

## PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (“the Ministry”) reconsideration decision dated May 12, 2015 in which the Ministry denied the Appellant’s request for the Monthly Nutritional Supplement (“MNS”) of nutritional items. The Ministry found that the eligibility criteria under subsections 67(1.1)(c) and (d), and 7(a) of Schedule C of the Employment and Assistance for Persons with Disabilities Regulation (“EAPWDR”) were not met. Specifically, the minister was not satisfied the Appellant requires nutritional items 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. The Ministry found that there was insufficient information to confirm that the Appellant has a medical condition that results in the inability to absorb sufficient calories to satisfy daily requirements through her regular diet or that she was displaying symptoms of underweight status and significant weight loss to demonstrate a need for caloric supplementation.

## 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 reconsideration consisted of:

1. Information from the Ministry's records indicating the following:

- The Appellant is a single parent in receipt of disability assistance.
- The Appellant's Body Mass Index ("BMI") of 21.6 is within the normal range.
- As a recipient of disability assistance the Appellant is generally eligible to receive supplements under the EAPWDR.
- She is not receiving a diet supplement, short term nutritional supplement or appeal award.
- There do not appear to be any available resources in the family unit to pay for nutritional items pursuant to EAPWDR subsection 67(1)(g).
- Her application was completed and signed by a medical practitioner who listed and described a severe medical condition and the minister was satisfied that the Appellant is being treated for a chronic, progressive deterioration of health as required by EAPWDR subsection 67(1.1)(a).
- The minister was also satisfied that the Appellant was displaying two or more symptoms as a direct result of her chronic, progressive deterioration of health as required by EAPWDR section 67(1.1)(b).

2. A Request for Reconsideration signed by the Appellant on May 11, 2015 in which she stated that if she does not have money to pay for a diet for her lifelong medical condition, her immune system will deteriorate and she will be unable to move her arms and legs and have to live in a hospital. In that circumstance her child will be placed in foster care. Deterioration in her health can also cause death.

3. An application for MNS signed by the Appellant on January 7, 2015 and completed by her physician on February 10, 2015 who provided the following information:

- Under Diagnosis, the physician reported Central Sensitivity Syndrome and Fibromyalgia described as chronic pain, neuropathic pain, and fatigue with decreased functional capacity and cognitive dysfunction.
- In response to whether the Appellant is being treated for a chronic, progressive deterioration of health due to her severe medical conditions the physician wrote, "Patient is awaiting entry into the Complex Chronic Diseases program at (a local) hospital."
- When asked to indicate whether the Appellant displays two or more of the symptoms [listed in EAPWDR subsection 67(1.1)(b)] the physician reported:
  - Malnutrition with the comment, "poor absorption due to chronic GI problems/ food intolerance";
  - Significant muscle mass loss with the comment, "generalized muscle weakness";
  - Significant neurological degeneration with the comment, "cognitive dysfunction ('brain fog')"; and
  - Moderate to severe immune suppression with the comment, "immune dysregulation".
- The Appellant's height was reported as 5'5" and her weight as 130 lbs.
- In response to 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,

"Diet high in plant based foods in addition to high protein food sources: fish, poultry, lean meats, legumes and all long term".

- When asked to describe how the nutritional items will alleviate one or more of the symptoms (previously specified) and provide caloric supplementation to the regular diet, the physician wrote, "Nutritional items help promote muscle mass and function, boost immunity, and improve cognition".
- When asked to describe how the requested items will prevent imminent danger to the Appellant's life, the physician wrote, "improved nutrition will help (prevent) further decline in functional status and worsening symptoms".
- The section for Additional Comments was left blank.

*Additional submissions:*

The appeal proceeded via a written hearing with the consent of both parties. In its email to the tribunal of June 12, 2015, the Ministry stated that no submission would be provided as it was relying on its reconsideration decision.

The Appellant's only additional submission was her Notice of Appeal of May 15, 2015 in which she stated that Fibromyalgia could severely affect her immune system, involving her vital organs, which sustain life. If her immune system is compromised, her organs could shut down causing death, which could be imminent and sudden due to there being no cure. The panel accepts this submission as argument, in particular, substantiating the Appellant's position in her Request for Reconsideration with respect to her immune system deteriorating and resulting in serious consequences if she does not receive MNS.

## PART F – Reasons for Panel Decision

The issue in this appeal is whether the Ministry's reconsideration decision of May 12, 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.

[ ]

**(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.

As the Ministry noted that some MNS criteria in EAPWDR section 67 were met, the panel's focus is on whether the Ministry reasonably determined that the 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***

#### *Appellant's position*

The Appellant, through the information provided by her physician, argued that she requires a long term diet high in plant based foods and protein to promote muscle function, boost immunity and improve cognition, thereby preventing a further decline in her functional status and symptoms.

#### *Ministry's position*

The Ministry argued that MNS is for PWD recipients who display symptoms of wasting with their severe and progressive medical condition. The supplement is intended to prevent imminent danger to the person's life by providing essential items to supplement regular nutritional needs. Additional eligibility criteria for nutritional items in subsection 7(a) 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 prescribed a specific diet (high in plant based foods and protein) rather than caloric supplementation to the Appellant's regular diet. The Ministry argued that the physician's recommendation for specific foods does not confirm that the Appellant has a medical condition that results in the inability to absorb sufficient calories to meet daily requirements. The Ministry noted that the physician also did not confirm that the Appellant is displaying the symptoms of underweight status and significant weight loss to demonstrate that she requires caloric supplementation. Moreover, the Appellant's BMI is within the normal range.

*Panel decision*

Subsection 7(a) of Schedule C requires the requested 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. The panel notes that neither the physician nor the Appellant specified any need for additional calories. The physician prescribed a diet high in plant based foods and protein while the Appellant stated that she needed MNS to “pay for a diet for (her) lifelong medical condition”. While the physician wrote that the Appellant has “poor absorption due to chronic GI problems/ food intolerance”, he did not detail whether this condition requires caloric supplementation to her regular dietary intake. Further, her normal range BMI of 21.6 does not support a need for caloric supplementation.

With regard to how nutritional items will alleviate a symptom, the physician reported that the Appellant’s symptoms are malnutrition due to poor absorption, generalized muscle weakness, cognitive dysfunction and immune dysregulation. The physician stated that the prescribed dietary items would help to promote muscle mass, and immune and cognitive function. While promoting these functions may improve the symptoms that were highlighted by the physician, he did not, as noted by the Ministry, indicate the symptoms directly related to a need for caloric supplementation (significant weight loss or underweight status).

While significant muscle mass loss could be a symptom of wasting, the physician did not connect the remedy of a nutritious diet to a need for caloric supplementation as a way of alleviating this symptom. Further, as stated above, the Appellant’s normal range BMI does not suggest a requirement for additional calories beyond her regular dietary intake. Therefore, there is no medical evidence to confirm that specific nutritional items that are part of a caloric supplementation are required to alleviate the Appellant’s “generalized muscle weakness”.

Given that:

- No symptom requiring additional calories above a regular dietary intake was identified;
- The physician was referring to a generic healthy diet, high in foods such as legumes and lean meats rather than specific nutritional items, and
- The Appellant’s BMI falls within the normal range;

the panel finds that the Ministry reasonably determined that the physician’s information does 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. 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***

*Appellant’s position*

In her reconsideration and appeal submissions, the Appellant stated that if she does not receive MNS to fund a diet for her condition, her immune system will deteriorate resulting in paralysis (in her arms

and legs), confinement to a hospital, and removal of her child from her care. Her organs can shut down causing imminent and sudden death.

#### *Ministry's position*

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" refers to immediacy such that the danger to the client's life is likely to happen soon. The Ministry argued that the physician's comment that "improved nutrition will help (prevent) further decline in functional status and worsening symptoms" does not indicate an imminent danger to life. Although the Ministry acknowledged that nutritional items would be beneficial to the Appellant's health, it found that the physician provided no additional information to describe that the Appellant requires nutritional items as part of a caloric supplementation to a regular dietary intake and 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 her life. The panel notes that the dictionary definition of "imminent" is "impending/ soon to happen" and therefore finds that the Ministry reasonably interpreted the legislation when it found that imminent danger refers to immediacy, with the threat to life happening soon if the Appellant does not receive the nutritional items. Therefore, the purpose of subsection 67(1.1)(d) is to provide MNS only in circumstances where the failure to provide it will clearly result in life-threatening consequences.

With regard to the Ministry's finding that the physician provided no evidence of imminent danger to the Appellant's life if nutritional items were not obtained, the panel notes that the physician suggested a general improvement in health and function with improved nutrition and did not indicate any imminent life threatening consequences if nutritional items were not obtained. Further, the physician provided no information to substantiate the Appellant's concerns about paralysis, or organ shut down causing imminent and sudden death.

Given the evidence the Ministry had at the time of the reconsideration and the Appellant's additional submission on appeal, 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.