

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (ministry) reconsideration decision dated February 6, 2017 which denied the appellant's request for a Monthly Nutritional Supplement (MNS) for additional nutritional items. The ministry held that the requirements of Section 67(1.1) of the Employment and Assistance for Persons With Disabilities Regulation (EAPWDR) and Section 7 of Schedule C were not met as there is not sufficient information to establish that:

- the appellant requires additional nutritional items as part of a caloric supplementation to a regular dietary intake to alleviate the symptoms of his chronic, progressive deterioration of health and to prevent imminent danger to life.

PART D – Relevant Legislation

Employment and Assistance for Persons With Disabilities Regulation (EAPWDR), Section 67(1.1) and 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 evidence before the ministry at the time of the reconsideration decision included:

- 1) Complex Chronic Disease Program (CCDP) Interdisciplinary Assessment dated June 21, 2016;
- 2) Internal Medicine Consultation report dated August 19, 2016;
- 3) CCDP Initial Nutrition Assessment Form dated September 14, 2016;
- 4) CCDP Occupation Therapy Initial Assessment and Progress Notes dated October 27, 2016;
- 5) Application for MNS dated November 7, 2016 signed by the appellant's medical practitioner (MP) and stating in part that:
 - The appellant's severe medical conditions are Fibromyalgia (FM) and Myalgic Encephalomyelitis (ME) "borderline;"
 - In response to the question whether, as a direct result of the severe medical condition, the appellant is being treated for a chronic, progressive deterioration of health, the MP wrote: "Yes, please see attached internal medicine assessment from August 19, 2016."
 - In response to the question whether as a direct result of the chronic progressive deterioration in health, does the appellant display two or more symptoms, the MP indicated the symptom of malnutrition and wrote: "protein energy malnutrition- meeting only 25% of protein goal as per RD assessment (see attached); patient has high protein needs due to FM; patient has a low intake of all essential nutrients," and the symptom of significant muscle mass loss and wrote: "was previously a swimmer and could complete ADL's; can now only walk 1 to 2 blocks on a good day due to FM," and the symptom of significant neurological degeneration and wrote: "related to FM as per internal medicine and OT assessment- see attached;"
 - The appellant's height and weight are recorded;
 - In response to a request to specify the additional nutritional items required, the MP wrote: "high protein food sources and protein powder; organic fruits and vegetables; whole grains and healthy fats; all items needed for a high protein balanced diet;
 - In response to the question 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 MP wrote: "Yes, inflammation related to FM can affect GI health and metabolism (how nutrients are metabolized); this patient also has elevated liver enzymes/ fatty liver which could affect nutrient needs and absorption";
 - Asked to describe how the nutritional items required will alleviate one or more of the symptoms described and provide caloric supplementation to the regular diet, the MP wrote: "high protein foods/ protein powder- address protein-energy malnutrition; fruits and vegetables and whole grains and healthy fats reduce inflammation and cognition;"
 - Asked to describe how the nutritional items will prevent imminent danger to the appellant's life, the MP wrote: "The above listed nutritional items will prevent further malnutrition; if nutrient status continues to deteriorate, the patient is a risk of life threatening infection and danger related to poor cognition and reduced strength;" and
 - For additional comments, the MP wrote: "The internal medicine assessment from August 19, 2016 was conducted by [a doctor] who is no longer at the CCDP. [The MP] has reviewed the documentation and signed this form on her behalf. For this patient, weight is not a good indicator of health as it does not reflect the patient's nutrient intake quality. The patient will continue to receive support from the CCDP team;" and,

- 6) Request for Reconsideration dated January 31, 2017 with attached letter dated January 25, 2017 in which the MP and the RD wrote that:
- Regarding the symptom of malnutrition, as per the dietitian assessment of September 14, 2016, the appellant is not able to meet his estimated protein and total nutrient needs with his current income and has higher needs due to ME and FM. His current intake is 25% of his goal. He has protein energy malnutrition as a result of ME and FM.
 - Regarding the symptom of significant muscle mass loss, as per the OT assessment of June 21, 2016, the appellant has limited ability or requires assistance to complete all activities of daily living, and has a falls history. All of this is related to decreased strength and function due to FM and ME, indicating that he has had a significant loss of muscle mass and strength since his diagnosis.
 - Regarding the symptom of significant neurological degeneration, both the Internal Medicine Assessment of August 19, 2016 and the OT assessment of June 21, 2016 note brain fog, short term memory, difficulty with word finding, and losing train of thought and these symptoms are likely a result of FM and ME.
 - Due to low income, the appellant has not been able to afford the recommended vitamin/mineral supplementation and food items that will reduce the symptoms described.
 - If the appellant is not able to meet his estimated daily protein and total caloric requirements, this will contribute to additional muscle loss, poor cognition and immune suppression.
 - Poor absorption of nutrients is common in patients with ME and FM, and several of the medications he takes to treat FM and ME also contribute to the interference of nutrient absorption.
 - Based on the dietitian assessment of September 14, 2016, the appellant's medical conditions require higher protein and nutrient needs than a person without these conditions.

Additional information

In the Notice of Appeal dated March 2, 2017, the appellant expressed his disagreement with the ministry's reconsideration decision.

Prior to the hearing, the appellant provided the following additional documents:

- 1) Written submission dated April 5, 2017 with attached Clinical Case Definition and Guidelines for Medical Practitioners regarding ME/ Chronic Fatigue Syndrome (CFS);
- 2) Medical Certificate dated June 6, 2017 in which a physician confirmed that:
 - The appellant is suffering from diabetes mellitus, CFS, FM, and depression.
 - The appellant is in need of special diet assistance for these medical conditions and this need is ongoing and permanent.
 - The nutritional supplements will contribute to his improvement in condition and general well-being; and,
- 3) Email dated June 15, 2017 in which a naturopathic physician wrote:
 - The appellant requires further support with his meals and natural remedies (supplements) to improve his health and to assist him to recover and be less dependent on government support.
 - The appellant's current circumstances and level of support are prohibiting the appellant from getting better and becoming more independent.

Admissibility of New Information

The ministry did not raise an objection to the admissibility of the additional documents submitted by the appellant, which provided additional information regarding the appellant's condition and his need for nutritional items. As the information in the Medical Certificate and email provides additional detail with respect to issues addressed at reconsideration, the panel has admitted these documents as being in support of information and records that were before the ministry at the time of reconsideration, in accordance with Section 22(4) of the *Employment and Assistance Act*.

The panel considered the appellant's submission and the paper regarding ME/CFS as his argument, discussed in Part F- Reasons for Panel Decision.

The ministry relied on its reconsideration decision as the ministry's submission on the appeal.

PART F – Reasons for Panel Decision

The issue on the appeal is whether the ministry decision, which denied the appellant's request for a Monthly Nutritional Supplement for additional nutritional items because the requirements of Section 67(1.1) of the EAPWDR and Section 7 of Schedule C were not met, was reasonably supported by the evidence or is a reasonable application of the applicable enactment in the circumstances of the appellant.

Section 67(1.1) of the EAPWDR sets out the eligibility requirements which are at issue on this appeal for providing the additional nutritional supplement, as follows:

Nutritional supplement

- 67** (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 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.

Section 7 of Schedule C of the EAPWDR provides as follows:

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.

Vitamins and Minerals

At reconsideration, the ministry found that the appellant's request for the MNS of vitamins/minerals meets the eligibility criteria set out in Section 67(1.1) of the EAPWDR and it was approved.

Additional Nutritional Items- Section 67(1.1)(a) & (b)

The ministry acknowledged that a MP confirmed that the appellant is being treated for a chronic, progressive deterioration of health on account of a severe medical condition, specifically FM,

pursuant to Section 67(1.1)(a) of the EAPWDR. The appellant pointed out in his submission that while the ministry found that the diagnosis of ME was not conclusive as he did not fulfill 2/3 of the criteria, he may not fully understand the scope of the questions when the diagnosis was made, he is currently experiencing more pronounced symptoms, and he believes he now meets 80% of the criteria as severe and the remaining criteria as moderate. The appellant argued that ME and CFS are treated as synonymous in contemporary literature, as evidenced in the attached paper, and the physician confirmed in the Medical Certificate dated June 6, 2017 that the appellant is suffering from several medical conditions including CFS. As it is also stated in the paper at page 1 that “CFS must not be confused with ME/CFS because the ‘fatigue’ of ME/CFS represents pathophysiological exhaustion and is only one of many symptoms,” the panel finds that the ministry reasonably relied on the conclusions by the physician who is a specialist in complex chronic diseases, as set out in the Internal Medicine Consultation report dated August 19, 2016. There was no further information provided on the appeal from the specialist to update or clarify the appellant’s current diagnosis; however, the ministry was satisfied at reconsideration that the appellant is being treated for FM and the ministry thereby acknowledged that FM itself is a severe medical condition.

Section 67(1.1)(b) of the EAPWDR requires that a MP confirm that as a direct result of the chronic, progressive deterioration of health, the person displays two or more of the symptoms listed. The ministry acknowledged that there is sufficient information from the MP in the application as well as in accompanying reports and letter to establish that the appellant displays two or more of the symptoms, namely: malnutrition and significant muscle mass loss.

Caloric Supplementation- Section 67(1.1)(c) and Section 7 of Schedule C of the EAPWDR

Section 7 of Schedule C and Section 67(1.1)(c) of the EAPWDR stipulate that the MP must confirm that, for the purpose of alleviating a symptom referred to in sub-section (b), the appellant requires the additional nutritional items that are part of a caloric supplementation to a regular dietary intake as specified in the request. In response to the request to specify the additional nutritional items required by the appellant, the MP wrote in the MNS application dated November 7, 2016: “high protein food sources and protein powder; organic fruits and vegetables; whole grains and healthy fats; all items needed for a high protein balanced diet.” Asked to describe how the nutritional items required will alleviate one or more of the symptoms described and provide caloric supplementation to the regular diet, the MP wrote: “high protein foods/ protein powder- address protein-energy malnutrition; fruits and vegetables and whole grains and healthy fats reduce inflammation and cognition.” However, Section 7 of Schedule C provides for additional nutritional items that are specifically, “*part of a caloric supplementation to a regular dietary intake*” and the panel finds that the ministry reasonably required the MP to confirm a need for supplementation of calories beyond recommended food choices within a regular, balanced diet.

Given an opportunity to elaborate on the initial assessment, in the letter dated January 25, 2017 included with the Request for Reconsideration, the MP and the RD wrote that, due to low income, the appellant has not been able to afford the recommended [vitamin/mineral supplementation] and *food items* that will reduce the symptoms described. The MP and the RD wrote that, based on the dietitian assessment of September 14, 2016, the appellant’s medical conditions require higher protein and nutrient needs than a person without these conditions. The ministry noted in the reconsideration decision that the appellant may be eligible for another health supplement that is specifically for those who require a high protein diet. In the additional documents submitted by the appellant, a naturopathic physician wrote in an email dated June 15, 2017 that the appellant requires further support with his meals and natural remedies (supplements) to improve his health and to assist him to recover and be less dependent on government support. In the additional information, the medical professionals emphasized the appellant’s inability to afford the recommended food choices for a high protein and a healthy, balanced diet.

By requiring evidence of a need for “caloric supplementation” to one’s regular dietary intake, or calories in addition to the regular diet, the MNS for additional nutritional items is geared specifically for those experiencing one of the listed symptoms as a result of an individual’s “regular diet” not providing sufficient calories, rather than for those who do not have enough to eat or who are not eating a sufficient amount of the recommended items within a regular diet. The wording in the legislation is specific to “caloric supplementation” and the panel considered the ordinary meaning of “supplementation” to be calories added beyond a regular diet.

In response to the question 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 MP wrote: “Yes, inflammation related to FM can affect GI health and metabolism (how nutrients are metabolized); this patient also has elevated liver enzymes/ fatty liver which could affect nutrient needs and absorption.” The ministry pointed out that, given the appellant’s height and weight recorded in the MNS application, the appellant’s BMI of 32.9 is in the obesity range. While the MP wrote additional comments in the MNS application that “...for this patient, weight is not a good indicator of health as it does not reflect the patient’s nutrient intake quality,” the MP does not dispute that the appellant’s BMI is a good indicator of his ability to absorb sufficient calories from his regular dietary intake. The panel finds that the ministry reasonably considered the appellant’s BMI as one of several factors to determine if the evidence demonstrates that the appellant requires caloric supplementation, or calories added, to a regular dietary intake. The panel finds that the ministry reasonably concluded that there is not sufficient information from the MP to confirm that specified additional nutritional items are required by the appellant as part of a caloric supplementation to a regular dietary intake to alleviate a related symptom, as set out in Section 67(1.1)(c) of the EAPWDR.

Imminent Danger to Life- Section 67(1.1)(d) of the EAPWDR

Section 67(1.1)(d) requires that the MP confirm that failure to obtain the nutritional items that are part of a caloric supplementation to a regular dietary intake will result in imminent danger to the person’s life. In the original Application, the MP responded to the question how the nutritional items will prevent imminent danger to the appellant’s life, by writing: “(t)he above listed nutritional items will prevent further malnutrition; if nutrient status continues to deteriorate, the patient is a risk of life threatening infection and danger related to poor cognition and reduced strength.” The ministry found that the information fell short of confirmation that failure to provide nutritional items specifically for caloric supplementation will result in an imminent danger to the appellant’s life. As previously discussed, the “above listed nutritional items” consist of “all items needed for a high protein balanced diet,” as specified in the MNS application, and are not specifically *part of a caloric supplementation to a regular dietary intake*.

Given an opportunity to elaborate on the initial assessment, the MP wrote in the letter dated January 25, 2017 that if the appellant is not able to meet his estimated daily protein and total caloric requirements, this will contribute to additional muscle loss, poor cognition and immune suppression. In the Medical Certificate dated June 6, 2017, a physician confirmed that the appellant is in need of special diet assistance for his medical conditions and “the nutritional supplements will contribute to his improvement in condition and general well-being.” While the medical professionals indicate that the appellant would benefit from the specified nutritional items, Section 67(1.1)(d) of the EAPWDR requires that the failure to obtain the items will result in “imminent” danger to life, which refers to an immediacy indicating that there is a danger to the appellant’s life that is likely to happen soon.

As the ministry reasonably determined that there was insufficient information to show that “high protein food sources and protein powder; organic fruits and vegetables; whole grains and healthy fats” are nutritional items that are part of a caloric supplementation to a regular dietary intake, the panel finds that the ministry also reasonably concluded that the MP has not confirmed that failure to obtain nutritional items that are specifically part of a caloric supplementation to a regular dietary intake, will result in imminent danger to the appellant's life, as required by as required by Section 67(1.1)(d) of the EAPWDR.

Conclusion

The panel finds that the ministry's reconsideration decision, which denied the appellant's request for a Monthly Nutritional Supplement for additional nutritional items on the basis that all of the requirements of Section 67(1.1) of the EAPWDR were not met, was reasonably supported by the evidence and the panel confirms the ministry's decision. Therefore, the appellant's appeal is unsuccessful.