

PART C – Decision under Appeal

The Ministry of Social Development and Social Innovation (the ministry) reconsideration decision dated 3 June 2015 determined that the appellant was not eligible for the monthly nutritional supplement (MNS) for nutritional items under section 67(1) of the Employment and Assistance for Persons with Disabilities Regulation (EAPWDR) because it was not established that the requested nutritional items would be part of caloric supplementation to a regular dietary intake to alleviate the symptoms of a chronic, progressive deterioration of health and prevent imminent danger to life under s. 67(1.1) of the EAPWDR.

The ministry however determined the appellant was eligible for a MNS for vitamins/mineral supplementation to alleviate a symptom set out in s. 67(1.1)(b) of the EAPWDR and to prevent an imminent danger to her life as set out in s. 67(1.1) and Schedule C, subsection 7(c) of the EAPWDR.

PART D – Relevant Legislation

EAPWDR, section 67.
EAPWDR, Schedule C, s. 7.

PART E – Summary of Facts

The following evidence was before the ministry at the time of reconsideration:

- The appellant is a person with disabilities (PWD) who receives disability assistance.
- An Application for MNS dated 21 November 2014 completed and signed by the appellant's physician indicating that:
 - The appellant suffers from auto-immune dysfunction, fibromyalgia with chronic pain and allergies, including food allergies and multiple chemical sensitivities.
 - As a result of the severe medical condition of the appellant, the physician noted that she has severe allergies to food and environment but does not indicate what treatment is being used.
 - As a direct result of the chronic, progressive deterioration of health the appellant displays the following symptoms: Significant deterioration of a vital organ: fibromyalgia and chronic pain.
 - The appellant's height is 167 cm and weight 81.8 kg.
 - In terms of vitamins or mineral supplementation:
 - The physician recommended multiple vitamins but not the duration.
 - He stated this item would help the appellant's immune system.
 - Asked to describe how this item would prevent imminent danger to the appellant's life, the physician wrote, "help fight infections and improve [her] immune system.
 - In terms of nutritional items:
 - The physician stated the appellant required protein powder 3 times a day (4 scoops / day), probiotics – DDS OD and buffered vitamin C.
 - To the question "Does this applicant have a medical condition that results in the inability to absorb sufficient calories to satisfy daily requirements through a regular dietary intake, the physician answered "food sensitivities – allergies".
 - The physician left blank the section about whether the nutritional items would alleviate one or more of the symptoms of the appellant and provide caloric supplementation to her regular diet.
 - In terms of preventing imminent danger, the physician indicated "better nutrition".
- A Request for Reconsideration dated 15 May 2015 and signed by the appellant indicated that her physician completed the areas that were missing in the Application form. The amended form was attached and indicated the following:
 - The amended form is dated 22 May 2015 and signed again by the appellant's physician.
 - No change for diagnoses, description and treatment.
 - In the section "As a result of the severe medical condition of the appellant" the physician added significant muscular mass loss: lower arms, thigh area. He also added "lungs" to the section on significant deterioration of a vital organ.
 - In the section about whether the nutritional items would alleviate one or more of the symptoms of the appellant and provide caloric supplementation to her regular diet, the physician indicated: regain muscle that is missing and stop further deterioration of more muscle groups.
 - The physician also provided additional comments to the effect that the appellant was allergic to influenza injections, she needed to build up her immunity and would help prevent frequent infections – he also indicated the appellant was allergic to many foods and described them.

In her Notice of Appeal dated 14 June 2015, the appellant indicated the following: She needs organic meat etc. that she cannot afford as well as protein powder that she is not allergic to;

- Her disabilities caused her to keep fluid retention;
- She lived 2 years without electricity in her residence which contributed to maintaining her weight;
- She had a car accident and she rides a stationary bike ½ hour every day;
- She lost muscle because of tennis arm injury.

At the hearing the appellant presented a one-page report from her physician dated 15 June 2015 that is a more recent page 3 of the Application for MNS that was completed earlier and that included the following additional evidence:

- After “food sensitivities – allergies” he added: to food additives * Needs organic food due to chemical additives.
- In terms of how the nutritional items would alleviate her symptoms, he re-wrote as follows: “Needs protein [illegible] 4 scoops a day of protein.
- In terms of whether these items would prevent imminent danger, he added after “better nutrition”: “which helps patient’s weight loss and less fluid retention”.
- He included new additional comments:
 - (1): Weight gain due to increase sodium in protein powder as the [product] is the only one she can tolerate – increased water retention due to menopause, IBS, auto immune issues.
 - (2): having no protein would cause imminent danger to her health.”

The appellant also testified that she suffered from a debilitating skin disease (lichen sclerosus), which is only kept in check by the use of her probiotics. She also has a prescription cream for the rash but Pharmacare does not cover it. She testified that friends did buy bottles of probiotics and she felt good given that she had a supply of that product. She indicated she was a very premature baby whose immune system did not develop properly and as a result she grew up with a lot of allergies but that her situation has become more complicated now. She has no electricity in her home because of a property dispute with a family member and last winter the police visited her on several occasions to check on her and see if she was all right.

The ministry did not present additional evidence and relied on its reconsideration decision.

The ministry objected to the admissibility of the documentary evidence on the grounds that it did not add to the information that was already before the reconsideration officer. The panel determined the additional oral and documentary evidence was admissible under s. 22(4) of the Employment and Assistance Act (EAA) as it was in support of the records before the minister at reconsideration and provided more specific information on the needs of the appellant and corroborated the evidence presented by the appellant’s physician.

PART F – Reasons for Panel Decision

The issue under appeal is whether the ministry's decision that the appellant was not eligible for the MNS for nutritional items under section 67(1) of the EAPWDR because it was not established that the requested nutritional items would be part of caloric supplementation to a regular dietary intake to alleviate the symptoms of a chronic, progressive deterioration of health and prevent imminent danger to life under s. 67(1.1) of the EAPWDR, was a reasonable application of the legislation or reasonably supported by the evidence.

The applicable legislation is section 67 of the EAPWDR that states:

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 ...

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).

Also applicable is s. 7 (Monthly Nutritional Supplements), Schedule C of the EAPWDR:

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

(c) for vitamins and minerals, up to \$40 each month.

The ministry argued that the evidence did not demonstrate that the items the medical practitioner indicated were required were in fact nutritional supplements as they were not required as part of a caloric supplementation since probiotics were aids to digestion and not nutritional items and protein powder was not indicative of a need for caloric supplementation. The ministry further argued that there was no evidence of imminent danger to the appellant's life if she did not get the nutritional items requested. The ministry also argued that the program already covered her need for protein supplement.

The appellant argued she was suffering from several disabilities and auto-immune disorder and as a result she needed very specific categories of food because of allergies and sensitivities to additives. She stated she was allergic to chemicals and antibiotics and that she had no other recourse but nutritional supplements to build her immune system as she could not rely on medications. She argued that without those supplements, she was exposed to very serious threats to her life since, for instance, she might not be able to breath if an allergic attack occurred as she cannot use puffers in the event of an allergic reaction as they cause her adrenalin to go out of control due to her reaction to the medication in them. She stated needing an air purifier system and only few brands of bottled water were appropriate for her because of cleaners used for cleaning the bottles. She said that she was also allergic to flu vaccination and that could put her in imminent danger and that without proteins and probiotics, her health was in danger. She argued that it was the probiotics that were keeping her alive and that she could not afford paying for all those supplements. She finally argued that her physician has confirmed on the new application that there is an imminent danger to her life.

Panel decision:

The panel acknowledges the appellant's challenges and that her allergies are causing multiple problems. This issue must be considered in the light of the legislation in respect of nutritional items since the ministry already determined the appellant was eligible for the vitamins/minerals supplements. The physician identified 2 of the 7 symptom areas: significant muscle mass loss (lower arms & thighs) and significant deterioration of a vital organ (fibromyalgia, chronic pain, lungs). Those symptoms do not seem to be connected to caloric supplementation, unlike malnutrition, underweight status or significant weight loss. The panel finds the ministry reasonably determined the appellant's BMI at 35 based on the information provided by her physician was not indicative of a need for caloric supplementation. As well, the ministry's determination that probiotics are aids to digestion and not nutritional items is reasonable. Thus, the panel finds the ministry reasonably determined there was

not enough evidence to demonstrate the items identified by the appellant's physician were part of a caloric supplementation to a regular dietary intake to alleviate symptoms of her chronic, progressive deterioration of health.

The panel agrees that the appellant's condition may pose a threat to her health in numerous circumstances, in particular given her serious allergies. However, the issue to be determined by the ministry was whether the failure to obtain the items the physician had identified would result in **imminent** danger to her life. The panel notes that the physician characterized the issue of the imminent threat to her life by "help fight infections and improve her immune system". In the most recent evidence provided by the physician, he wrote that it was a threat to her health – he did not write "to her life". The panel finds that "imminent" has a strong sense of immediacy, of urgency while the evidence is more to the effect that the failure to obtain those items will eventually affect the appellant's health. Thus, the panel comes to the conclusion that the ministry could reasonably determine that the evidence provided by the medical practitioner did not demonstrate that failure to obtain those items would result in imminent danger to the appellant's life. Consequently, the panel finds the ministry reasonably determined the appellant was not eligible for nutritional items supplementation under s. 67(1.1) of the EAPWDR.

In conclusion, the panel finds the ministry's decision was reasonably supported by the evidence and confirms the decision.