



PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (“the Ministry”) reconsideration decision dated April 28, 2015 in which the Ministry approved the Appellant's request for the Monthly Nutritional Supplement (MNS) of vitamin/mineral supplements and denied her request for the MNS of nutritional items. The Ministry was not satisfied that the Appellant requires nutritional items as part of a caloric supplementation to a regular dietary intake to alleviate symptoms of a chronic, progressive deterioration of health and to prevent imminent danger to her life as set out in the Employment and Assistance for Persons with Disabilities Regulation (“EAPWDR”) subsections 67(1.1)(c) and (d), and subsection 7(a) of Schedule C. The Ministry therefore found that the eligibility criteria for the MNS of nutritional items were not met:

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 reconsideration consisted of:

1. Three pages of Ministry policies for Nutritional Supplements, with the Ministry noting that the pages are for information purposes only and the Appellant may wish to apply for the short term supplement after her surgery.

2. A Request for Reconsideration signed by the Appellant on April 15, 2015 to which she attached the following:

- Her written submission in which she emphasized that the *Bariatric Surgery Lifestyle Manual and Cookbook* (“bariatric manual”) stresses the importance of healthy nutrients before and after surgery. She requires financial support in order to buy supplements, protein, and healthy foods and continue with her doctor’s recommendation to have the surgery. Her doctor has made it clear that additional supplements are needed for healing and to decrease the risk of liver damage.
- A letter from the Appellant’s registered clinical dietitian dated April 2, 2015 (“dietitian’s information”) which stated that the Appellant is receiving counselling pre and post bariatric surgery. The Appellant will not be able to eat regular foods “for awhile” after her surgery and will need powdered or prepared protein supplements. Even when she can eat regular foods, she will still need to supplement her diet with protein powders/ shakes since the quantity of solid foods she can eat will be limited. Inadequate protein intake can cause malnutrition and loss of muscle mass and would also affect the Appellant’s immune system and metabolism.
- Twenty-two pages from the bariatric manual. Highlighted sections (for nutritional items) state that the patient will need to explore and purchase protein supplements since she may not be able to eat enough high protein foods to meet the body’s requirements after surgery. Nutritional supplements include items such as Glycema or Diabetic Boost. Protein supplements are an important part of the patient’s post-operative diet since overall food intake may be insufficient for basic protein needs as well as additional needs for wound healing. Unflavoured protein powders such as Beneprotein are the best choice since they can be added to any food or beverage. Other recommended protein supplements include Kaizen, 100% whey protein, Dunawhey, and fat free Greek yogurt.
- A copy of the EAPWDR legislation with highlighted subsections that include the symptoms of significant weight loss and significant muscle mass loss [subsections 67(1.1)(b)(iii) and (iv)]; imminent danger to the person’s life [subsection 67(1.1)(d)]; short term caloric supplementation while recovering from surgery [subsection 67(3)(b)(i)]; and caloric supplementation to a regular dietary intake [Schedule C section 7(a)].

3. An Application for Monthly Nutritional Supplement (“MNS application”) signed by the Appellant on November 25, 2014 and completed by her family physician on January 19, 2015. The physician reported that the Appellant’s diagnosis is “fatty infiltration liver” which he described as “obesity associated fatty liver”. The Appellant is being treated for a chronic, progressive deterioration of health and has been referred for bariatric surgery with a BMI (Body Mass Index) of 34.6. The physician reported that as a direct result of her chronic, progressive deterioration of health, the Appellant displays the following symptoms:

-
- malnutrition, with the comment “low Vitamin D serum levels”,
 - significant muscle mass loss, with the comment “possibly”, and
 - significant deterioration of a vital organ. with the comment “liver infiltration - fat”.

The physician reported that the Appellant’s height is ninety-eight centimetres and her weight is one hundred kilograms.

For item number five in the application, *Vitamin and Mineral Supplementation*, the Ministry noted that one of the physician’s responses related to nutritional items, not vitamins and minerals:

- When asked to specify the vitamin or mineral supplements required and expected duration of need, the physician wrote "High protein diet – indefinite period of time (after proposed surgery she will need to stay on this diet)"

For item number six in the application, *Nutritional Items*, the physician provided the following information regarding nutritional items [Information for vitamins/minerals that was included in this section has been omitted]:

- When asked 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 “No”.
- When asked to describe how the nutritional items required will alleviate one of more of the symptoms specified in Question three, and provide caloric supplementation to the Appellant’s regular diet, the physician wrote “Improved caloric quality pre-op and required post operatively”.
- When asked to describe how the nutritional items requested will prevent imminent danger to the Appellant’s life, the physician wrote “N/A”.
- The section for Additional Comments was left blank.

The appeal proceeded via a written hearing with the consent of both parties. The Ministry noted that the Appellant is a single person in receipt of Employment and Assistance for Persons with Disabilities (“PWD”) benefits and that no date has yet been scheduled for her bariatric surgery. In its email to the tribunal of May 28, 2015, the Ministry stated that no submission would be provided as it is relying on its reconsideration decision. The Appellant provided additional submissions as follows:

Appellant’s additional submissions

In her Notice of Appeal of May 6, 2015, the Appellant included a letter from her endocrinologist (“medical specialist’s letter”) and stated that she requires MNS both before and after her surgery. It is vital for her to have a nutritional supplement indefinitely in conjunction with vitamins and minerals.

The medical specialist’s letter dated May 5, 2015 included the following information:

- The Appellant is a middle-aged female living with morbid obesity, dyslipidemia, hepatic adiposity, and mild steatohepatitis.
- A critical piece of the Appellant’s past medical history is Cushing’s Disease which was diagnosed and treated in 2003.
- Until approximately ten years ago, the Appellant had rapid onset of metabolic syndrome in addition to the above listed illnesses. She also had other features and effects of Cushing’s

[]

Disease including proximal muscle wasting, cachexia, depression, fatigue, malaise, abdominal obesity, and progression in all visceral adiposity.

- She underwent neurosurgical partial pituitary resection in February 2003 but experienced the non-resolution of many chronic, systemic effects of Cushing's syndrome. Often times, surgical intervention prevents the progression of metabolic disease but does not reverse it.
- Nutritional supplementation could be considered to address the irreversible effects of the disease especially because the Appellant is now chronically disabled and requires Ministry assistance.
- In an assessment on May 1, 2015, the Appellant was found to have mild proximal muscle weakness and wasting. She has retained in tact pituitary function and has normal serum Cortisol levels once again. She also has a concurrent thyroid condition.
- In addition to prior Cushing's syndrome and muscle wasting, the Appellant will be rendered in a chronic gastrointestinal malabsorptive state for which Bariatric intervention is highly effective.
- The Appellant will require nutritional supplements for a least one month prior to surgery and for several months afterwards. During the one month pre-operative period, she will be rendered in a severe caloric restrictive nutritional deficiency as a side effect of advised medical treatment.
- A total caloric restricted diet with protein supplementation is advised for the Appellant's hepatomagely as a result of adipose deposition.
- The writer recommends a total of thirteen months of supplements, one month pre-operatively and for twelve months afterwards.

In accordance with section 22(4)(b) of the *Employment and Assistance Act*, the panel admits all of the above information as evidence in support of the information and records that were before the Ministry at the time the decision being appealed was made. The panel notes that the medical specialist's information provides a more detailed context for the Appellant's request for MNS, describing an extensive medical history, and corroborating the medical reason for nutritional items which was briefly identified in the reconsideration record as obesity associated "fatty infiltration liver".

PART F – Reasons for Panel Decision

The issue in this appeal is whether the Ministry's reconsideration decision of April 28, 2015 which held that the Appellant is not eligible for MNS of nutritional items because the criteria in EAPWDR subsections 67(1.1)(c) and 67(1.1)(d) and 7(a) of Schedule C were not met, was reasonably supported by the evidence or was a reasonable application of the applicable enactment in the circumstances of the Appellant.

The following sections of the EAPWDR set out the eligibility criteria for MNS:

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.

[Redacted]

(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

In her reconsideration submission and Notice of Appeal, the Appellant argued that it is vital for her to have healthy nutrients before and after her surgery in order to have the surgery in the first place, heal from it afterwards, and decrease the risk of liver damage.

In the MNS application, the Appellant's family physician argued that nutritional items will alleviate one or more of the symptoms listed in EAPWDR subsection 67(1.1)(b), and provide caloric supplementation to the Appellant's regular diet under subsection 67(1.1)(c) by ensuring "improved caloric quality" pre-operatively and because the items are required post-operatively.

Further, the Appellant's dietitian submitted that the Appellant will require protein powders/shakes after surgery because the quantity of solid foods she can eat will be limited and inadequate protein intake can cause malnutrition and loss of muscle mass, as well as impact the Appellant's immune system and metabolism. The bariatric manual confirms that protein supplements are an important part of the patient's post-operative diet since overall food intake may be insufficient for basic protein needs as well as additional needs for wound healing.

The Appellant's medical specialist argued that nutritional supplementation could be considered to address the irreversible effects of Cushing's Disease and will be necessary pre and post-surgery due to "caloric restrictive nutritional deficiency" caused by the recommended medical treatment. He also advised a "caloric restricted diet with protein supplementation" for the Appellant's hepatomagely.

As the Ministry's reconsideration decision denied the Appellant's request for nutritional items, the panel's focus will be on whether the Ministry reasonably determined that the EAPWDR criteria for nutritional items were not met.

EAPWDR Schedule C section 7 and subsection 67(1.1)(c): Nutritional items required as part of a caloric supplementation to a regular dietary intake and to alleviate a symptom

Ministry's position

The Ministry submitted that MNS is for PWD recipients who display symptoms of wasting with their severe and progressive medical condition. Additional eligibility criteria for nutritional items in section 7 of EAPWDR Schedule C require the nutritional items to be part of a "caloric supplementation to a regular dietary intake" and the items must also be for the purpose of alleviating a symptom of the person's chronic, progressive deterioration of health as set out in EAPWDR section 67(1.1).

The Ministry argued that the Appellant's physician (in the MNS application) 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. Further, the Ministry found that the Appellant is not currently displaying the symptoms of underweight status, significant weight loss, or significant muscle mass loss that would suggest she presently requires caloric supplementation. The Ministry argued that because the date of the Appellant's surgery has not yet been determined, the information submitted with her Request for Reconsideration (the dietitian's information and the bariatric manual) is anticipatory in nature; however, the MNS legislation is intended to address the amelioration of current symptoms.

Panel decision

EAPWDR subsection 7(a) of Schedule C requires the nutritional items to be part of a caloric supplementation to a regular dietary intake and for the purpose of alleviating a symptom under EAPWDR subsection 67(1.1)(c). "Caloric supplementation" indicates a need for additional calories and the Appellant's request for nutritional items is therefore a request for extra calories beyond those provided by her regular diet. These provisions are drafted in a present, active tense (using language such as "for the purpose of alleviating a symptom") thereby reasonably confirming the Ministry's position that MNS of nutritional items is intended to address a current need, not a future event.

With regard to how nutritional items will alleviate a symptom that was confirmed by the physician in the MNS application (malnutrition, and significant deterioration of an organ - liver) and provide caloric supplementation to the regular diet, the physician wrote that a "high protein diet" is "for preparation for bariatric surgery" and will improve "caloric quality" before and after surgery. As noted by the Ministry, the physician did not highlight a symptom that is directly related to a need for caloric supplementation (significant weight loss/muscle mass loss or underweight status). Further, the MNS application indicated that the Appellant's BMI is in the obese range of 34.6 which suggests a need for fewer calories, not caloric supplementation. Moreover, the Ministry stated that it had already provided the Appellant with a diet supplement to assist with her "high protein diet" requirement and argued that this type of diet is not indicative of a need for caloric supplementation.

Given that:

- No symptom indicating a need for additional calories was identified;
- The Appellant's BMI is in the obese range; and
- The physician was referring to a type of diet rather than specific nutritional items,

[Redacted]

the panel finds that the Ministry reasonably determined that the physician's statements and prescription for a high protein diet do not confirm that the Appellant requires nutritional items as part of a caloric supplementation to a regular dietary intake for the purpose of alleviating a symptom.

With regard to the Ministry's position that the MNS application, dietitian's information and bariatric manual do not confirm a current need for caloric supplementation to a regular dietary intake, the panel notes that all of the information addressed a pre/post-surgical context. The Ministry provided specific examples of the anticipatory need for MNS; for example, the physician's information that the Appellant requires "improved caloric quality pre-op and post-operatively" and the dietitian's description of the Appellant's dietary needs in the future tense.

Considering the additional information from the Appellant's medical specialist which the panel admitted as evidence in support of the Ministry's information and records, the panel notes the following:

- The specialist assessed the Appellant with current "mild proximal muscle weakness" [not "significant" as required under EAPWDR subsection 67(1.1)(c)].
- He indicated the Appellant currently has "'wasting", the extent of which he did not describe but which appears to contradict his observation that the Appellant is "living with morbid obesity" (confirmed by a BMI of 34.6 as noted in the MNS application).
- He indicated the Appellant requires nutritional supplementation in the form of a "total caloric restrictive diet with protein supplementation" pre-operatively, and "nutritional supplementation" in the form of protein supplements (currently, to address the irreversible effects of her past medical conditions, as well and pre and post-operatively).

The panel notes that a "total caloric restrictive diet" is the opposite of "caloric supplementation to a regular dietary intake" as set out in section 7(a) of Schedule C, and finds that the specialist's recommendation for "nutritional supplementation" and "protein supplementation" at any point in time, does not confirm that the Appellant has a current need for additional calories above her regular diet for the purpose of alleviating a symptom as required under subsection 7(a) of Schedule C, and subsection 67(1.1)(c).

On the basis of the above analysis the panel finds that the Ministry reasonably concluded the information provided does not confirm a current need for MNS of nutritional items as part of a caloric supplementation to a regular dietary intake and to alleviate a symptom. The Ministry therefore reasonably found that these criteria in EAPWDR subsection 7(a) of Schedule C, and subsection 67(1.1)(c) were not met.

EAPWDR subsection 67(1.1)(d): Failure to obtain the items will result in imminent danger to life

The Ministry submitted that MNS is intended to prevent imminent danger to the person's life by providing essential, specified items to supplement regular nutritional needs. The Ministry found that the word "imminent" denotes a degree of immediacy and means that the threatened loss of life will, in all likelihood, occur very soon. The Ministry argued that the Appellant's physician (in the MNS application) did not confirm that the Appellant requires nutritional items to prevent imminent danger to her life. The Ministry further argued that because the date of the Appellant's surgery has not yet been determined, the information submitted with her Request for Reconsideration (the dietitian's

[]

information and the bariatric manual) is anticipatory in nature; however, the MNS legislation is intended to provide nutritional items that are presently required to prevent imminent danger to life.

Panel decision

In order for the Appellant's request for MNS of nutritional items to fulfill the criteria in EAPWDR subsection 67(1.1)(d), the Ministry must be satisfied that failure to obtain the requested items will result in imminent danger to the person's life. The panel notes that the dictionary definition of "imminent" is "impending/ soon to happen" and therefore finds that the Ministry reasonably determined that imminent danger "denotes a degree of immediacy and means the threatened loss of life is more likely than not going to occur very soon" if the Appellant does not receive the nutritional items. Therefore, the purpose of section 67(1.1)(d) is to provide MNS only in exceptional circumstances where the failure to provide it will clearly result in life-threatening consequences.

With regard to the Ministry's finding that there was no evidence of imminent danger to the Appellant's life if nutritional items were not obtained, the panel notes that in the MNS application, when asked to describe how the items are required to prevent imminent danger to life, the physician wrote "N/A". Further, the dietitian's information indicated eventual consequences of inadequate protein intake including malnutrition, loss of muscle mass, and a compromised immune system. The panel finds that the Ministry reasonably determined that "N/A" and the eventual effects of inadequate protein do not confirm that failure to obtain nutritional items will result in imminent danger to the Appellant's life.

With regard to the medical specialist's information, the panel notes that the specialist did not address how failure to obtain nutritional items will result in imminent danger to the Appellant's life. The specialist stated that the Appellant is chronically disabled due to her past and present medical conditions and will be rendered in a "chronic gastrointestinal malabsorptive state". His information confirms the chronic nature of the Appellant's conditions as well as future consequences. He does not indicate a pressing need for nutritional items to prevent imminent danger to her life.

Given the evidence the Ministry had at the time of the reconsideration and the medical specialist's additional information, the panel finds that the Ministry reasonably determined that the "imminent danger" criterion in subsection 67(1.1)(d) of the EAPWDR was not met.

Conclusion

The Panel confirms the Ministry's reconsideration decision as being reasonably supported by the evidence and a reasonable application of EAPWDR section 67(1.1) and section 7 of Schedule C in the circumstances of the Appellant.