

## PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (“the ministry”) reconsideration decision dated April 27, 2017 in which the ministry denied the appellant’s request for the Monthly Nutritional Supplement (“MNS”) of nutritional items and vitamin/ mineral supplements. The ministry determined that all of the legislative criteria for nutritional items and vitamin/ mineral supplements were not met under sections 67(1.1), and section 7 of Schedule C of the Employment and Assistance for Persons with Disabilities Regulation (“EAPWDR”). Specifically, the minister was not satisfied that a medical practitioner has confirmed that:

- The appellant displays two or more of the symptoms listed in section 67(1.1)(b) as a direct result of a chronic, progressive deterioration of health.
- Under section 67(1.1)(c), for the purpose of alleviating a symptom, she requires additional nutritional items and/ or vitamins/ minerals as described in section 7 of Schedule C.
- Failure to obtain the items will result in imminent danger to the person’s life pursuant to section 67(1.1)(d); and
- she requires nutritional items as part of a caloric supplementation to a regular dietary intake pursuant to section 7(a) of Schedule C.

## 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 the following:

1. A Request for Reconsideration (“RFR”) signed by the appellant on March 28, 2017 in which she stated her argument [which the panel will address in *Part F*] reporting that she cannot swallow properly; her health is declining; she cannot increase her muscle mass; and she is “getting infections on a steadier basis.”

2. For the reconsideration, she provided a letter from her family physician dated April 12, 2017. He recommended the following items:

- Spectra gel: 2 bottles per month [for skin lesions];
- Simethicone chewable tablets: 168 tablets per month [to alleviate GERD symptoms];
- Ranitidine tablets: 56 tablets per month [to alleviate GERD symptoms]
- Tylenol arthritis extended release tablets: 84 tablets per month [for joint and muscle pain];
- Ensure Enlive: 1 bottle per day - 31 bottles per month [to build muscle mass].

The physician added that all of the items are necessary and the appellant will need all of them for a duration of one year. He listed her specific medical conditions as diarrhea; difficult bladder control; arthritis pain and muscle pain; skin infections due to dry and itchy skin; and GERD.

3. The ministry’s denial letter and Decision Summary dated February 28, 2017.

4. An application for MNS signed by the appellant on November 15, 2016 and completed by her family physician on January 13, 2017:

- Under Diagnosis, the physician reported 6 conditions: Moderate immune suppression - “frequent infections”; Depression; COPD; Gastro-esophageal reflux (GERD); Anxiety; and Osteoarthritis.
- 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, “She has chronic pain and due to her swallowing issues she has difficulty gaining muscle mass. She also is very susceptible to infections.”
- When asked to indicate whether the appellant displays two or more of the symptoms [as listed in EAPWDR section 67(1.1)(b)], the physician check marked: *Significant muscle mass loss*: - “difficulty gaining muscle mass”; and Moderate to severe immune suppression - “gets frequent infections.”
- The appellant’s height was reported as 161 cm. and her weight as 59 kg.
- Under *Vitamin or Mineral Supplementation*, the physician specified the following requirements: multi-vitamins, Vitamin D, and Ensure “due to difficulty swallowing solids.” The physician reported that these would “help increase muscle mass and boost energy.”
- When asked how the items will prevent imminent danger to the applicant’s life, the physician wrote, “decrease her susceptibility to infections and ER visits.”

### *Nutritional Items*

- When asked to specify the additional items required and expected duration of need, the physician left the form blank.
- 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, “Difficulty swallowing.”
- 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, “Increase weight and help increase muscle mass. Prevent more infections.”
- When asked to describe how the requested items will prevent imminent danger to the appellant’s

life, the physician wrote, "Prevent further weight loss and decrease visits to ER due to infections."

◦ *Additional Comments* was left blank.

5. Information from the ministry record indicating the appellant is in receipt of disability assistance and currently receives a diet allowance of \$40 per month.

*Additional submissions:*

The appellant filed her undated Notice of Appeal stating her argument on appeal. Both the appellant and the ministry summarized their arguments at the hearing, and the panel accepts the arguments as submissions in support of the information in the reconsideration record and will consider these arguments in *Part F - Reasons*.

The appellant provided the following additional documents prior to the hearing:

◦ A prescription from a physician for Restoralax, to be taken daily for 10 days;  
◦ A receipt for Clearlax, total \$15.74; hand-written notation, "Clearlax Polyethylene Glycol...\$14.99."  
[The appellant explained at the hearing that Clearlax is a generic brand of Restoralax].

The ministry objected to the additional documents on the grounds that the reconsideration decision was made based on the information and documents that were before the minister at reconsideration, stating that "additional medical information takes away from the decision...when it is different information than what was before the adjudicator." At the hearing, the appellant explained that Restoralax was prescribed for her digestion at a recent visit to the ER as her "system is shutting down without the MNS." The ministry added that Restoralax is used to promote regularity.

The panel finds that although Restoralax is a new item that was not mentioned in the reconsideration record, it was prescribed for the appellant's digestive conditions/ symptoms which were before the minister at reconsideration. The panel therefore admits the additional documents under section 22(4)(b) of the *Employment and Assistance Act* as evidence in support of the information and records before the minister at the time the decision being appealed was made.

The appellant attended the hearing with her advocate. The advocate explained that they have "an issue with defining muscle mass loss", and therefore, the appellant went back to the doctor to ask if there is a way to show the loss of muscle mass. However, the doctor told her that there is "no way of showing the initial versus the final loss." The appellant stated that she has been paying for Ensure and cannot afford it or her other health supplements and that she had "a scan of (her) tummy done at the hospital" and it was determined that she needs more supplements that she cannot afford because her "digestive system is shutting down."

In response to questions from the panel, the appellant explained that she weighed about 20 pounds less at this time last year but even though she has gained weight she has "lost more muscle mass" because she "cannot turn weight into muscle due to the lack of nutrients in her system" and she

"cannot build muscle mass on food alone - needs nutrients." She reiterated that the doctor examined her in the hospital but told her that there is "no way of proving muscle mass loss."

The appellant added that she has trouble with daily activities due to her loss of muscle mass, as well as general weakness from loss of strength. When asked whether her swallowing difficulties affect her diet and cause her to require extra calories, she explained that she has to eat softer foods because if she swallows, "the food comes back up." The advocate explained that the appellant's caloric intake "is down from last year because she's regurgitating the food."

The ministry summarized its argument at the hearing and explained that the adjudicator uses *Body Mass Index* (“BMI”) calculated on the basis of the applicant’s height and weight, as an additional piece of information to determine whether the applicant displays the symptom of *significant muscle mass loss*, and that the ministry has another program (short term health supplement) to address a temporary need for Ensure or other specific items. The ministry also stated that some of the items specified by the appellant’s physician (medications for GERD, for example), are available by prescription.

The panel finds that the oral testimony provides additional corroborative detail on the appellant’s symptoms, and the calculation of BMI, referred to in the reconsideration decision; and admits the testimony under section 22(4)(b) of the *Employment and Assistance Act* as evidence in support of the information and records before the minister at the time the decision being appealed was made.

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## PART F – Reasons for Panel Decision

The issue in this appeal is whether the ministry's reconsideration decision of April 27, 2017 which held that the appellant is not eligible for the MNS of nutritional items and vitamin/ mineral supplements because not all of the criteria in EAPWDR section 67(1.1) and section 7 of Schedule C were met, was reasonably supported by the evidence or was a reasonable application of the EAPWDR in the circumstances of the appellant.

The following sections of the EAPWDR set out the eligibility criteria for the MNS of nutritional items and vitamin/ mineral supplements:

### **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.

## 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.

### Analysis

The ministry accepted that the some of the criteria in EAPWDR section 67(1) were met, in particular, the appellant is in receipt of disability assistance, and she does not have resources to pay for or obtain the recommended nutritional supplements.

However, the minister was not satisfied that the criterion in section 67(1)(c) was met. This section states that “the requirements set out in subsection (1.1) (a) to (d) are met in respect of the person with disabilities.” Of these requirements, the ministry found that the only one that was met was the requirement in section 67(1.1)(a) which stipulates that the person “is being treated by the practitioner for a for a chronic, progressive deterioration of health on account of a severe medical condition.” The ministry accepted that “a medical practitioner has confirmed that you are being treated for a chronic, progressive deterioration of health on account of a severe medical condition, specifically moderate immune suppression, depression, COPD, gastroesophageal reflux (GERD), anxiety, and osteoarthritis” with additional conditions listed in the physician’s letter provided for the reconsideration.

The ministry determined that the remaining requirements under section 67(1.1) and section 7 of Schedule C of the EAPWDR were not met and the panel considers these requirements as follows and provides its decision on the reasonableness of the ministry’s determination for each requirement. The panel notes that section 67(1.1) requires all of the criteria to be confirmed by the applicant’s medical practitioner.

### ***Section 67(1.1)(b): as a direct result of the chronic, progressive deterioration of health, the person displays two or more of the symptoms listed in sections 67(1.1)(b)(i) to (vii) of the Regulation***

The appellant argues that she displays both of the symptoms that her doctor indicated in the MNS application:

- *Significant muscle mass loss*, because she is unable to gain muscle mass without supplements and she experiences weakness and a lack of strength with daily activities. She argued that even though her doctor told her there is no way to prove loss of muscle mass, he was of the opinion that she displays loss of muscle mass based on his examination.
- *Moderate to severe immune suppression* because she is getting frequent infections when she cannot afford her vitamins and other supplements.

She argued that her symptoms are a direct result of a chronic, progressive deterioration of health because her digestive system is shutting down without the required supplements; she cannot keep food down due to her swallowing difficulties; and she is getting frequent infections due to not being

able to afford the vitamins, Ensure, and minerals that she desperately needs, and she cannot live without extra benefits to help her maintain her health.

The ministry argued that the appellant is not eligible for the MNS because she displayed only one symptom rather than two as required by the Regulation. The ministry was satisfied that the appellant displayed the symptom of *Moderate to severe immune suppression* but argued that the physician's information did not confirm that she had *Significant muscle mass loss* as a direct result of her chronic, progressive deterioration of health. The ministry argued that while the physician noted "difficulty gaining muscle mass", he did not provide any information on "how much muscle has been lost and the period of time in which this occurred." The ministry argued that the appellant's BMI was also inconsistent with *significant muscle mass loss* because the physician's information indicated that she was within the normal weight range for her height.

The ministry further argued that the physician's information did not confirm that the appellant's symptoms were the direct result of a chronic, progressive deterioration of health because the physician indicated that the appellant requires nutritional items for only a temporary period of one year. The ministry argued that a short-term need for the items "implies that the symptoms of your medical condition will be remedied after a short period of time", and noted that a short-term nutritional supplement is covered under a different ministry program, and not the MNS.

The panel finds that the ministry reasonably determined that the physician had not confirmed that the appellant displayed two or more of the legislated symptoms as a direct result of her chronic, progressive deterioration of health as required under section 67(1.1)(b) of the EAPWDR. While the physician filled in the space on the application form for *Significant muscle mass loss*, he stated only that the appellant has "difficulty gaining muscle mass." His comments do not indicate any actual loss of muscle mass; as noted by the ministry, there was no information on how much muscle mass has been lost over what time period.

Similarly, the physician's letter, provided for the reconsideration, stated that the appellant has "constant joint and muscle pain" but he did not describe any *significant muscle mass loss*. While the appellant argued that her physician told her that there is no way to prove loss of muscle mass, the panel finds that the ministry was reasonable in requiring information on how much muscle mass has been lost as the measurement of muscle mass at points in time or other empirical data, or at the very least, an explanation from the physician as to how he arrived at the conclusion that the appellant displayed that symptom, would provide clear evidence of the legislative requirement for two of the symptoms listed in section 67(1.1)(b) of the EAPWDR.

The panel further finds that the ministry reasonably determined that the short-term need for nutritional items identified by the physician did not confirm that the appellant's symptoms are a *direct result of the chronic, progressive deterioration of health* under section 67(1.1)(b) of the EAPWDR. The letter from the physician stated that the appellant requires all of the prescribed items for a period of one year, but he did not indicate whether the reason for this was because her situation would be reviewed after a year. The panel cannot speculate as to why the supplements were prescribed for only one year, and therefore finds that the ministry reasonably concluded that a short-term need for the supplements does not confirm that the appellant's symptoms resulted from a *chronic, progressive deterioration of health* as required by the Regulation.

**Section 67(1.1)(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**

The appellant argued that she requires vitamins and other items prescribed by her physician to relieve her symptoms because she is:

- getting frequent infections due to not being able to afford her vitamins, Ensure, and minerals which she desperately needs; and
- she cannot build muscle mass without nutritional supplements.

The ministry noted that the physician did not specify any nutritional items under section 7(a) of Schedule C of the EAPWDR and while he stated that vitamin/ mineral supplementation will “help increase muscle mass and boost energy”, the minister found that the symptom of *Significant muscle mass loss* was not confirmed and therefore “it cannot be established that you require the vitamin/ mineral supplementation for the purpose of increasing muscle mass.”

As the symptom of *Significant muscle mass loss* was not confirmed by the physician (as discussed above), the panel finds that the ministry reasonably determined that the appellant does not require vitamins [which are set out in section 7 of Schedule C] to alleviate the loss of muscle mass pursuant to section 67(1.1)(c) of the EAPWDR. Nevertheless, the physician did identify *moderate to severe immune suppression* as a symptom and the ministry accepted it as such, so it could be said that the physician has confirmed that the appellant requires vitamin supplements to “reduce her susceptibility to infections” to alleviate the symptom of *Moderate to severe immune suppression* as indicated in the MNS application.

***Section 67(1.1)(d): failure to obtain the items referred to in paragraph (c) will result in imminent danger to the person's life.***

The appellant argued that she requires nutritional items and vitamins to prevent an imminent danger to her life because her digestive system is shutting down without the supplements and she cannot live without extra benefits to help her maintain her health.

The ministry was not satisfied that she requires nutritional items or vitamin/ mineral supplements to prevent an imminent danger to her life. Regarding nutritional items, the ministry noted the physician’s comment, “prevent further weight loss and decrease visits to ER due to infections” and for vitamin/ mineral supplementation, he wrote, “decrease her susceptibility to infections and ER visits.” The ministry argued that these statements do not show that failure to obtain the items will result in imminent danger to life, stating at the hearing that “decreasing visits to the ER has nothing to do with the question.”

The panel finds that the ministry reasonably determined that the “imminent danger” criteria was not established under section 67(1.1)(d) of the EAPWDR. This section requires the physician to confirm that the failure to obtain the requested items will result in imminent danger to the appellant’s life. The panel notes that the dictionary definition of “imminent” is “impending/ soon to happen” and there would need to be evidence that life-threatening consequences will occur very soon if the appellant does not receive specified nutritional items. Accordingly, the purpose of section 67(1.1)(d) is to provide the MNS only in circumstances where the failure to obtain specified items will clearly result in life-threatening consequences.

While the physician wrote that nutritional items and vitamin/ mineral supplements will prevent imminent danger to the appellant’s life by decreasing her susceptibility to infections, preventing further weight loss, and decreasing visits to the ER, there is no evidence that she has an active, life-threatening infection and the physician has also not described any weight loss (the appellant reported at the hearing that she has gained weight). Furthermore, as argued by the ministry, a decrease in ER visits has no logical connection to an imminent danger to life as set out in the Regulation.



The panel finds that the physician's statements are forward-looking as he indicates that nutritional supplements will prevent further problems in the future - his information, therefore, does not address any immediate, life-threatening consequences of going without the items covered by the MNS. Given that there is no evidence that the appellant's life will be in imminent danger if she does not receive the MNS for nutritional items and vitamin/ mineral supplementation, 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.

*Additional criteria*

**Section 7(a) of Schedule C: Additional nutritional items required as part of a caloric supplementation to a regular dietary intake and to alleviate a symptom under section 67(1.1)(b)**

The appellant argued that she requires additional items as part of a caloric supplementation to her regular diet because of her swallowing difficulties. She stated that she can only eat softer foods due to "the food coming back up" and, therefore, her "caloric intake is down" as a result of regurgitation.

The ministry noted that the physician did not specify any "additional" nutritional items in the MNS application but reported that the appellant's condition of "difficulty swallowing" results in the inability to satisfy daily requirements through a regular dietary intake. The ministry argued that no information was provided "to specify that you require additional nutritional items above a regular dietary intake or the frequency in which you require additional caloric intake." The ministry further argued that "due to an absence of information regarding the weight and the muscle mass loss that you experience, the ministry is not satisfied that the information...establishes that you require extra calories - caloric supplementation - over and above those found in your regular diet."

The panel finds that the ministry reasonably determined that the additional criteria in section 7(a) of Schedule C of the EAPWDR were not met. Section 7(a) of Schedule C requires additional nutritional items to be part of a caloric supplementation to a regular dietary intake and to also be for the purpose of alleviating a symptom under EAPWDR section 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.

As noted by the ministry, the physician did not indicate any "additional" nutritional items over and above his prescription for one can of Ensure per day. Despite the appellant's testimony that her "caloric intake is down" due to problems with swallowing solid foods, there is no evidence that Ensure or any other item is needed for the purpose of caloric supplementation. In fact, the physician stated that while the appellant has an inability to absorb sufficient calories due to her swallowing difficulties, she requires "Ensure Enlive to build muscle mass". There was no evidence that she requires additional nutritional items, or cans of Ensure for that matter, for the purpose of *caloric supplementation to a regular dietary intake*, or to alleviate the symptom that was accepted by the ministry: *Moderate to severe immune suppression*. Furthermore, there was no evidence that the appellant's GERD or other digestive issues are causing malnutrition, significant weight loss, or wasting that would support a need for caloric supplementation.

Regarding the physician's indication that the appellant requires nutritional items to "prevent further weight loss", as noted by the ministry, the appellant's BMI does not indicate underweight status. Furthermore, *Significant weight loss* was not identified by the physician as a symptom that the appellant displays; in fact, the appellant testified that she had gained weight in the past year.

### *Conclusion*

For the reasons set out above, the panel finds that the ministry reasonably determined that the information provided by the physician in the MNS application does not confirm all of the requirements in the EAWDR. As all of the requirements were not met, the ministry was not authorized to provide the MNS. The panel finds that the reconsideration decision is reasonably supported by the evidence and confirms the decision pursuant to sections 24 (1)(a) and (2)(a) of the *Employment and Assistance Act*. The appellant is therefore not successful in her appeal.