

PART C – DECISION UNDER APPEAL

The decision under appeal is the Ministry of Social Development and Poverty Reduction (the ministry) reconsideration decision dated March 12, 2018, which held that the appellant is not eligible to receive the monthly nutritional supplement (MNS) of nutritional items because all of the requirements of section 67(1.1) of the Employment and Assistance for Persons with Disabilities Regulation (EAPWDR) were not met.

The ministry was satisfied that a medical practitioner has confirmed the appellant is being treated for a chronic, progressive deterioration of health on account of a severe medical condition, meeting the requirement of paragraph (a), and that as a direct result of a chronic, progressive deterioration of health, the appellant displays two or more of the symptoms listed in paragraph (b). However, the minister was not satisfied that a medical practitioner confirmed that:

- as required by paragraph (c), for the purpose of alleviating a symptom referred to in paragraph (b), the appellant requires the items set out in section 7 of Schedule C, namely “additional nutritional items that are part of a caloric supplementation to a regular dietary intake,” and
- as required by paragraph (d), failure to obtain the items will result in imminent danger to the appellant’s life.

PART D – RELEVANT LEGISLATION

EAPWDR, section 67 and section 7 of Schedule C

PART E – SUMMARY OF FACTS

Information before the minister at reconsideration

The appellant is a recipient of disability assistance who also receives a monthly high protein diet allowance. The appellant requested the MNS of additional nutritional items and vitamins/minerals. The request for the MNS for vitamins/minerals was approved at reconsideration.

Information provided at the time of the initial request comprised the Application for Monthly Nutritional Supplement (the MNS application) and a one-page letter, both dated October 1, 2017 and completed by the appellant's medical practitioner, as well as a Surgical Pathology Report (observation date of June 11, 2015).

At reconsideration, the appellant submitted a 2-page letter from the medical practitioner dated February 18, 2018, and a 7-page advocate's submission.

Information provided on appeal and admissibility

In addition to her Notice of Appeal, the appellant submitted a 2-page letter dated April 6, 2018, signed by the medical practitioner, as well as a 9-page advocate's submission. The ministry's appeal submission stated that the additional information from the advocate and medical practitioner has been reviewed and that "had the ministry had this information at the time of the reconsideration decision, the ministry may have found his (sic) request met the criteria for the monthly nutritional supplement of nutritional items." The ministry did not take a position as to the admissibility of the additional information.

Section 22(4) of the *Employment and Assistance Act* (EAA) provides that panels may admit as evidence (i.e. take into account in making its decision) the information and records that were before the minister when the decision being appealed was made and "oral and written testimony in support of the information and records" before the minister when the decision being appealed was made – i.e. information that substantiates or corroborates the information that was before the minister at reconsideration. These limitations reflect the jurisdiction of the panel established under section 24 of the EAA – to determine whether the ministry's reconsideration decision is reasonably supported by the evidence or a reasonable application of the enactment in the circumstances of an appellant. That is, panels are limited to determining if the ministry's decision is reasonable and are not to assume the role of decision-makers of the first instance. Accordingly, panels cannot admit information that would place them in that role.

The panel determined that the information in the April 6, 2018, letter provides additional details which are, on balance, consistent with and therefore in support of the information available at reconsideration. Accordingly, this information was admitted in accordance with section 22(4) of the EAA. The advocate's submission is largely comprised of argument and reiteration of the medical practitioner's information but also introduces some information, including that the appellant "often goes without eating for prolonged periods of time" and therefore requires meal replacement beverages. The panel finds that the reiterative information is admissible but the information respecting the need for meal replacement is new information that is not in support of the information at reconsideration and is therefore not admissible in accordance with section 22(4) of the EAA. In reaching this conclusion, the panel also notes that even if the advocate's information was admitted, little or no weight would be given to it as the legislation clearly requires that the ministry bases its decision on information from a medical or nurse practitioner.

The arguments of both parties are set out in Part F of this decision.

Summary of relevant information

Diagnoses

The physician diagnoses the appellant with ulcerative colitis, described as rectal bleeding, weight loss, and diarrhea, and as being fairly extensive in nature. Requires anti-inflammatory treatment. Requires nutritional supplementation in order to compensate for malabsorption of essential elements, loss of protein resulting in loss of muscle mass, and loss of weight.

At reconsideration, the medical practitioner diagnoses “severe ulcerative colitis.”

On appeal, the medical practitioner writes that the appellant’s condition causes her to experience extreme fluctuations in weight. The letter includes blank spaces where the medical practitioner could have indicated the appellant’s weight in June 2015 when the ulcerative colitis was diagnosed and the amount of weight lost since that diagnosis.

The colonoscopy report identifies the following diagnoses:

- Descending colon biopsies - Focal features of chronic colitis with mild active inflammation. Negative for granulomata, dysplasia and malignancy.
- Sigmoid colon biopsies – mild active colitis.
- Rectal biopsies – chronic colitis with focal mild active inflammation.

Symptoms

In the MNS application, the medical practitioner reports that the appellant is 5’3 ½ ‘ and weighs 115 lbs. and identifies the following two symptoms from those listed in the MNS application:

- Significant muscle mass loss (Manifested by deconditioning).
- Significant deterioration of a vital organ (Extensive inflammation of colon).

At reconsideration, the medical practitioner adds the following symptoms (malnutrition and weight loss were previously mentioned by the medical practitioner in the MNS application, but not identified as symptoms from the list in the MNS application):

- Malnutrition.
- Underweight status.
- Significant weight loss.

Information specific to the request for additional nutritional items

The summary below reflects the questions (italicized) and responses found in the MNS application, as well as the additional information from all three letters signed by the medical practitioner.

Specify the additional nutritional items required and expected duration of need.

- Probiotics
- Protein supplement

At reconsideration, the medical practitioner also identified:

- High protein diet
- Diet consisting of fresh fruits and vegetables

Does the applicant have a medical condition that results in the inability to absorb sufficient calories to satisfy daily requirements through a regular dietary intake? If yes, please describe.

- Yes, ulcerative colitis

Describe how the nutritional items will alleviate one or more of the symptoms specified and provide caloric supplementation to the regular diet.

- Will alleviate weight loss, malnutrition, anemia due to blood loss.
- Requires extra caloric supplementation in addition to regular dietary intake as she is suffering from malnutrition, significant weight loss, significant muscle mass loss and the deterioration of a vital organ.
- By taking a caloric supplement the symptoms of malnutrition and significant muscle mass loss will be alleviated or reduced.

Describe how the nutritional items requested will prevent imminent danger to the applicant's life.

- Probiotics will counteract + prevent diarrhea, fluid loss + blood loss which could ultimately prove fatal.
- If not treated thoroughly with medication and a therapeutic diet, it will result in a severe decompensation of her health.
- "I confirm that failure to obtain the additional nutritional items could result in imminent danger to her life."
- "Caloric supplementation will counteract and prevent diarrhea, fluid loss [and] blood loss which could ultimately prove fatal for [appellant's name]."

PART F – REASONS FOR PANEL DECISION

Issue under appeal

The issue under appeal is whether the ministry's reconsideration decision that the appellant is not eligible to receive the MNS of additional nutritional items because all of the requirements of section 67(1.1) of the EAPWDR were not met is reasonably supported by the evidence or a reasonable application of the legislation in the appellant's circumstances. That is, was the ministry reasonable in determining that a medical practitioner has not confirmed that:

- as required by paragraph (c), for the purpose of alleviating a symptom referred to in paragraph (b), the appellant requires the items set out in section 7 of Schedule C, namely "additional nutritional items that are part of a caloric supplementation to a regular dietary intake," and
- as required by paragraph (d), failure to obtain the items will result in imminent danger to the appellant's life?

Relevant Legislation

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 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.

Panel Decision

While the ministry determined that the requirements of section 67(1.1)(b) were met, having been satisfied that the evidence established that the appellant displays two of the symptoms listed in paragraph (b), malnutrition and significant muscle mass loss, the ministry was not satisfied that the appellant displays the additional three symptoms identified by the medical practitioner. The ministry concluded that the symptoms of underweight status, significant weight loss and significant deterioration of an organ, though confirmed by the medical practitioner, were not supported by the evidence provided, also noting that the colon is not considered a vital organ essential for survival (e.g. brain, heart, kidneys, liver and lungs). As the legislated criteria of section 67(1.1)(b) were met, the panel will focus on the evidence and argument respecting the listed symptoms as it relates to those criteria the ministry determined were not met.

However, as the advocate's appeal submission includes substantial argument that the ministry has unduly applied a strict and narrow interpretation of the term "vital organ," contrary to case law and the *Interpretation Act*, and thereby unreasonably concluded that the colon is not a vital organ, the panel has addressed this point. While the advocate comments that "there are some schools of thought that include 10 organs as "vital," including the large and small intestines, the panel notes that the Cambridge English Dictionary defines "vital organ" as "the main organs inside the body, such as the heart, lungs and brain that are necessary for life" and that other on-line sources commonly referenced the five organs identified by the ministry as being the "vital organs." The panel considers it reasonable for the ministry to apply the commonly accepted meaning of "vital organ," which does not include the colon.

Additional Nutritional Items - Section 67(1.1)(c) and Schedule C, section 7(a)

At reconsideration, the appellant argues, through her advocate, that the medical practitioner's information has established that as a result of severe ulcerative colitis, the appellant has the symptoms identified, including significant weight loss and underweight status, and that the ministry has mistaken or misconstrued the information from the medical practitioner. In her NOA, the appellant takes the position that she requires caloric supplementation in order to address her symptoms of malnutrition, underweight status and significant weight loss. On appeal, the appellant's medical practitioner and advocate argue that using only BMI as a means to determine underweight status is inadequate particularly as the appellant's condition causes her to experience extreme fluctuations in weight. The advocate also provides argument on appeal respecting malnutrition that relates to the information not admitted by the panel.

Respecting the requirements of paragraph (c) and section 7(a), the ministry argues that the medical practitioner does not provide enough evidence to demonstrate that the appellant is displaying the symptoms set out in section 67(1.1)(b) that indicate the need for caloric supplementation (emphasis included for all references to caloric supplementation) such as underweight status or significant weight loss. In support of this conclusion, the ministry finds that the information in the MNS application respecting height and weight indicates a BMI of 20, which is in the normal range, and concludes that the need for probiotics and protein supplements is not considered indicative of a need for caloric supplementation. Further, although the medical practitioner writes that nutritional items will alleviate malnutrition, the information provided does not suggest that malnutrition is as a result of caloric malabsorption. Also, while the medical practitioner writes that nutritional items will alleviate anemia, this is not considered a symptom that results from caloric malabsorption. Similarly, the ministry concludes that the information from the medical practitioner in the supporting letters does not establish the symptoms of underweight status and significant weight loss, and that the need for fresh fruits and vegetables, malabsorption of essential elements, and loss of protein are not indicative of caloric malabsorption. Rather, the ministry considers this information indicative of the need for vitamin, mineral and protein supplementation, as opposed to caloric supplementation, and is therefore not satisfied that the information establishes that a medical practitioner has confirmed that the appellant requires additional nutritional items that are part of a caloric supplementation to a regular dietary intake for the purpose of alleviating a symptom referred to in paragraph (b).

Panel Decision

Section 67(1.1)(c) and Schedule C, section 7(a) stipulate that the nutritional items be required as caloric supplementation in addition to a regular dietary intake for the purpose of alleviating a symptom set out in paragraph (b). When considering the evidence provided, the ministry must exercise its decision-making discretion reasonably by weighing and assessing all of the relevant evidence and cannot simply defer to the opinion of a medical or nurse practitioner as that would be an improper fettering of its decision-making authority.

In this case, the medical practitioner has stated that caloric supplementation is required to alleviate symptoms and has identified symptoms that are suggestive of the need for caloric supplementation, significant weight loss and underweight status. The ministry found this information not to be supported by the evidence. In particular, the ministry points to the height and weight of the appellant and the resulting BMI, which falls within the normal range. The appellant argues that BMI alone is not a sufficient basis upon which to discount those symptoms and conclude that the need for caloric supplementation to a regular dietary intake is not required. While the panel considers this a reasonable argument, the panel finds the ministry has considered other information and was also reasonable to rely on the information in the MNS application respecting the appellant's weight loss and current weight status.

On appeal, the medical practitioner failed to indicate how much weight the appellant has lost since her diagnoses, despite being prompted to do so. Rather, on appeal, the medical practitioner reports that the appellant experiences extreme fluctuations in weight, giving rise to the possibility that the appellant's weight is sometimes greater than that reported in the MNS application. At reconsideration, the medical practitioner also had the opportunity to indicate a time frame for weight loss and the amount of weight lost, but did not. Consequently, the ministry is left with the fact that the appellant's BMI is within the normal range, a fact not disputed by the appellant.

Additionally, the panel considers the ministry reasonable to assess the reported symptoms and stated opinion of the medical practitioner respecting the need for caloric supplementation by examining the additional nutritional items identified by the medical practitioner, which are probiotics, protein supplement, high protein diet, and a diet consisting of fresh fruits and vegetables. The medical practitioner also describes the needs of the appellant as "a therapeutic diet," which is not the same as the need for caloric supplementation. The panel finds that the ministry has reasonably concluded that probiotics do not relate to caloric intake and that the remaining items relate to specific dietary needs for protein and fresh fruit and vegetables, not caloric supplementation.

Based on the above analysis, the panel concludes that the ministry was reasonable to determine that the need for caloric supplementation to a regular dietary intake is not supported by the available information respecting the appellant's current weight and weight loss or by the nutritional items required. Therefore, the panel finds that the ministry reasonably concluded that a medical practitioner has not confirmed that the appellant requires additional nutritional items "that are part of a caloric supplementation to a regular dietary intake" for the purpose of alleviating one the symptoms set out in paragraph (b) and has not met the requirements of section 67(1.1)(c) and section 7(a) of Schedule C.

Additional Nutritional Items - Section 67(1.1)(d)

The appellant's advocate argues that the medical practitioner has provided ample evidence to the effect that failure to obtain the nutritional items will result in imminent danger to the appellant's life.

The ministry argues that the information that probiotics will counteract and prevent diarrhea, fluid and blood loss which could ultimately prove fatal, does not establish that caloric supplementation is required to prevent imminent danger to life. The ministry also argues that the narrative respecting severe decompensation of health does not establish that caloric supplementation is required to prevent imminent danger to life

Panel Decision

Paragraph (d) requires that failure to provide additional nutritional items required to alleviate a symptom set out in paragraph (b) will result in imminent danger to life. That is, nutritional items that are part of caloric supplementation to a regular dietary intake must be required to address danger to life and that danger must be of a degree of immediacy that it is "imminent." In this case, the medical practitioner reports that probiotics will counteract and prevent diarrhea, fluid loss, and blood loss which "could ultimately prove fatal" and that failure to obtain the additional nutritional items "could result in imminent danger to her life." The panel finds that probiotics are not caloric supplementation and that this information does not reflect the urgency or immediacy that would reasonably be expected if the danger to life was "imminent." Rather, these comments reflect the possibility of a life-threatening situation at some unknown point in time, not that it will occur imminently. Additionally, the panel considers the ministry reasonable to conclude that the medical practitioner's statement that if the appellant's conditions is not treated thoroughly with "medication and a therapeutic diet it will result in a severe decompensation of her health," does not address a need for "caloric supplementation" to prevent imminent danger to life.

For these reasons, the panel finds that the ministry reasonably determined that a medical practitioner has not confirmed that failure to provide additional nutritional items will result in imminent danger to the appellant's life as required by section 67(1.1)(d) of the EAPWDR.

Conclusion

The panel confirms the ministry's reconsideration decision as it was reasonably supported by the evidence. The appellant is not successful on appeal.