

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation's (ministry) reconsideration decision dated November 19, 2014 which held that the appellant is not eligible for a Monthly Nutritional Supplement (MNS) for additional nutritional items pursuant to Section 67(1) and Section 7 of Schedule C of the Employment and Assistance for Persons with Disabilities Regulation (EAPWDR). The ministry found that the evidence provided by the appellant's medical practitioner (physician) does not confirm that:

- due to a severe medical condition which resulted in a chronic, progressive deterioration of health, the appellant displays two of the symptoms set out in section 67(1.1)(b);
- the appellant requires additional nutritional items that are part of a caloric supplementation to a regular dietary intake for the purposes of alleviating a symptom referred in section 67(1.1)(b) [section 67(1.1) (c)], or;
- failure to obtain the items request would result in imminent danger to the appellant's life [section 67(1.1) (d)].

PART D – Relevant Legislation

Employment and Assistance for Persons with Disabilities Regulation (EAPWDR) – section 67 (1) and (2), and section 7 of Schedule C.

PART E – Summary of Facts

The evidence before the ministry at the time of reconsideration consists of:

1. Application for MNS signed and dated (October 9, 2014) by the appellant's physician but not completed in the physician's hand writing, which lists the appellant's medical conditions as breast cancer, diabetes 2, osteoarthritis and lupus;
2. 3-page typed letter (hear on referred to as the letter) with a handwritten date as November 6, 2014 which lists that the appellant's medical conditions and dietary needs for each condition. The letter is signed by the appellant's physician and in the physician's hand writing it is written, "I have reviewed the above statement". The conditions are listed as osteoarthritis/osteoporosis, lupus, diabetes 2, breast cancer, malnutrition, chronic gastritis and irritable bowel syndrome. Under the section that describes the appellant's breast cancer the author of the letter wrote, "Failure to obtain a caloric supplement to regular dietary intake will result in imminent danger to life.";
3. Surgical Pathology Report of the right breast with a procedure date of August 20, 2014, an accession date of August 21, 2014 and states "negative for dysplasia or malignancy".
4. Surgical Pathology Report of the right breast with a procedure date of August 9, 2013, an accession date of August 9, 2013, and states infiltrative ductal adenocarcinoma;
5. Request for Reconsideration signed and dated November 6, 2014 which states that :
 - she has breast cancer and will be treated for years to come;
 - the hospital and health nurse advised her to eat 5-6 times per day but sometimes she merely eats twice per day due to only \$35 extra per month;
 - she receives \$35 for vitamin/mineral supplement;
 - she goes to the food bank but the food there is not nutritional, expired or has mold growing on it; and
 - she tries to purchase Ensure when it is on sale as there are days when she is tired and in pain so all she can do is drink an Ensure.

In the Notice of Appeal, signed and dated November 24, 2014, the appellant states:

- she believes she meets the criteria for MNS;
- her doctor specified "failure to obtain a caloric supplement to regular dietary intake will result in imminent danger to life"; and
- imminent danger means "able to happen soon or impending".

At the hearing the appellant relied on the information provided in the letter dated November 6, 2014, and stated this letter outlines in detail that:

- she has bone loss due to osteoporosis; neurological degeneration due to lupus; the physician specifies that certain foods will help reduce pain and progression of deterioration of health and imminent danger to life; failure to obtain a caloric supplement to regular dietary intake will result in imminent danger to life; certain foods help replace and repair tissues and the immune system, and the physician has established muscle mass and bone loss.

She also added that:

- her physician provided all the information he could but the ministry is being very particular;
- she cannot exercise due to pain but would like to;
- she has applied for MNS because food price are very high and she cannot get her healthy calories;
- less nutritional food is easier to afford but will not help her fight each of the progressive

diseases she has;

- when she cannot cook or eat due to her medical conditions, she relies on nutrition shakes;
- her cancer is in remission but she continues to take medication and must eat 5-6 meals per day in the hope it will not come back;
- a caloric supplement is not only to gain weight, rather it can be to lose or maintain weight too;
- she appreciates that the government pays for her medication but it does not cover the cost of her cancer medication, which is provided to her by the cancer clinic (the appellant showed a bottle of medication she takes as part of her cancer treatment. It contained 20mg tablets of Tamoxifen that is to be taken once daily);
- when asked why question #2 of the application for MNS did not list cancer as a cause of her chronic progressive deterioration of health yet it was discussed throughout the documentation provided as a cause of her symptoms, the appellant stated it was an oversight;
- when asked how diabetes inhibits absorption of nutrients, the appellant stated that high sugar levels affect the functioning of other organs that absorb nutrients;
- when asked to explain her neurological degeneration the appellant stated that when her lupus and/or arthritis flares up, it causes pain and limited movement due to the nerve damage;
- when asked who prepared the 3-page letter dated November 6, 2014 the appellant stated that she discussed her medical conditions in detail with her physician in his office, then went home and typed the letter. Later she brought the letter back to her physician for review;
- when asked, the appellant could not provide evidence supporting that the diabetes and cancer clinic advised her to eat 5-6 meals per day;

Admissibility of New Information

The ministry did not object to the admission of the new information. The panel finds that the bottle of Tamoxifen provides information on part of her cancer treatment plan. The panel admits this additional information as being in support of information and records that were before the ministry at the time of reconsideration, in accordance with Section 22(4)(b) of the *Employment and Assistance Act*.

At the hearing the ministry relied on its reconsideration decision and added that:

- the appellant already receives \$40 supplement for vitamins and minerals and \$35 dietary allowance for her diabetic needs;
- if she were to provide medical confirmation of her breast cancer, the appellant could qualify for an additional dietary supplement;
- bone loss does not qualify for MNS;
- though the application for MNS was completed in the appellant's handwriting, this was not a factor for the denial; and
- in order to determine that muscle mass loss and neurological degeneration occurred, they must be measurable in both degree and over a period of time, thereby showing a progression in the deterioration of the appellant's health.

PART F – Reasons for Panel Decision

The issue on appeal is whether the ministry's decision which held that the appellant is not eligible for a Monthly Nutritional Supplement (MNS) because she failed to meet the legislative criteria set out in the EAPWDR was reasonably supported by the evidence or was a reasonable application of the applicable enactment in the circumstances of the appellant. In particular, was the ministry reasonable in determining that the evidence provided by the appellant's medical practitioner (physician) does not confirm that due to a severe medical condition which caused chronic, progressive deterioration of health the appellant displays two of the symptoms listed in section 67 (1.1)(b), the additional nutritional items are part of a caloric supplementation to a regular dietary intake for the purpose of alleviating a symptom referred to in section 67 (1.1)(b), or that failure to obtain the items requested would result in imminent danger to her life?

The relevant legislation is as follows:

EAPWDR

Nutritional supplement

67 (1) The minister may provide a nutritional supplement in accordance with section 7 [*monthly nutritional supplement*] of Schedule C to or for a person with disabilities in a family unit who receives disability assistance under

(a) section 2 [*monthly support allowance*], 4 [*monthly shelter allowance*], 6 [*people receiving room and board*] or 9 [*people in emergency shelters and transition houses*] of Schedule A, or

(b) section 8 [*people receiving special care*] of Schedule A, if the special care facility is an alcohol or drug treatment centre,

if the minister is satisfied that

(c) based on the information contained in the form required under subsection (1.1), the requirements set out in subsection (1.1) (a) to (d) are met in respect of the person with disabilities,

(d) the person is not receiving a supplement under section 2 (3) [*general health supplement*] of Schedule C,

(e) the person is not receiving a supplement under subsection (3) or section 66 [*diet supplements*],

(f) the person complies with any requirement of the minister under subsection (2), and

(g) the person's family unit does not have any resources available to pay the cost of or to obtain the items for which the supplement may be provided.

(1.1) In order for a person with disabilities to receive a nutritional supplement under this section, the minister must receive a request, in the form specified by the minister, completed by a medical practitioner or nurse practitioner, in which the practitioner has confirmed all of the following:

(a) the person with disabilities to whom the request relates is being treated by the practitioner for a chronic, progressive deterioration of health on account of a severe medical condition;

(b) as a direct result of the chronic, progressive deterioration of health, the person

displays two or more of the following symptoms:

- (i) malnutrition;
- (ii) underweight status;
- (iii) significant weight loss;
- (iv) significant muscle mass loss;
- (v) significant neurological degeneration;
- (vi) significant deterioration of a vital organ;
- (vii) moderate to severe immune suppression;

(c) for the purpose of alleviating a symptom referred to in paragraph (b), the person requires one or more of the items set out in section 7 of Schedule C and specified in the request;

(d) failure to obtain the items referred to in paragraph (c) will result in imminent danger to the person's life.

(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

The Ministry's Position:

The ministry's position is that the appellant already receives \$40 for vitamin and minerals supplement and \$35 for a dietary allowance for her diabetes. The ministry argues that in order to be eligible for a MNS the appellant must meet all four criteria listed in section 67 (1.1) (a-d) of the EAPWDR and that the additional nutritional items be for additional caloric intake to a regular diet as stated in section 7 of Schedule C of the EAPWDR. The ministry argues that the evidence does not establish that the appellant displays two of the symptoms listed section 67 (1.1.) (b) and that failure to obtain the nutritional items will result in imminent danger to life, and that the request is for additional calories. The appellant's physician states that breast cancer puts her in imminent danger however the legislation [section 67 (1.1)(d) of the EAPWDR] requires that a failure to obtain the nutritional items requested will result in imminent danger to the appellant's life and this has not been confirmed by the physician. Furthermore, muscle mass loss is substantiated by the appellant's physician however the level of significance has not been established as the physician has not provided evidence to confirm how much muscle mass was lost and/or over how long a period and neurological degeneration due to muscle spasms/weakness has not been explained.

The Appellant's Position:

The appellant's position is that her physician has provided information that establishes that she suffers from bone and muscle mass loss and neurological degeneration, and that failure to obtain a nutritional supplement will result in imminent danger to her life. The physician has also stated that her medical conditions lead to a chronic, progressive deterioration of health. Thereby she meets the legislative criteria as it is set out. She also argues that in order to fight cancer and live with her other medical conditions she needs a good healthy diet and to eat 5-6 times per day.

The Panel's Decision:

Section 67 (1.1) (b) of the EAPWDR states that as a direct result of the chronic, progressive deterioration of health, the person displays two or more of the listed symptoms. The evidence provided by appellant's physician establishes that the appellant has several severe medical conditions for which she is currently being treated; namely breast cancer, lupus diabetes type 2 and osteoarthritis. In the application for MNS, the physician states that the appellant displays the symptoms of malnutrition, muscle mass loss due to osteoarthritis and osteoporosis, and neurological degeneration due to lupus and osteoarthritis. In the letter under the heading 'lupus', the appellant's physician confirms that the appellant has "severe muscle weakness, muscle spasms due to significant neurological degeneration", under the heading osteoarthritis/osteoporosis "significant muscle mass loss due to poor nutrition, muscle has turned to unhealthy fat..." and the appellant stated she is unable to exercise which may allow her to build muscle mass. However, the physician has not provided information to allow quantitative determination of whether or not muscle mass loss and neurological degeneration are significant in extent and length of time. Furthermore, the panel finds that the physician has indicated that the muscle mass loss is due to poor nutrition, which is neither chronic nor progressive in nature, and which is not indicated on the appellant's application for MNS as a medical condition for which she is currently receiving treatment. As a result the panel finds that the ministry reasonably determined that evidence does not establish that appellant meets the requirements of section 67 (1.1) (b) of the EAPWDR.

Section 67 (1.1) (c) of the EAPWDR states that for the purpose of alleviating a symptom referred to in section 67 (1.1) (b) of the EAPWDR, the appellant requires one or more of the items set out in section 7 of Schedule C. The appellant argues that her physician has determined that she requires more nutritional items to maintain her strength to fight lupus, osteoarthritis and breast cancer. He specifically mentions folic acid, grains, fruits, vegetables and fish. The ministry argues the listed items represent a specific diet rather than additional calories and that the height and weight recorded in the appellant's application for MNS indicates a body mass index of 30.9, which is in the obese range. The panel finds that in the letter, the physician outlines specific nutritional items that may help either reduce pain, swelling and inflammation or aid in cell growth. This speaks to a specific diet rather than additional calories. Furthermore, the nutritional items specified are requested to alleviate pain, swelling, inflammation and to aid in cell growth but these are not the conditions that are outlined in section 67 (1.1) (b) of the EAPWDR. As a result, the panel finds that the ministry reasonably determined that evidence does not confirm that the purpose of alleviating a symptom referred to in section 67 (1.1) (b) of the EAPWDR, the appellant requires one or more of the items set out in section 7 of Schedule C pursuant to section 67 (1.1) (c) of the EAPWDR.

Section 67 (1.1) (d) requires that a failure to obtain the nutritional items will result in imminent danger

to the appellant's life. The appellant argues the letter from her physician establishes that she is in imminent danger. The ministry argues that the physician has established that the appellant's cancer puts her in imminent danger not that a failure to obtain the nutritional items requested will result in imminent danger to the appellant's life. The panel finds that under several headings in the letter, the physician states that the nutritional items requested will reduce imminent danger to life, or that failure to obtain the items will increase the imminent danger to life but did not state that the appellant's life is in imminent danger as she currently does not have the items requested, nor does he provide additional medical reports to substantiate imminent danger to life. The panel notes that the heart of the applicable legislation rests on the definition of imminent, and that imminent, as it is defined in the dictionary, refers to something that is likely to happen at any moment or is impending. The panel finds that the evidence does not establish that if the nutritional items are not obtained, that danger to the appellant's life would be impending. As a result, the panel finds the ministry reasonably determined that the evidence does not confirm that failure to obtain the nutritional items requested would result in imminent danger to the appellant's life pursuant to section 67(1.1) (d) of the EAPWDR.

Conclusion:

The panel finds that the ministry reasonably concluded that the evidence establishes that the appellant's request did not meet the legislative criteria set out in section 67 (1.1) (b, c and d) of the EAPWDR to be eligible for MNS. The panel confirms the ministry's decision.