

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation's ("the ministry") Reconsideration Decision dated September 3, 2014 which denied the appellant's request for a Monthly Nutritional Supplement ("MNS") for additional nutritional items on the basis that the appellant had not met all of the criteria of section 67 of the Employment and Assistance for Persons with Disabilities Regulation ("*EAPWDR*").

While the ministry determined that the appellant was being treated by a medical practitioner for a chronic progressive deterioration of health on account of a severe medical condition and that as a result she displayed two or more of the specific symptoms as listed in section 67(1.1)(b), the ministry found that the appellant did not require a protein supplement as part of a caloric supplementation to a regular dietary intake to alleviate the symptoms of her chronic, progressive deterioration of health and to prevent imminent danger to her life as required by section 67(1.1)(c) and (d) and Schedule C, section 7 of the *EAPWDR*.

PART D – Relevant Legislation

Employment and Assistance for Persons with Disabilities Regulation ("*EAPWDR*") section 67(1), (1.1) and (2) and Schedule C, section 7

PART E – Summary of Facts

With the consent of both parties, the hearing was conducted as a written hearing pursuant to section 22(3)(b) of the *Employment Assistance Act*.

The evidence before the ministry at reconsideration included:

1. The appellant's Request for Reconsideration dated September 3, 2014 ("the RFR"); and
2. The appellant's Application for Monthly Nutritional Supplement form ("MNS Application") dated July 2, 2014 and prepared by the appellant's physician ("the GP").

Additional Evidence

In addition to this information, the appellant submitted additional evidence. With her September 15, 2014 Notice of Appeal, the appellant attached a letter dated September 15, 2014 and prepared by her GP ("the GP Letter"). In it, the GP commented on and sought to clarify the evidence in the MNS Application and did not introduce any new evidence. In addition, the appellant submitted written submissions dated October 28, 2014, prepared by her advocate. The submissions referred to the GP Letter and the MNS Application and similarly did not raise any new issues or evidence. The panel is satisfied that the GP Letter and the written submissions are both admissible as written testimony in support of the information and records that were before the minister when the decision being appealed was made pursuant to section 22(4)(b) of the *Employment and Assistance Act*.

Facts

The appellant applied for a Monthly Nutritional Supplement ("MNS") in the form of both Vitamin or Mineral Supplementation and Nutritional Items on July 2, 2014. The prescribed MNS Application form was prepared by the appellant's GP. In it, the GP is asked to list and describe the appellant's severe medical conditions and he diagnoses the appellant with colorectal cancer and post-chemotherapy weight loss and anorexia. In response to the question whether the appellant is being treated for a chronic, progressive deterioration of health, the GP notes that the appellant has just completed chemotherapy and is preparing for major surgery (colonic resection). With respect to the question of whether the appellant displays two or more of the listed symptoms as a direct result of the chronic, progressive deterioration of health, the GP confirms malnutrition ("chemo-induced nausea/anorexia"), significant muscle mass loss ("++muscle mass loss secondary to illness and therapy") and moderate to severe immune suppression ("chemotherapy").

The MNS Application then provides two distinct sections for the GP to complete– one for a request for Vitamin or Mineral Supplementation and one for Nutritional Items. In the initial instruction paragraph for both of these categories, they each state that they are "only available to an applicant to alleviate one or more of the symptoms specified in Question 3, if those symptoms are a direct result of a chronic, progressive deterioration of health, and to prevent imminent danger to the applicant's life."

Under the section for Vitamin or Mineral Supplementation, the GP identifies the specific vitamin or mineral supplement required by the appellant as a combination of "protein-caloric-vitamin supplementation x 6 mos" and indicates that these will "help re-nourish protein stores and counteract long term nutritional deficiencies." The GP further states that these items will prevent imminent

danger to the appellant's life by noting "as above."

Under the section for Nutritional Items, the GP notes that additional nutritional items required by the appellant are "vitamins" and "protein supplements" but does not indicate the expected duration of need. The GP answers "no" 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 GP describes how the nutritional items required will alleviate one or more of the appellant's symptoms and provide caloric supplementation to her regular diet by noting that they will allow recovery from chemotherapy and prepare for healing from operation. The GP does not answer the question of how the nutritional items will prevent imminent danger to the appellant's life.

In a decision prepared by the ministry dated July 14, 2014, the appellant's request for Vitamin or Mineral Supplementation was approved while the request for Nutritional Items was denied.

In the Request for Reconsideration, the appellant states that she has lost weight and muscle mass secondary to cancer and chemotherapy and that she is now having further surgery resulting in further catabolic state. She further states that she is unable to meet high protein and caloric demands by diet alone and that the extra nutritional items are required for recovery of illness and surgery.

The Reconsideration Decision states that the minister is not satisfied that the appellant requires a protein supplement 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 imminent danger to her life as set out in section 67(1.1) of the *EAPWDR*.

The appellant submitted two separate Notices of Appeal. The first is dated September 15, 2014 and attaches the GP Letter. In that letter, the GP addresses the ministry's finding in the Reconsideration Decision that there is no evidence of an imminent danger to the appellant's life. He writes that the appellant is fighting cancer, has had two operations and is in the midst of a very strong chemotherapy. He states further that while she is functionally able to absorb nutrients, she is unable to intake adequate calories without protein/caloric supplements as a result of her symptoms. The GP reiterates that the appellant has lost extensive weight and muscle mass secondary to cancer, two surgeries and chemotherapy and that "her life is certainly in imminent danger." He goes on to say that the appellant's cancer which requires toxic chemotherapy is a condition and treatment well known to cause imminent and mortal danger to nutrition and short term well-being.

A second Notice of Appeal was submitted and dated September 30, 2014. On October 28, 2014, the appellant's advocate filed written submissions in support of the appeal. In those submissions, the advocate states that the appellant lives with life threatening cancer and must have nutritional supplements in order to avoid imminent danger to her life, citing the GP Letter. After referring to the Reconsideration Decision, the advocate disagrees with the ministry's finding that failure by the appellant to obtain the nutritional items will not result in imminent danger to her life and refers to the GP Letter and, specifically, the GP's statement that the appellant's life "is certainly in imminent danger."

The ministry relied on the Reconsideration Decision and submitted no new information.

PART F – Reasons for Panel Decision

The issue to be decided is whether the ministry reasonably determined that the appellant was ineligible for a Monthly Nutritional Supplement (“MNS”) for additional nutritional items on the basis that the appellant had not met all of the criteria of section 67 of the Employment and Assistance for Persons with Disabilities Regulation (“*EAPWDR*”).

While the ministry determined that the appellant was being treated by a medical practitioner for a chronic progressive deterioration of health on account of a severe medical condition and that as a result she displayed two or more of the specific symptoms as listed in section 67(1.1)(b), the ministry found that the appellant did not require a protein supplement as part of a caloric supplementation to a regular dietary intake to alleviate the symptoms of her chronic, progressive deterioration of health and to prevent imminent danger to her life as required by section 67(1.1)(c) and (d) and Schedule C, section 7 of the *EAPWDR*.

The relevant legislation, section 67 and Schedule C, section 7 of the *EAPWDR*, provides as follows:

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 center,

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.

(B.C. Reg. 68/2010)

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.C. Reg. 68/2010)

(b) Repealed (B.C. Reg. 68/2010)

(c) for vitamins and minerals, up to \$40 each month.
(B.C. Reg. 68/2010)

Positions of the Parties

The appellant's position is that she requires monthly nutritional supplements in the form of additional nutritional items due to her cancer diagnosis, the chemotherapy she is receiving to treat it and the symptoms associated with both the disease and the treatment.

The ministry's position as set out in the Reconsideration Decision is that the appellant has not met the eligibility criteria for additional nutritional items as set out in section 67 and Schedule C, section 7 of the *EAPWDR*.

Discussion

Section 67(1.1) of the *EAPWDR* sets out the criteria that an applicant must satisfy to be eligible for a nutritional supplement which may include additional nutritional items, vitamins and minerals or both. Each of the criteria is mandatory and where an applicant does not satisfy each of them, the request for the nutritional supplement will be denied.

Section 67(1.1)(a) of the *EAPWDR* provides that an applicant must be under treatment by a medical or nurse practitioner for a chronic progressive deterioration of health on account of a severe medical condition. The ministry agreed that the appellant had satisfied this requirement insofar as the GP had completed the MNS Application which listed the appellant's medical condition as colorectal cancer and post-chemotherapy weight loss/anorexia and that she had just completed chemotherapy and was preparing for major surgery in the form of a colonic resection.

Section 67(1.1)(b) of the *EAPWDR* provides that an applicant must demonstrate that as a direct result of the chronic, progressive deterioration of health, the person displays two or more of the seven specifically listed symptoms. These symptoms must be confirmed by a medical practitioner or nurse practitioner. The ministry agreed that the appellant had satisfied this requirement as the GP confirmed in the MNS Application that the appellant suffers from malnutrition, significant muscle mass loss and moderate to severe immune suppression.

Section 67(1.1)(c) of the *EAPWDR* provides that a medical practitioner or nurse practitioner must confirm that for the purpose of alleviating a symptom referred to in sub-paragraph (b), an applicant requires one or more of the items set out in section 7 of Schedule C and specified in the request. For additional nutritional items, section 7 provides that they must be "part of a caloric supplementation to a regular dietary intake." The ministry found that the appellant did not satisfy this aspect of the regulation stating in the Reconsideration Decision that the appellant does not require a "protein supplement" as part of a caloric supplementation to a regular dietary intake to alleviate the symptoms of a chronic progressive deterioration of health. The panel does note however that the ministry advised the appellant in the Reconsideration Decision in a "Note to Client" that a monthly diet allowance of \$40 for a high protein diet is available for clients with cancer under Schedule C, section 6 of the *EAPWDR*.

In the MNS Application, under the "Vitamins and Minerals" section the GP states that the appellant requires "protein-caloric-vitamin supplementation" to "re-nourish protein stores and counteract longterm nutritional deficiencies." Under the "Nutritional Items" section, the GP states that the appellant requires both vitamins and "protein supplements" which will allow recovery from chemotherapy and prepare for healing from her operation.

While the GP answers "no" to the question of whether the appellant has a medical condition which results in her inability to absorb sufficient calories to satisfy daily requirements through a regular dietary intake (and underlined the word "absorb"), he comments in the GP Letter that the appellant is "unable to intake adequate calories without protein/caloric supplements on account of the very symptoms [the Reconsideration Officer] states that she has!"

While the GP has referenced the appellant's need for protein and caloric supplementation as a means to re-nourish protein stores and counteract longterm nutritional deficiencies under the

“Vitamins and Minerals” section of the MNS Application instead of the Nutritional Items section, the Panel finds that each of the GP’s statements must be given broad consideration and not simply dismissed due to being found in the improper section. In making its determination, the ministry only refers to the GP’s statement in the application that the appellant requires a “protein supplement” which is listed in the Nutritional Items section which indicates that the ministry gave no consideration to the GP’s statement under the Vitamins and Minerals section, particularly the statement that the appellant requires caloric supplementation.

The GP has stated clearly in the MNS Application that the appellant requires, among other things, caloric supplementation for a period of 6 months to address nutritional deficiencies and protein stores which references the listed symptom of malnutrition. The GP Letter confirms this opinion. Further, the legislation is clear that it is only necessary that the caloric supplementation be shown to alleviate a singular symptom rather than multiple “symptoms described” as provided by the ministry in the Reconsideration Decision. Given the aforementioned, the Panel finds that the ministry’s determination that the appellant does not require a “protein supplement” as part of a caloric supplementation to a regular dietary intake to alleviate the symptoms of a chronic progressive deterioration of health as set out in section 67(1.1)(c) of the *EAPWDR* to be unreasonable.

Section 67(1.1)(d) of the *EAPWDR* provides that a medical practitioner or nurse practitioner must confirm that failure by an applicant to obtain the items referred to in paragraph (c) will result in imminent danger to the person’s life.

In the MNS Application, the GP states under the Vitamins and Minerals section that the “protein-caloric-vitamin supplementation” will prevent imminent danger to the appellant’s life writing “as above” in reference to his statement that these items will help renourish protein stores and counteract longterm nutritional deficiencies. As noted previously, the GP makes no statement in this respect under the Nutritional Items section. As also noted previously, the Panel finds that a broader view of the MNS Application should be taken and given the GP’s view that a combination of items including caloric supplementation will alleviate the appellant’s symptoms, the MNS Application provides evidence with respect to how the nutritional items will prevent imminent danger to the appellant’s health.

Turning to the GP Letter, the GP writes that as a result of her cancer, chemotherapy and two surgeries, the appellant has lost extensive weight and muscle mass. He writes further that cancer and chemotherapy are together “well known to cause imminent and mortal danger to nutrition and short term well being.”

As noted previously, the ministry approved the appellant’s request for a MNS for vitamins and minerals which requires that many of the same legislative criterion be met as for an application for additional nutritional items. Notably, both require an applicant to demonstrate that failure to obtain either will result in imminent danger to the person’s life. From this, it follows that the ministry determined that failure to obtain the vitamins and minerals would result in imminent danger to the appellant’s life. However, as set out above, the MNS Application provides that the appellant requires a combination of protein, caloric and vitamin supplementation and to find that failure to provide vitamins and minerals will result in imminent danger to the appellant’s life while failure to provide additional nutritional items will not, demonstrates an inconsistent application of the legislation given the totality of the evidence as set out in the MNS Application. Given that evidence in combination

with the clarification provided in the GP Letter, the Panel finds that the ministry's determination that failure by the appellant to obtain additional nutritional items would not result in imminent danger to her life as set out in section 67(1.1)(d) of the *EAPWDR* was unreasonable.

Therefore, the Panel finds that the ministry's decision to deny the appellant Monthly Nutritional Supplements in the form of additional nutritional items was not a reasonable application of the applicable legislation in the circumstances of the appellant and the Panel therefore rescinds the Reconsideration Decision.