

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the “ministry”) reconsideration decision of October 30, 2015 wherein the ministry decided that the appellant was not eligible for a monthly nutritional supplement (“MNS”) – either for nutritional items for caloric supplementation as described in s. 7(a) of Schedule C of the Employment and Assistance for Persons with Disabilities Regulation (“EAPWDR”) or for vitamins and minerals as described in s. 7(c) of Schedule C.

The basis for the decision was that the ministry concluded that the appellant did not satisfy eligibility criteria set out in section 67(1) and Schedule C, section 7 of the EAPWDR. In particular, the ministry found that:

- The appellant is not a recipient of disability assistance as required by section 67(1); and
- The appellant’s physician had not confirmed that the appellant required caloric supplementation to a regular dietary intake as specified by EAPWDR Schedule C section 7(a).

PART D – Relevant Legislation

Employment and Assistance for Persons with Disabilities Act (“EAPWDA”) sections 1 [*definitions*] and 5 [*disability assistance and supplements*].

EAPWDR section 1 [*definitions*], section 24 [*amount of disability assistance*], section 67 [*nutritional supplement*], Schedule A section 8 [*people receiving special care*], and Schedule C section 7 [*monthly nutritional supplement*].

PART E – Summary of Facts

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

- An Application for Monthly Nutritional Supplement form signed by the appellant's physician on August 21, 2015 (the "Form").
- A letter from the residential clinical lead at the care facility where the appellant resides (the "Care Facility") dated October 16, 2015. The letter confirms that the Care Facility is a residential care facility that provides care for a variety of residents with complex care needs. The Care Facility provides meal replacements such as Boost or Resource products, but it does not provide vitamins and minerals. The letter does state that "All medications that are administered at the site are prescribed by a physician and provided by a pharmacy. This includes all vitamins and minerals that are required by physician prescription."
- A report listing the medications taken by the appellant during the month of August 2015.

In part 1 of the Form, the appellant's physician diagnosed her with organic brain syndrome, brain stem cancer, and post-polio syndrome. In part 3 of the Form the physician also indicated that the appellant suffers from a skin condition linked to the symptom of severe immune suppression.

In part 5 of the Form, which deals with vitamin or mineral supplementation, the physician specified that the appellant requires calcium carbonate 1200 mg OD, niacinamide 500 mg BID, and vitamin D 1000 iu daily (the "Vitamins"). He also noted that nutritional meal supplements such as Ensure are available at the Care Facility.

The physician completed part 6 of the Form, which deals with nutritional items, and commented "Current caloric intake sufficient." (emphasis included)

In its reconsideration decision, the ministry appeared to accept that all legislative criteria for provision of MNS in the form of nutritional items were satisfied except that the evidence does not indicate that the appellant requires additional calories, and that she is "not in receipt of monthly support and shelter under the [EAPWDR] Section 67(1) and 67(1)(a)..."

The ministry also appeared to accept that all legislative criteria for provision of MNS in the form of vitamins and minerals were satisfied, except that the appellant is "not in receipt of monthly support and shelter under [EAPWDR] section 67(1) and 67(1)(a)..."

In her oral testimony on appeal the appellant, through her representative, stated that:

- The appellant has been designated as a person with disabilities.
- She had not intended to apply for nutritional items. The physician was only assigned to the appellant in June and appeared to complete the Form in a hurry.
- The appellant's ministry worker told her to apply for MNS as she would be eligible.
- The appellant's representative has been paying about \$30 a month to supply the appellant with the Vitamins. However, the representative has a young family to provide for and cannot continue to pay for the Vitamins indefinitely.
- The appellant's skin condition has cleared up and her health is the best it has been in three years because of the Vitamins.
- The representative has not been able to get more documentary evidence of the appellant's

condition because she received short notice of this appeal, and though she has an appointment booked with a skin specialist it is a six month wait.

- The appellant receives a small federal pension which all goes toward the cost of her care at the facility where she resides. The ministry pays for the balance of the appellant's care facility fees, and provides her a comfort allowance of \$95 per month.
- The appellant's monthly cable and phone expenses are \$40 and \$30 respectively, leaving her with only \$25 per month for all her personal needs such as deodorant, toothpaste, incontinence pads etc.

In response to questions from the panel, the appellant (through her representative) stated that:

- The Care Facility is a licensed care facility.
- The care facility is not an alcohol or drug treatment centre.

The ministry relied on its reconsideration decision.

Admissibility of Additional Oral Information

The oral statements of the appellant and her representative substantially tended to reiterate or corroborate information that had been before the ministry at reconsideration. The panel accepted these statements into evidence in accordance with section 22(4) of the *Employment and Assistance Act*.

PART F – Reasons for Panel Decision

The issue on appeal is whether the ministry's reconsideration decision, which held that the appellant is not eligible for a MNS, is reasonably supported by the evidence or whether it is a reasonable application of the applicable enactment in the circumstances of the appellant.

Legislative Amendment

The panel notes that some of the legislation on which this case turns was amended effective September 1, 2015 after the physician signed the Form on August 21, 2015, but before the ministry made its original decision on September 17, 2015 and its reconsideration decision on October 30, 2015. There is no evidence before the panel as to when the appellant actually made application for MNS by submitting the Form to the ministry. The panel has analyzed the legislation as it stood both prior to after September 1, 2015 and has concluded that the amendment does not affect its conclusion on the issue on appeal.

The applicable legislation is as follows:

EAPWDA

Interpretation

1 (1) In this Act: ...

"**disability assistance**" means an amount for shelter and support provided under section 5 *[disability assistance and supplements]*;

Disability assistance and supplements

5 Subject to the regulations, the minister may provide disability assistance or a supplement to or for a family unit that is eligible for it.

EAPWDR

Definitions

1 (1) In this regulation: ...

"**special care facility**" means a facility that is a licensed community care facility under the *Community Care and Assisted Living Act* or a specialized adult residential care setting approved by the minister under subsection (3);

Amount of disability assistance

24 Disability assistance may be provided to or for a family unit, for a calendar month, in an amount that is not more than

(a) the amount determined under Schedule A, minus

(b) the family unit's net income determined under Schedule B.

Nutritional supplement (before September 1, 2015)

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,

...

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 family unit in receipt of disability assistance, if the supplement is provided to or for a person in the family unit who

(a) is a person with disabilities, and

(b) is not described in section 8 (1) [*people receiving special care*] of Schedule A, unless the person is in an alcohol or drug treatment centre as described in section 8 (2) of Schedule A,

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 another nutrition-related supplement,

(e) Repealed. [B.C. Reg. 145/2015, Sch. 2, s. 7 (c).]

(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).

(3) Repealed. [B.C. Reg. 145/2015, Sch. 2, s. 8.]

Schedule A

People receiving special care

8 (1) For a person with disabilities who receives accommodation and care in a special care facility (other than a special care facility described in subsection (3)) or a private hospital or who is admitted to a hospital because he or she requires extended care, the amount referred to in section 24 (a) [*amount of disability assistance*] of this regulation is the sum of

(a) the actual cost, if any, to the applicant or recipient of the accommodation and care at the rate approved by the minister for the type of facility, plus

(b) a comforts allowance of \$95 for each person for each calendar month.

(2) If the special care facility under subsection (1) is an alcohol or drug treatment centre, the minister may, in addition, pay either or both of the following while the applicant or recipient is in the alcohol or drug treatment centre:

(a) actual shelter costs for the applicant's or recipient's usual place of residence up to the amount under section 4 for a family unit matching the applicant's or recipient's family unit;

(b) a monthly support allowance for the applicant's or recipient's family unit, equal to the amount calculated under sections 2 and 3 of this Schedule minus the portion of that allowance that would be provided on account of the applicant or recipient.

(3) For a person with disabilities who receives accommodation and care in a special care facility operated by a service provider as defined in section 1 of the *Community Living Authority Act*, the amount referred to in section 24 (a) [*amount of disability assistance*] of this regulation is the sum of

(a) the support allowance that is applicable under sections 2 and 3 of this Schedule for a family unit matching the applicant's or recipient's family unit, plus

(b) the maximum shelter allowance that is applicable under section 4 of this Schedule for a family unit matching the applicant's or recipient's family unit.

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 appellant's position is that she satisfies the legislative criteria for MNS in the form of vitamins and minerals. She stated that she did not intend to apply for nutritional items. The appellant argued that her care fees are topped up by the ministry and the ministry pays a comforts allowance of \$95 per month so she is a recipient of amounts for shelter, support, and disability assistance as required by section 67(1) of the EAPWDR.

The ministry's position is that, with respect to nutritional items, there is no evidence that the appellant requires caloric supplementation. With respect to both nutritional items and vitamins/minerals, the ministry argued that the fees the ministry pays to the Care Facility are a per diem amount, and they do not constitute disability assistance as required by section 67(1).

Panel Decision

Section 7 of EAPWDR Schedule C provides for two kinds of MNS:

- Up to \$165 per month for additional nutritional items that are part of a caloric supplementation to a regular dietary intake, and
- Up to \$40 per month for vitamins and minerals.

Regarding nutritional items, the physician was clear in the Form that the appellant's current caloric intake is sufficient. Both the physician (in the Form) and the Care Facility (in its letter of October 16, 2015) confirmed that the Care Facility does provide meal replacement items. The appellant, through her representative, stated that it was never her intention to apply for nutritional items. It appears to the panel that perhaps the physician was simply unfamiliar with the Form and completed part 6 in error. Based on the evidence the panel concludes that the ministry reasonably determined that the appellant is not eligible for MNS as nutritional items.

Regarding vitamins and minerals, the only criterion at issue is described by the ministry as "[the appellant] is not in receipt of monthly support and shelter under [EAPWDR] Section 67(1)..." The appellant argued throughout that the appellant's Care Facility fees are topped up by the ministry and that the ministry provides a \$95 per month comfort allowance, so that the appellant obviously does receive amounts for shelter, support, and disability assistance.

The ministry based its decision on the legislation as it stood *before* September 1, 2015. At that time, section 67(1) required that in order for a person who was not living in an alcohol or drug treatment centre to be eligible for MNS, they would have to be receiving a support allowance under section 2 of Schedule A, a shelter allowance under Schedule 4 of Schedule A, room and board under section 6 of Schedule A, or be living in an emergency shelter or transition house under section 9 of Schedule A. There is no evidence before the panel to suggest that any of those requirements are satisfied in the appellant's circumstances.

Post-September 1, 2015 section 67(1) provides that eligibility for MNS requires an applicant to be in receipt of disability assistance, without express reference to support and shelter costs. The proper interpretation of the current legislation is that the appellant does receive disability assistance. The Care Facility is a special care facility as defined in section 1 of the EAPWDR. Section 8 of Schedule A of the EAPWDR provides for payment of the actual cost of accommodation and care, as well as a comforts allowance for residents of special care facilities. In setting these amounts, section 8 refers

explicitly to section 24 of the EAPWDR which deals with the amount of disability assistance. The total accommodation and care fees, along with the comforts allowance, are “an amount for shelter and support” as specified in the definition of “disability assistance”.

Unfortunately, the panel’s interpretation of the term “disability assistance” in the current legislation does not help the appellant. Section 67(1)(b) of the EAPWDR – in both the pre- and post- September 1, 2015 versions, specifically excludes residents of a special care facility from eligibility for MNS unless the special care facility is an alcohol and drug treatment centre. The appellant’s evidence is that the Care Facility is not an alcohol and drug treatment centre.

Based on the foregoing analysis, the panel concludes that the ministry reasonably determined that the appellant is not eligible for the MNS of vitamins and minerals regardless of which version of the legislation was in force at the time the appellant applied for MNS.

Conclusion

The panel is very sympathetic to the appellant’s circumstances, and is hopeful that with a physician’s prescription the Care Facility may provide the Vitamins. However, the panel is bound to apply the legislation as written. Based on the evidence and for the above-noted reasons, the panel finds that the ministry’s reconsideration decision to deny the appellant’s request for MNS is a reasonable application of the legislation in the appellant’s circumstances, and the panel accordingly confirms the ministry’s decision.