dietary intake.

The panel considers that evidence of malnutrition can be caused by not eating enough of the right things as a result of choices made regarding the composition of one's regular dietary intake, as well as by being unable to use, or process, the food that one eats as a result of a medical condition. By requiring evidence of a need for caloric "supplementation" to one's regular dietary intake, or calories in addition to the regular diet, the MNS for additional nutritional items is geared specifically for those experiencing one of the listed symptoms as a result of a regular diet being insufficient, rather than for those who do not have enough to eat or who are not eating enough of the right things within a regular diet. The ministry pointed out that although the appellant lost weight from the time of the application (February 7, 2014) to time of a note by a physician on July 8, 2014, his approximate BMI at both times, as calculated by the record of his height and weight, was within the normal range. 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.

In reaching its decision, the panel notes that the medical practitioner did not list any of the supplements indicated in the August 27, 2014 letter from the appellant's doctor in another country as additional nutritional items required by the appellant, and the panel has before it no information from a medical practitioner to explain if or how these supplements might meet the requirements of Section 67(1.1)(c) and Section 7 of Schedule 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 pointed out that in describing how the nutritional items required will prevent imminent danger to life, the medical practitioner indicated in the MNS application: "leads to malnutrition and worsening of his conditions" and this description does not constitute confirmation that the appellant requires caloric supplementation to prevent imminent danger to his life. The ministry stated that the term "imminent" connotes a degree of immediacy that is not supported by the evidence that indicates that the appellant has regained an amount of weight and has an appropriate BMI.

The appellant's position is that the information from the medical practitioner in the application and in the letter from his specialist doctor from another country confirmed that failure to obtain the additional nutritional items will result in imminent danger to his life. The appellant argued in his Request for Reconsideration that his condition has worsened over the last year and a half and he has had to defer his studies for the last 3 semesters. The advocate argued that Lyme disease is progressive and some people end up in a wheelchair. The advocate argued that the supplements keep the appellant from "being knocked down" in that they maintain his body weight and help flush out the debris from his body, build the appellant's immune system, have anti-inflammatory properties, and improve his cognitive function.

*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 original Application, the medical practitioner responded to the question how the nutritional items will prevent imminent danger to the appellant's life, by stating "...leads to malnutrition and worsening of his conditions." The panel finds that the evidence of the medical practitioner demonstrates a need for specific food choices to help prevent malnutrition due to the appellant's decreased appetite and discomfort with eating. Although the advocate explained the beneficial qualities of the supplements listed by the specialist doctor in another country, the panel finds that need for these supplements to treat Lyme disease and the specific diagnosis are not confirmed by a medical practitioner, as required by Section 67(1.1) of the EAPWDR. The panel finds that although the advocate stated that some people with the Lyme disease end up in a wheelchair, there is insufficient information provided by a qualified medical practitioner to confirm that the risk of complications from the confirmed medical conditions, namely chronic fatigue syndrome and chronic chest pain, are 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 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 that are part of a caloric supplementation to a regular dietary intake 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 on the basis that 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.