



### PART C – Decision under Appeal

The decision under appeal is the reconsideration decision of the Ministry of Social Development and Social Innovation (the “ministry”) dated October 17, 2016 that denied the appellant’s request for a monthly nutritional supplement (MNS) of nutritional items because the ministry determined that the appellant does not meet the eligibility criteria under section 67(1.1) subsections (c) and (d) and section 7 of Schedule C of the EAPWDR. Specifically, the ministry determined that a medical practitioner has not confirmed that the appellant requires nutritional items that are part of a caloric supplementation to a regular dietary intake for the purpose of alleviating a symptom referred to in section 67(1.1)(b). In addition, the minister is not satisfied that the appellant faces a direct and imminent life threatening need and requires the necessary nutritional supplement to meet the life threatening need. The ministry did determine that the appellant was eligible to receive vitamin/mineral supplementation.

### PART D – Relevant Legislation

EAWPDR 67(1.1)  
EAPWDR 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 and Assistance Act*.

The documentary evidence before the ministry at reconsideration included the following:

1. An *Application for Monthly Nutritional Supplement* signed and dated by the appellant's physician on June 29, 2016. In that application the appellant's physician diagnosed the appellant's medical conditions as Myalgic Encephalomyelitis, Fibromyalgia, and Irritable Bowel Syndrome. As a consequence of these conditions the physician indicated that the patient displays the symptoms of malnutrition, significant muscle mass loss, significant neurological degeneration and moderate to severe immune suppression. The physician reported that the appellant requires "*Protein rich foods – nuts, eggs, poultry, fish, protein powder for smoothies*" / "*Dairy alternatives – almond milk, lactose free products*" / "*Gluten free grains. Increased intake of fruits & vegetables + healthy fats.*" The physician also stated that these dietary items will alleviate the appellant's symptoms as follows: "*Protein will prevent further muscle loss, boosts immunity & improve energy*" / "*Dairy alternatives level + cognition*" (sic) / "*Gluten-free grains – will reduce inflammation & GI symptoms*" / "*Fruits/Veg/healthy fats – reduce inflammation/pain & boost immunity.*" In regard to the nutritional items preventing imminent danger to the appellant's life the physician stated "*Without adequate nutrient intake as requested above, this patient will continue to have decreased muscle & function, not be able to care for herself, have increased falls risk and risk of infection, all dangers to applicant's life. In addition, poor cognition can contribute to dangers such as fire from stove etc.*" The physician also concluded that the appellant's weight is not an adequate indication [or] assessment of health. He stated "*As per RD (registered dietitian) assessment this patient is not meeting her basic protein & energy needs. Poor intake due to inability to prepare food (fatigue / weak muscles) & low cost calorie dense foods can lead to unintended weight gain.*"
2. A *Monthly Nutritional Supplement Decision Summary* dated September 1, 2016.
3. The appellant's *Request for Reconsideration* signed and dated by the appellant on October 3, 2016. Accompanying the Request for Reconsideration was a letter from the appellant's dietitian and physician that reported that the appellant suffered from malnutrition, significant muscle loss, significant neurological degeneration and moderate to severe immune suppression. They reported that the appellant was not able to meet her estimated protein and total protein needs with her current income. They stated that the appellant's current protein intake is less than 50% of her protein goal and she has greater protein needs due to her chronic illness.

In the *Reconsideration Decision* the ministry stated that the appellant is a Person with Disabilities in receipt of disability assistance. The ministry determined that the appellant met the eligibility requirement set out in subsection 67(1.1) (a) of the EAPWDR. In addition, the ministry determined that a medical practitioner had confirmed that the appellant suffered from symptoms of malnutrition, significant muscle mass loss, significant neurological degeneration and moderate to severe immune suppression. Accordingly, the ministry determined that the appellant met the criteria for subsection 67(1.1) (b). The ministry determined that the evidence provided by the appellant did not meet the eligibility criteria set out in subsections 67(1.1) (c) and (d) of the EAPWDR because the ministry

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concluded that a medical practitioner had not confirmed that the appellant requires the additional nutritional items as part of a caloric supplementation to a regular dietary intake.

The appellant's *Notice of Appeal* was signed and dated on October 28, 2016 and was accompanied by a letter from her physician dated October 28, 2016. In that letter, the physician described the reconsideration decision as wrong and arbitrary. He stated that "All of our other patients with a clinical condition similar to (the appellant) have been deemed eligible for the Monthly Nutritional Supplements of nutritional items". The panel noted that this was new evidence and concluded that the physician's letter of October 28, 2016 contained evidence that was not before the ministry at the time of reconsideration. Section 22(4) of the *Employment and Assistance Act (EAA)* instructs appeal panels that they may only admit as evidence "(a) the information and records that were before the minister when the decision being appealed was made, and (b) oral or written testimony in support of the information and records referred to in paragraph (a)." Pursuant to section 22(4) of the *EAA*, the panel therefore does not admit this new information as evidence because it is not in support of the information that was before the ministry at the time of reconsideration..

The appellant did not make a written submission for the hearing.

The ministry did provide a written submission dated November 25, 2016. The contents of that submission responded to the issues raised in the letter from the appellant's physician dated October 28, 2016 and accordingly addressed matters which were not before the ministry at the time of reconsideration. Pursuant to section 22(4) of the *EAA*, the panel therefore does not admit the ministry's submission as evidence.

## PART F – Reasons for Panel Decision

The issue in this appeal is whether the ministry's decision that determined that the appellant was not eligible for a MNS of nutritional items because the ministry determined that the appellant did not meet the eligibility requirements to receive this supplement was either a reasonable application of the legislation or reasonably supported by the evidence. In particular, was the ministry reasonable in determining that a medical practitioner has not confirmed that the appellant requires nutritional items that are part of a caloric supplementation to a regular dietary intake for the purpose of alleviating a symptom referred to in section 67(1.1)(b) and is not someone who faces a direct and imminent life threatening need and requires the necessary health supplement to meet the life threatening need.

The relevant legislation is as follows:

From the EAPWDR:

### **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 C

### Health Supplements

#### 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

The appellant argues that she suffers from symptoms of malnutrition, significant muscle mass loss, significant neurological degeneration and moderate severe immune suppression and that the MNS of nutritional items is needed to alleviate these symptoms. Moreover, the appellant's dietitian and physician argue that due to her low income she is unable to meet her estimated protein and total nutrient needs. In addition, the appellant's physician argues that the additional nutritional items are requested to prevent imminent danger to the appellant's life.

The letter dated October 3, 2016 from the appellant's dietitian and physician stated " . . . as per dietitian assessment (May 2016) the patient is not able to meet her estimated protein and total nutrient needs with her current income. This patient has increased protein needs due to her chronic illness and her current protein intake is less than 50% of her protein goal. She has significant protein malnutrition" / " . . . this patient is not able to meet her basic nutritional needs with her current income . . . her medical conditions require higher protein and nutrient needs than a person without these conditions. These additional funds will empower the patient to meet her nutrient needs and improve her function . . ." The letter also details the appellant's limited capacity to complete activities of daily living as a consequence of her medical conditions and her need to use a cane due to decreased strength and mobility as well as her risk of falls. The appellant's ability to socialize is almost non-existent, she cannot work and can no longer do activities such as dancing, walking, knitting/crocheting or other positive coping strategies.

#### Ministry Position

The ministry concluded that the appellant did qualify to receive vitamin/mineral supplementation. Specifically, the ministry determined that the appellant met the requirements of subsections 67(1.1) (a), (b), (c) and (d) of the EAPWDR insofar as the request for vitamin/mineral supplementation was concerned. The ministry also determined that insofar as the appellant's request for the MNS for nutritional items was concerned, the appellant met the requirements of subsections 67(1.1) (a) and (b) of the EAPWDR but not subsections (c) and (d). Subsection (c) specifies that the applicant must require the nutritional item as part of a caloric supplementation to a regular dietary intake for the purpose of alleviating a symptom referred to in section 67(1.1) (b) of the EAPWDR. The ministry reviewed the information provided by the appellant's dietitian and physician and noted that they were proposing that the appellant required a high protein, lactose-free and gluten-free diet as opposed to caloric supplementation to a regular dietary intake. The ministry argued that high protein, lactose-free and gluten-free diets do not meet the intent of the MNS of nutritional items. The ministry also notes that the appellant's Body Mass Index (BMI) is in the overweight range and although her physician

argued that the appellant's weight is not an adequate indication [or] assessment of health, that the physician had not provided enough information to establish that the appellant required caloric supplementation to a regular dietary intake.

The ministry argued that as it cannot be established that the appellant requires nutritional items due to a need for caloric supplementation to a regular dietary intake, it cannot be established how nutritional items will prevent imminent danger to life.

#### Panel Decision

The panel notes that the ministry concluded that the appellant met the criteria in subsections 67(1.1) (a) and (b) of the EAPWDR for both vitamin/mineral supplementation and for MNS of nutritional items. But insofar as the criteria for subsections (c) and (d) were concerned, the ministry determined that these criteria were met for the provision of vitamin/mineral supplementation but not for MNS of nutritional items. Accordingly, the panel paid careful attention to the evidence provided by the appellant's dietitian and physician, and the Reconsideration Decision to assess why the appellant qualified for one nutritional supplement but not the other.

To qualify for MNS of nutritional items the legislation requires that the additional nutritional items be part of a caloric supplementation to a regular dietary intake, and that these items are required for the purpose of alleviating a symptom referred to in subsection 67(1.1) (b) of the EAPWDR. By contrast, to qualify for vitamin/mineral supplementation, the applicant need only establish that these items are required for the purpose of alleviating a symptom referred to in subsection 67(1.1) (b) of the EAPWDR. Accordingly, the panel reviewed the evidence provided by the appellant's dietitian and physician to assess whether the appellant required MNS of nutritional items as part of a caloric supplementation to a regular dietary intake.

The panel notes that in the *Application for Monthly Nutritional Supplement* the appellant's physician stated that the additional nutritional items required by the appellant were: "*Protein rich foods – nuts, eggs, poultry, fish, protein powder for smoothies*" / "*Dairy alternatives – almond milk, lactose free products*" / "*Gluten free grains. Increased intake of fruits & vegetables + healthy fats.*" Under additional comments, the physician added (in part): *As per RD (registered dietitian) assessment this patient is not meeting her basic protein & energy needs. Poor intake due to inability to prepare food (fatigue / weak muscles) & low cost calorie dense foods can lead to unintended weight gain.*" In the letter of October 3, 2016, the appellant's dietitian and physician stated ". . . as per dietitian assessment (May 2016) the patient is not able to meet her estimated protein and total nutrient needs with her current income. This patient has increased protein needs due to her chronic illness and her current protein intake is less than 50% of her protein goal. She has significant protein malnutrition" / ". . . this patient is not able to meet her basic nutritional needs with her current income . . . her medical conditions require higher protein and nutrient needs than a person without these conditions. These additional funds will empower the patient to meet her nutrient needs and improve her function . . ."

From this evidence the panel concludes that the appellant's diet is not considered by her dietitian and physician to be a "regular dietary intake" and that that they consider this to be a consequence of the appellant having insufficient income to afford such a diet. The panel is not in a position to determine whether the appellant's income is sufficient to afford a regular dietary intake (including protein rich foods such as nuts, eggs, poultry fish, protein powder for smoothies; dairy alternatives such as almond milk and lactose-free products; gluten-free grains; and fruits, vegetables and healthy fats).

But the panel does conclude that the appellant's dietitian and physician are recommending changes to the appellant's diet of regular foods rather than proposing that the appellant requires caloric supplementation to a regular dietary intake. Accordingly, the panel concludes that the ministry reasonably determined that the appellant did not meet the criterion for subsection 67(1.1) (c) of the EAPWDR.

Subsection 67(1.1) (d) of the EAPWDR specifies that for an applicant to be eligible to receive the MNS for nutritional items they must be in imminent danger to life if they fail to obtain such items. The appellant's physician provided the following response to the question asking how the requested nutritional items will prevent imminent danger to the appellant's life: "*Without adequate nutrient intake as requested above, this patient will continue to have decreased muscle & function, not be able to care for herself, have increased fall risk & risk of infection, all dangers to applicant's life. In addition, poor cognition can contribute to dangers such as fire from stove etc.*" The ministry argued that as it cannot be established that the appellant requires nutritional items due to a need for caloric supplementation to a regular dietary intake, it cannot be established how nutritional items will prevent imminent danger to the appellant's life. As noted above, the panel concluded that the ministry reasonably determined that the evidence did not indicate that the appellant required caloric supplementation to a regular dietary intake. Accordingly, the panel concludes that the ministry reasonably determined that the appellant did not meet the criterion for subsection 67(1.1) (d) of the EAPWDR.

### **Conclusion**

Having reviewed and considered all of the evidence and the relevant legislation, the panel finds that the ministry's determination that the appellant was not eligible to receive the MNS for nutritional items was a reasonable application of the applicable enactment in the circumstances of the appellant.

The panel therefore confirms the ministry's reconsideration decision. The appellant was not successful in her appeal.