

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development (ministry)'s reconsideration decision dated March 2, 2017, finding the appellant is not eligible to receive a Monthly Nutritional Supplement (MNS) of vitamin/mineral supplementation and additional nutritional items under sections 7(a) and 7(c) of Schedule "C" of the *Employment and Assistance for Persons with Disabilities Regulation* (EAPWDR) because the appellant does not meet the legislated requirements in section 67(1.1)(d) (imminent danger to her life) and section 7(a) of Schedule "C" (caloric supplementation to a regular dietary intake) and section 7(c) of Schedule "C" (lipid is not a vitamin or mineral supplement) of the EAPWDR.

PART D – Relevant Legislation

The relevant legislation is section 67 and sections 7(a) and 7(c) of Schedule "C" of the EAPWDR.

PART E – Summary of Facts

On November 10, 2016, the ministry received the appellant's application for MNS.

On November 30, 2016, the ministry denied the appellant's request on the basis that, although the appellant is designated as a person with disabilities, her income was currently in excess of assistance rates so that she was not in receipt of disability assistance and so not eligible for MNS.

On December 8, 2016, the ministry determined that the appellant was eligible for disability assistance as her income was below the assistance rates.

On January 18, 2017, the ministry rendered a new decision based on the appellant's November 10 MNS application. In that decision, the ministry found that the appellant did not qualify for MNS because the medical evidence did not establish that she required caloric supplementation and that failure to obtain the MNS items would result in imminent danger to the appellant's life.

Also on January 18, 2017, the ministry again found that the appellant did not qualify to receive disability assistance as her income was in excess of assistance rates.

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

1. The ministry's decision summary dated January 18, 2017 finding that the appellant met all of the criteria to receive the vitamin and mineral MNS but that what had been prescribed (lipid supplements) "are not considered vitamin or mineral supplementation"; and that the appellant did not qualify for the nutritional items MNS because the medical evidence did not indicate that "caloric supplementation over and above regular dietary intake is required".
2. The appellant's application for MNS dated November 18, 2016, which states that:
 - the appellant is diagnosed with rheumatoid arthritis, chronic pain syndrome, chronic fatigue syndrome and hypothyroidism;
 - the appellant suffers from the symptoms of: malnutrition, significant muscle mass loss, moderate to severe immune suppression and significant deterioration of her joints;
 - the appellant requires "lipid supplements/unsaturated fat diet";
 - the appellant has a medical condition that means she cannot get enough calories through a normal diet;
 - the supplements "will allow boosting of inadequate diet intake both in respect to caloric adequacy & several vit/mineral deficiency";
 - the supplements will prevent imminent danger to the appellant's life by "Improve reserve/immune strength.
3. A letter from the appellant's physician dated February 5, 2017, reiterating her diagnoses and symptoms and stating:

Her regular diet is totally inadequate for what she needs in order to boost her immune system, address her significant muscle wasting/muscle loss and compounded micronutrient deficiencies. In particular, she has profound Protein, Calcium, Vitamin D and Vitamin B12 deficiencies. Above and beyond a regular diet, [the appellant] requires additional nutritional calories, vitamins and minerals. I have recommended that that the additional caloric supplementation be provided in the form of increased protein/unsaturated fats, primarily fish, shellfish, lean meats, cheese/dairy and nuts as well as increased nutrient-dense foods high in

fibre and complex carbohydrates, such as whole grains, fresh fruits and vegetables.”

4. An 8000-word submission prepared by the appellant setting out in some detail her medical conditions and symptoms and their impact on her daily life, a number of alleged delays and mistakes made by the ministry in handling both her MNS application and her PWD status, and a descriptive list of the foods and supplements she and her physician consider that she requires as part of a micro/macro nutrient-rich diet in order to maintain her health in the face of her medical conditions.

The appellant made two written appeal submissions. The first, running to about 7500 words sets out the appellant's arguments regarding the ministry's reconsideration decision. The second, at 136 pages, contains photocopies of background documents.

At the hearing the appellant summarized her written submissions but did not add any new information or arguments.

PART F – Reasons for Panel Decision

The issue under appeal is the reasonableness of the ministry's reconsideration decision dated March 2, 2017, finding the appellant is not eligible to receive a Monthly Nutritional Supplement (MNS) of vitamin/mineral supplementation and additional nutritional items under sections 7(a) and 7(c) of Schedule "C" of the EAPWDR because the appellant does not meet the legislated requirements in section 67(1.1)(d) (imminent danger to her life) and section 7(a) of Schedule "C" (caloric supplementation to a regular dietary intake) and section 7(c) of Schedule "C" (lipid is not a vitamin or mineral supplement) of the EAPWDR..

The relevant legislation is section 67 and sections 7(a) and 7(c) of Schedule "C" of 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).

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

In her written submission the appellant details the history of her file and how the ministry mistakenly found her ineligible for disability assistance in November 2016, later reversing that decision and telling the appellant that her November 10 MNS application would be reviewed. The appellant alleges significant mistakes and delays on the ministry's part causing her stress and inconvenience. She argues that, since the ministry reversed its decision as regards her PWD status it should have approved her MNS application. Instead, the ministry took a significant amount of time to re-review her application and denied her on the same day (January 18) as it again found her ineligible for disability assistance.

The appellant also argues at some length regarding the ministry's findings in that re-review of her MNS application. Specifically, she argues that her physician has clearly stated, particularly in her February 5 letter, that she requires caloric supplementation in addition to her regular diet.

As well, the appellant argues that her physician's reports indicate that her life is in imminent danger. She states: "My physician's information has met the test of "imminent danger" in that my medical condition is at a stage where nutritional intervention is required to alleviate the further deterioration of my health."

The Ministry's Position

The ministry's position at the hearing was that the medical evidence before the ministry at the time of the reconsideration decision did not establish that failure to obtain MNS would result in "imminent danger" to her life. As well, the information before the ministry did not establish that the nutritional supplement is required as "caloric supplementation over and above regular dietary intake". Rather, the physician is prescribing a particular diet in order to maximize the nutritional value to the appellant.

The ministry did not present argument as to why "lipid" does not qualify as a vitamin or mineral.

The Panel's Decision

The panel notes that the ministry's reconsideration decision appears to rely on the argument that at the time of the decision the appellant was not in receipt of disability assistance and so did not qualify for MNS on that ground. At the hearing the ministry representative stated that the ministry is not relying on that finding but rather on the merits of the ministry's MNS decision of January 18. The panel considers that while it would be patently unfair for the ministry to present arguments at the appeal hearing that it did not make in its reconsideration decision, it will allow this because:

1. the appellant has more than amply addressed the arguments raised by the ministry at appeal,
2. the ministry did not raise arguments at appeal that were not in the original decision, so that the appellant was not faced with anything unexpected at the appeal hearing, and
3. whether or not the ministry's finding that the appellant did not qualify for MNS because she was not receiving disability assistance is only one of three criteria that the ministry considers that the appellant did not meet so that if the appellant does not meet any of those other criteria, this criterion is moot.

In order to qualify for the MNS under section 7(c) of Schedule "C" of the EAPWDR the purpose of the

supplement must be “caloric supplementation to a regular dietary intake”. The appellant argues that this is exactly what her doctor means when she writes in her February 5 letter: “Above and beyond a regular diet, [the appellant] requires additional nutritional calories, vitamins and minerals.” The ministry argues that this is not a prescription for “caloric supplementation” but for a specific (nutrient-dense) diet.

The panel finds the physician’s letter to be ambiguous. On the one hand, it uses the words “above and beyond a regular diet”. On the other, it describes what is required as “additional nutritional calories” as opposed to simply “additional calories”. This MNS is clearly not a supplement to facilitate a more *nutritional* diet, but to simply provide for extra calories. Here the physician has addressed both needs and stated that the appellant needs both additional calories and additional *nutritional* calories. Does the appellant not meet the former because her physician has added to the need for extra calories that they should come in the form of *nutritional* calories? The panel finds this an unreasonable position. The physician has clearly indicated that the appellant requires “additional nutritional items” as “caloric supplementation to a regular dietary intake” (quotes are from the legislation). Therefore, the panel finds that the ministry’s determination that the appellant did not meet this criteria was not reasonable.

In order to qualify for the MNS under both sections 7(a) and 7(c) of Schedule “C” of the EAPWDR the appellant must meet all criteria under section 67 of the EAPWDR. The ministry found that the appellant met all those criteria except one. This requirement, found in section 67(1.1)(d), is that failure to obtain the MNS items will result in imminent danger to the applicant’s life.

The panel carefully reviewed all of the medical evidence in this case but could find nowhere a statement by a medical practitioner that the appellant’s life was in imminent danger. The appellant’s health is failing and it appears that she must carefully manage her diet in order to maintain what health she has. However, there is no indication in any of the evidence that her life is in imminent danger. It was therefore reasonable for the ministry to find that failure to obtain the MNS items would not result in imminent danger to the applicant’s life and that section 67(1.1)(d) was not met.

Accordingly, the Panel finds that the ministry’s reconsideration decision was reasonably supported by the evidence and confirms the ministry’s reconsideration decision.