

PART C – DECISION UNDER APPEAL

The decision under appeal is the Ministry of Social Development and Poverty Reduction (“the ministry”) reconsideration decision of March 5, 2018 in which the ministry denied the appellant’s request for a short term nutritional supplement (STNS) because the ministry was not satisfied that the appellant required caloric supplementation to a regular dietary intake in order to prevent critical weight loss while recovering from a serious disease. At reconsideration the ministry relied on the legislative authority set out in Employment and Assistance for Persons with Disabilities Regulation (EAPWDR) Sections 62, 67(3)(b), 76 and Schedule C, Section 2.

PART D – RELEVANT LEGISLATION

Employment and Assistance Act (EAA), Section 24 (1)

EAPWDR Sections 62, 67.001

PART E – SUMMARY OF FACTS

The appellant is a recipient of disability assistance as a person with disabilities (PWD).

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

- January 26, 2018 letter from the ministry to the appellant denying her request for a STNS and attaching the STNS decision summary;
- Ministry's STNS health supplement info sheet completed by the appellant's physician (GP) on January 8, 2018 and amended by the GP on February 1, 2018, indicating the following:
 - *Diagnoses:*
 1. *Diabetes;*
 2. *Gastroparesis – Acute;*
 3. *Critical Weight Loss – BMI 18.5 Feb 1/18;*
 - *Glucerna (nutritional supplement) 2 bottles/ day for 3 months.*
- handwritten prescription form dated February 1, 2018 signed by the GP repeating the information contained in the STNS health supplement info sheet [above] ;
- appellant's Request for Reconsideration received by the ministry on February 20, 2018 which was completed on behalf of the appellant by her Community Living BC (CLBC) support worker. Section 3 of the Request for Reconsideration noted that the appellant has been to hospital many times and has been admitted to hospital to help with her nausea/vomiting, dizziness, etc. and on most days the appellant can only keep down Glucerna. The support worker added that a health nurse has recommended the Glucerna as well as the GP.

Evidence at the Hearing

At the hearing the appellant reiterated that Glucerna is the only thing she can keep down. Since November 2017 she has lost an additional 20 pounds. She has been hospitalized on several occasions, and sometimes requires IV fluids to prevent dehydration. Approximately 2 weeks ago she was administered Botox to prevent her from throwing up. The gastroparesis condition is secondary to her diabetes and will continue for the remainder of her life. A dietician has provided her with instructions for a daily diet that is appropriate for her medical conditions. She attempts to follow the diet but is unable to keep the food down.

The appellant added that she can't make firm plans for appointments and other commitments because she becomes too sick and dizzy.

Admissibility of Additional Information

The ministry did not object to the admissibility of the appellant's oral evidence. The panel admitted all of the appellant's oral evidence under EAA Section 22 (4) (b) as evidence in support of the information that was before the ministry at reconsideration because it provided updated facts relevant to the medical conditions that formed the basis of her request for a STNS and did not constitute new information that was material to the reconsideration decision.

PART F – REASONS FOR PANEL DECISION

The issue on this appeal is whether the ministry's decision to deny the appellant's request for a STNS was reasonably supported by the evidence or was a reasonable application of the applicable enactment in the circumstances of the appellant. Specifically, the ministry was not satisfied that the appellant required caloric supplementation to a regular dietary intake in order to prevent critical weight loss while recovering from a serious disease.

LEGISLATION:

1. Relevant legislation:

EAA:

Decision of panel

- 24** (1) After holding the hearing required under section 22 (3) [*panels of the tribunal to conduct appeals*], the panel must determine whether the decision being appealed is, as applicable,
- (a) reasonably supported by the evidence, or
 - (b) a reasonable application of the applicable enactment in the circumstances of the person appealing the decision.

EAPWDR:

General health supplements

- 62** The minister may provide any health supplement set out in section 2 [*general health supplements*] or 3 [*medical equipment and devices*] of Schedule C to or for
- (a) a family unit in receipt of disability assistance,

Nutritional supplement — short-term

- 67.001** The minister may provide a nutritional supplement for up to 3 months to or for a family unit in receipt of disability assistance, if
- (a) the supplement is provided to or for a person in the family unit who is not receiving another nutrition-related supplement, and
 - (b) a medical practitioner or nurse practitioner confirms in writing that the person has an acute short-term need for caloric supplementation to a regular dietary intake to prevent critical weight loss while recovering from
 - (i) surgery,
 - (ii) a severe injury,
 - (iii) a serious disease, or
 - (iv) side effects of medical treatment.

2. Other Legislation relied upon by the Ministry at Reconsideration:

EAPWDR:

Nutritional supplement

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

Repealed (Part 7 – General and Transitional Provisions)

- 76** Repealed. [B.C. Reg. 8/2006, s. (b).]

The appellant argues that she requires a STNS because her GP has confirmed that she has an acute need for Glucerna as a caloric supplementation to her regular dietary intake to prevent critical weight loss while recovering from a serious disease.

The ministry's position is set out in the reconsideration decision, summarized as follows:

- as a recipient of PWD the appellant is eligible to receive general health supplements under EAPWDR Section 62;
- as stipulated under EAPWD Section 67(3)(b) to be eligible for a STNS a medical or nurse practitioner must confirm in writing that the person has an acute short-term need for caloric supplementation to a regular dietary intake to prevent critical weight loss while recovering from surgery, a severe injury, a serious disease or side effects of medical treatment;
- the appellant's GP has not confirmed in writing that the appellant is currently consuming a regular dietary intake that requires caloric supplementation.

Panel Decision

EAA Section 24 (1) requires an appeal panel to determine whether the reconsideration decision being appealed is, as applicable:

- a) reasonably supported by the evidence, or
- b) a reasonable application of the applicable enactment in the circumstances of the person appealing the decision.

On the first page of the March 5, 2018 reconsideration decision the ministry cited EAPWDR Section 76 and Schedule C, Section 2 as applicable legislation in coming to its decision. In Appendix A ("Reconsideration Summary") the reconsideration officer relied upon EAPWDR Section 67 (3) (b) as the legislative enactment that sets out the criteria for receiving a STNS. Sections 76 and 67(3) (b) have both been repealed and accordingly cannot be considered an "applicable enactment" as required under EAA Section 24 (1) (b). Appendix B ("Applicable Legislation") contains only EAPWDR Section 62, which governs a PWD recipient's general eligibility for any health supplement set out in Schedule C, Section 2.

EAPWDR Section 67.001, which is the legislative enactment that sets out the specific criteria that must be met for a person to be deemed eligible for a STNS, is not referred to in any part of the reconsideration decision.

The panel therefore finds that the ministry's decision declaring the appellant ineligible for a STNS is not a reasonable application of the applicable enactment in the circumstances of the appellant. The decision must therefore be rescinded.

The appellant is successful in her appeal.