



PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (Ministry) reconsideration decision dated August 27, 2014 in which the Ministry determined that the Appellant is not eligible for Monthly Nutritional Supplements (MNS), specifically vitamins and minerals and nutritional items pursuant to section 67(1.1), and Schedule C section 7 of the Employment and Assistance for Persons with Disabilities Regulation (EAPWDR) for the following reasons:

1. A medical practitioner has not confirmed that the Appellant displays two or more listed symptoms as a direct result of a chronic, progressive deterioration of health on account of a severe medical condition as required by subsection 67(1.1)(b) of the EAPWDR.
2. A medical practitioner has not confirmed that the Appellant requires a vitamin or mineral supplement to alleviate a symptom of a chronic, progressive deterioration of health and that failure to obtain the items will result in imminent danger to her life as required by subsections 67(1.1)(c) and (d) of the EAPWDR.
3. The Ministry was not satisfied that the Appellant requires additional nutritional items as part of a caloric supplementation to a regular dietary intake as set out in Schedule C section 7 of the EAPWDR. In addition, a medical practitioner has not confirmed that the Appellant requires nutritional items to alleviate a symptom of a chronic, progressive deterioration of health and that failure to obtain the items will result in imminent danger to her life as required by subsections 67(1.1)(c) and (d) of the EAPWDR

PART D – Relevant Legislation

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



PART E – Summary of Facts

The evidence before the Ministry at the time of the reconsideration consisted of:

- 1) The Appellant's Request for Reconsideration dated July 23, 2014 with a note dated July 15th requesting a time extension for the reconsideration because the Appellant was being referred to "Internal Medicine for a better diagnosis for treating her symptoms and a more detailed explanation of what she needs in terms of supplements."
- 2) A letter from the Ministry to the Appellant dated July 21, 2014 asking her to sign and date her Request for Reconsideration so that her request for a time extension can be processed.
- 3) An Application for a Monthly Nutritional Supplement completed by the Appellant's physician on April 22, 2014 who stated the following:
 - a) Under the heading Diagnosis (severe medical conditions), the physician indicated:
 - Diabetic Gastroparesis: delayed gastric emptying resulting in nausea and vomiting;
 - Irritable bowel syndrome: causing nausea and constipation and diarrhea;
 - Hiatus hernia: Gastroesophageal reflux;
 - Chronic pain syndrome: nausea and vomiting.
 - b) In response to the question of whether the Appellant is being treated for a chronic, progressive deterioration of health due to her severe medical conditions, the physician indicated:
 - Diabetes Type I: insulin dependent lifelong;
 - Chronic pain syndrome: medications.
 - c) In response to the question of whether the Appellant displays two or more of the legislated symptoms under section 67 (1.1) of the EAPWDR as a direct result of a chronic, progressive deterioration of health, the physician noted:
 - Underweight status: yes – Body Mass Index (BMI) 22;
 - Significant deterioration of a vital organ: pancreas.
 - d) The Appellant's height is recorded as 170 cm, and weight is 65 kg.
 - e) Under the heading Vitamin or Mineral Supplementation, when asked to specify the vitamin or mineral supplements required and expected duration of need, the physician wrote:
 - "vege greens and phyto berries";
 - gluten free diet, kidney care diet.
 - f) When asked to describe how this item will alleviate the specific symptoms identified, the physician wrote: "provide nutrients for daily living because patient does not tolerate solid food well."
 - g) When asked to describe how this item or items will prevent imminent danger to the applicant's life the physician wrote: "If patient cannot eat well she will need supplements that are conducive to her health issues to keep her functioning on a daily basis."
 - h) Under the heading Nutritional Items, in specifying additional nutritional items required, the physician indicated "vege greens and phytoberries. Protein smoothies or shakes. This is due to diabetes complications which she will have life long."
 - i) In response to the question of 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 physician wrote: "Insulin dependent – diabetic gastroparesis results in decreased

caloric intake as makes her vomit a lot and if not vomiting then very nauseous makes (illegible).”

- j) When asked to describe how the nutritional items will alleviate one or more of the legislated symptoms (in paragraph (b) of section 67(1.1)) and provide caloric supplementation to a regular diet, the physician stated: “A more liquid diet of caloric intake (sic) needs to nourish herself. Protein shakes as not able to tolerate solid protein.”
- k) When asked to describe how the nutritional items will prevent imminent danger to the Appellant’s life the physician wrote: “Low protein can lead to serious health problems.”

4) A letter to the Appellant from the Ministry dated July 3, 2014 and a Monthly Nutritional Supplement Decision Summary dated May 1, 2014, denying the Appellant’s application for MNS.

5) The Ministry noted the following in its reconsideration decision:

- The Appellant is a Person with Disabilities in receipt of disability assistance;
- No new information was received by August 27, 2014 further to the Appellant's request for an extension;
- The Appellant may qualify for a monthly diet supplement of \$35 for a person who has diabetes pursuant to section 8 of Schedule C of the EAPWDR.

The Ministry relied on the reconsideration decision at the hearing and did not submit any further information except to indicate that the normal BMI range for the Appellant’s height is 18.5 – 25. At the hearing, the Appellant added that she did not know the Ministry had approved a time extension for submitting additional information; that she had tried to obtain information but the nurse practitioner who had worked with her a lot called in sick; and that she is currently undergoing tests with an internal medicine specialist. These tests are ongoing and she has not yet received the results of a gastric emptying study. The Appellant also stated that she had not yet applied for a diabetic diet allowance as she “needed to figure out how.”

The Panel finds that the above statements relate to the Ministry’s earlier information regarding BMI, and to the Appellant’s attempts to obtain further information about her symptoms and nutritional needs. The Panel admits them pursuant to section 22(4)(b) of the *Employment and Assistance Act* as evidence in support of information and records that were before the Ministry at the time the decision being appealed was made.

The Panel makes the following finding of fact:

A medical practitioner has confirmed that as a direct result of the chronic, progressive deterioration of health, the Appellant displays one of the symptoms listed in paragraph (b) of section 67(1.1): significant deterioration of a vital organ – pancreas.



PART F – Reasons for Panel Decision

The issue in this appeal is whether the Ministry's determination that the Appellant is not eligible for MNS, specifically vitamins and minerals and nutritional items, pursuant to sections 67(1.1) and Schedule C section 7 of the EAPWDR was reasonably supported by the evidence, or was a reasonable interpretation of the applicable enactment in the circumstances of the Appellant.

The relevant sections of the legislation are as follows:

Employment and Assistance for Persons with Disabilities Regulation

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.

(2) In order to determine or confirm the need or continuing need of a person for whom a supplement is provided under subsection (1), the minister may at any time require that the person obtain an opinion from a medical practitioner or nurse practitioner other than the practitioner referred to in subsection (1) (c).

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.

Appellant's position

The Appellant's position, as stated in her Notice of Appeal dated September 6, 2014, is that she requires meal replacements and supplements to be able to minimally function daily due to chronic, debilitating nausea and vomiting which make her very ill. At the hearing, she added: "I get pretty much no nutrition because I can't keep solid food down. Sometimes I can keep a smoothie down and as long as I have something in my stomach I can get nutrition."

She argued that she does meet the legislative criteria of "two or more of the following symptoms" because both the Ministry in its reconsideration decision and her doctor on the MNS application form indicated that she has other symptoms including nausea, vomiting, constipation, and slow gastric emptying. She is not sure how the Ministry can say that she has only one symptom when diabetes is an auto immune disease that falls under "moderate to severe immune suppression" per clause (vii) of EAPWDR subsection 67(1.1)(b).

The Appellant argued that she also has malnutrition per clause (i) of subsection 1.1(b) because she will be malnourished if she can't keep food down and absorb nutrition into her body. With regard to Schedule C of the EAPWDR, while the Ministry stated that there is no evidence that she requires more food (caloric supplementation) than would be required to meet her regular dietary intake, her doctor said that she does require a more liquid caloric intake including protein shakes. She cannot tolerate solid protein and low protein leads to serious health issues.

The Appellant further argued that her doctor did state the items specifically needed for Schedule C of the EAPWDR indicating that she requires vitamins and minerals as well as "vege greens and phyto berries". She submitted that she is eligible for 3 out of the 9 options for a diet supplement under Schedule C section 8, including \$35 for diabetes and allowances for specific diets including gluten free. In her Notice of Appeal, she affirmed that she cannot eat gluten and requires a kidney (care) diet as prescribed by her doctor.

Ministry's position

The Ministry's position is that the Appellant's request for MNS, specifically vitamins and minerals, and nutritional items, does not meet all of the criteria in the EAPWDR and the Appellant is therefore not eligible for the items specified by her physician. The Ministry noted that the Appellant is a Person with Disabilities in recipient of disability assistance in accordance with section 67(1) of the EAPWDR and her application for MNS was in the form specified by the Ministry and it was completed by a medical practitioner pursuant to section 67(1.1). The Ministry was also satisfied that a medical practitioner is treating the Appellant for a chronic, progressive deterioration of health on account of severe medical conditions pursuant to subsection 67(1.1)(a): Diabetic gastroparesis, irritable bowel syndrome, hiatus hernia, and chronic pain syndrome. However, the Ministry was not satisfied that the following criteria were met:

EAPWDR subsection 67(1.1)(b): the person displays two or more (of the listed) symptoms

With regard to the symptoms listed in subsection 67(1.1)(b), the Ministry argued that the information from the Appellant's physician indicates that as a direct result of her chronic, progressive deterioration of health, the Appellant displays only one of the symptoms on the list: *(vi) significant deterioration of a vital organ* (pancreas). Although the physician also indicated that the Appellant has underweight status with a BMI of 22, the Ministry argued that "this is within normal limits for a female of (her) age and is not representative of underweight status." The Ministry further noted in its reconsideration decision that there is no information to suggest significant weight loss or loss of muscle mass.

EAPWDR subsection 67(1.1)(c): nutritional items required to alleviate a symptom described in paragraph (b)

Vitamin/mineral supplementation

The Ministry argued that the Appellant's physician did not specify which vitamins/minerals were required and that the items he identified under vitamins and minerals ("vege greens and phyto berries", and specific diets) are not a vitamin or mineral, but rather additional nutritional items to be considered under the criteria for those items. The Ministry argued that in any event, the criterion of needing vitamins and minerals for the purpose of alleviating the legislated symptoms had not been met. In particular, the Ministry was not satisfied that the physician's comment "provide nutrients for daily living because patient does not tolerate solid food well" adequately describes how a vitamin/mineral supplement would alleviate the symptom of significant deterioration of a vital organ (pancreas).

Nutritional items

The Ministry argued that the physician's request for "vege greens and phyto berries, protein smoothies or shakes" due to lifelong complications of diabetes does not address how these nutritional items will alleviate the identified symptom (significant deterioration of the pancreas). The Ministry also argued that the physician's prescription for a liquid protein diet did not address the alleviation of this symptom.

EAPWDR subsection 67(1.1)(d): Imminent danger to life due to failure to obtain requested nutritional items

Vitamin/mineral supplementation

The Ministry argued that specific vitamins/minerals were not identified by the Appellant's physician and in any event, his comment "If patient cannot eat well she will need supplements that are conducive to her health issues to keep her functioning on a daily basis" does not address how failure to obtain the vitamin/mineral supplement will result in imminent danger to the Appellant's life as required by section 67(1.1). The Ministry noted that "imminent" refers to an immediate situation such that the danger to life is likely to happen soon. The Ministry explained at the hearing that this legislative requirement was originally drafted for AIDS patients with symptoms of wasting, to prevent imminent danger to the person's life by providing essential, specified items to supplement regular nutritional needs.

Nutritional items

The Ministry argued that the physician's comment "low protein can lead to serious health problems" does not describe how the nutritional items will prevent imminent danger to the Appellant's life. At the hearing, the Ministry also argued that this comment is not directed at the Appellant's specific health conditions but is a generalization regarding health effects that could happen at a future time.

EAPWDR Schedule C section 7: nutritional items are part of a caloric supplementation to a regular dietary intake

The Ministry argued it was not satisfied that the Appellant requires "vege greens and phyto berries", and protein smoothies and shakes as part of a caloric supplementation to her regular diet. The Ministry noted the physician's statement "insulin dependent diabetic gastroparesis results in decreased calorie intake as makes her vomit a lot...and nauseated", but argued that while a liquid diet is recommended "this could be achieved by inclusion of regular fruits, vegetables and protein powders into a shake". The Ministry also argued that there is no evidence that the recommended liquid diet would involve consuming more food (caloric supplementation) than would be required to meet the Appellant's regular dietary intake.

The Ministry further argued that based on a BMI of 22, the Appellant's physician did not confirm that the Appellant was displaying the symptoms of underweight status or significant weight loss which would demonstrate that she requires caloric supplementation over and above her regular diet.

Panel's decision

In order for a recipient of disability assistance to be eligible for MNS, specifically vitamins and minerals and nutritional items under section 67 of the EAPWDR, all of the criteria in section 67(1.1), along with the additional criteria in Schedule C section 7 must be satisfied.

The criteria in section 67(1.1) that the Ministry determined were not met are that two or more listed symptoms must be displayed; the request for nutritional items must include specific vitamins and minerals and nutritional items for the purpose of alleviating one or more of the Appellant's symptoms;

[REDACTED]

and failure to obtain the requested items will result in imminent danger to the Appellant's life. The Panel notes that the specific nutritional items set out in Schedule C section 7 must be part of a caloric supplementation to a regular dietary intake and the Ministry found that this criterion was also not met.

The Panel further notes that "caloric supplementation" indicates a need for additional calories. The Appellant's request for nutritional items is therefore a request for extra calories beyond those provided by her regular diet. In addition, as the Ministry explained in its reconsideration decision, "imminent danger" to life refers to an immediate situation such that the danger to the Appellant's life is likely to happen soon.

EAPWDR subsection 67(1.1)(b): the person displays two or more (of the listed) symptoms

While the Panel notes that both parties agree that the Appellant's physician confirmed that she has significant deterioration of a vital organ (pancreas), there is a discrepancy between the physician's information and the Ministry's position regarding the symptom of underweight status. The physician indicated that the Appellant has underweight status due to a BMI of 22, while the Ministry argued that a BMI of 22 is within the normal range. The Panel places greater weight on the Ministry's evidence that a BMI of 22 is in the middle of the normal range because the Ministry provided additional information at the hearing, stating that a BMI range between 18.5 and 25 is normal with regard to the Appellant's height. Further, the Panel notes that the physician's evidence was that the Appellant is able to obtain nutrition, albeit from a liquid protein, gluten-free diet.

With regard to the Appellant's argument that her doctor reported various symptoms including nausea, and vomiting, the EAPWDR makes it clear that the only symptoms to be considered in determining eligibility for MNS are the ones listed in subsection 1.1(b) clauses (i) to (vii). While the Appellant may very well display other symptoms, the Ministry can only consider the ones that are listed in the regulation and confirmed by a medical practitioner. Similarly, the symptom the Appellant noted from clause (vii), moderate to severe immune suppression, would need to be reported by her physician on the MNS application form. The Ministry affirmed at the hearing that if this were done in a new application, the criterion of two of more symptoms could be met.

The Panel finds that because the physician's information did not confirm any of the other listed symptoms and the physician left the rest of the symptom section of the MNS application (question 3) blank, the Ministry reasonably determined that the criterion in subsection 67(1.1)(b) is not met.

EAPWDR subsection 67(1.1)(c): nutritional items required to alleviate a symptom described in paragraph (b)

The Panel notes that this subsection references "items set out in section 7 of Schedule C and specified in the request." Section 7 in turn refers to "specified" vitamins and minerals and additional nutritional items and states that the items are "as required" under subsection 67(1)(c); that is, for the purpose of alleviating a symptom as described above (under the "two or more symptoms" heading).

The Panel notes that the Appellant's physician did not list any specific vitamins/minerals and while he did specify nutritional items, he made no statements indicating that the nutritional items were for the purpose of alleviating the Appellant's symptom of significant deterioration of a vital organ (her pancreas). For this reason, the Panel finds that the Ministry reasonably determined that vitamins and

minerals were not specified to alleviate this symptom because "vege greens and phyto berries" are food supplements not vitamins; and "gluten free" and "kidney care" are described by the physician as types of diets - they are not vitamins or minerals.

The Panel also finds that the Ministry reasonably determined that the physician's information did not establish that the specified nutritional items ("vege greens and phyto berries, protein smoothies or shakes") were required to alleviate the deterioration of the Appellant's pancreas. The physician's comment "provide nutrients for daily living because patient does not tolerate solid food well" addresses the Appellant's need for nutrients. The physician has not provided information about how the nutritional items including a liquid protein diet would benefit pancreatic functioning. Thus, the criterion in subsection (1.1)(c) is not met for nutritional items.

EAPWDR subsection 67(1.1)(d): Imminent danger to life due to failure to obtain requested nutritional items

The Panel finds that the Ministry reasonably determined that there was no evidence of imminent danger to the Appellant's life if vitamins and minerals and nutritional items were not obtained because the physician's information for this criterion was that she will need supplements "to keep her functioning on a daily basis" and "low protein can lead to serious health problems." As the Ministry noted, the physician did not indicate any immediate life-threatening symptoms such as significant weight loss or wasting, and the physician did not indicate any immediate health consequence that can befall the Appellant if she does not consume more protein.

EAPWDR, Schedule C section 7, Nutritional items are part of a caloric supplementation to a regular dietary intake

The Panel finds that the Ministry reasonably determined that there was no evidence to indicate that additional nutritional items were required as part of a caloric supplementation to a regular dietary intake. The information from the Appellant's physician confirms that the Appellant's height and weight indicate a BMI that is within the normal range. This is not indicative of a need for additional calories to supplement her regular diet. Furthermore, there is no evidence that the Appellant has a medical condition that causes underweight status or wasting, resulting in an inability to absorb sufficient calories to satisfy daily requirements.

In response to the Ministry's finding in the reconsideration decision that there is no indication the Appellant requires "more food" than would normally be required to meet her regular dietary intake, the Appellant argued that her doctor stated that her diabetic gastroparesis "results in decreased caloric intake" due to vomiting and nausea, and she needs "a more liquid diet of caloric intake" because she cannot tolerate solid protein. The Ministry noted that a liquid protein diet could be achieved with regular foods blended together which the Panel finds is a reasonable conclusion. The Panel therefore finds that the Ministry reasonably determined that a need for liquid protein to reduce calorie loss due to nausea and vomiting is not equivalent to requiring additional calories *over and above* the Appellant's regular dietary intake.

EAPWDR, section 8 of Schedule C: Appellant's eligibility for diet supplements

The Panel notes the Appellant's submission that she qualifies for a diabetic supplement as well as supplements for specific diets, and the Ministry's instructions for applying for these supplements. The Ministry explained that it needs a prescription pad note from a physician that states the Appellant's medical condition, specifies a type of diet; and indicates the duration the diet is needed for.

The Panel's jurisdiction is limited to deciding the reasonableness of the Ministry's reconsideration decision of August 27th which denied MNS on the basis of the information provided as of that date. Eligibility for other supplements or MNS once she obtains new information or a note from her physician or specialist will need to be assessed via the Ministry's application processes.

Conclusion

The Panel confirms the Ministry's reconsideration decision as being reasonably supported by the evidence and a reasonable interpretation of the applicable enactment in the circumstances of the Appellant.