

PART C – DECISION UNDER APPEAL

The decision under appeal is the Ministry of Social Development and Poverty Reduction's ("ministry") reconsideration decision dated July 26, 2018 in which the ministry found that the appellant was not eligible for the Monthly Nutritional Supplement ("MNS") for nutritional items because her request did not meet all of the requirements under section 67(1.1) and section 7 of Schedule C of the Employment and Assistance for Persons with Disabilities Regulation ("EAPWDR"). Specifically, the ministry was not satisfied that a medical practitioner has confirmed that for the purpose of alleviating a symptom, the appellant requires additional nutritional items as described in section 7 of Schedule C and that failure to obtain the items will result in imminent danger to her life.

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 and documentation before the minister at the reconsideration consisted of:

1. Information from the ministry's record of decision which indicates:

- On April 18, 2018, the appellant submitted an application for the MNS of nutritional items and vitamin/mineral supplements.
- On May 23, 2018, the ministry denied the request for nutritional items and approved the request for vitamin/mineral supplements.
- On June 29, 2018, the ministry received the appellant's Request for Reconsideration ("RFR") with an extension request to July 26, 2018 to submit additional information (received by the ministry on July 9, 2018).
- On July 26, 2018, the ministry completed its review of the RFR.
- The appellant is already in receipt of the vitamin/mineral supplement.
- The appellant is a Person with Disabilities in receipt of disability assistance.

2. A letter from a family physician dated July 5, 2018, listing the appellant's medical conditions including Type 2 diabetes, Vitamin D deficiency, osteoarthritis, anaemia, fibromyalgia, fatty liver, glaucoma, IBS, and thalassaemia. Regarding nutritional items, the letter states that the appellant "would benefit from a diet high in fruit and vegetables, high protein and low carbohydrate." The physician specifically recommends a low glucose, low/gluten-free diet that includes spinach, kale, salads, cucumber, avocado, shellfish (shrimp), and salmon. The physician also recommends Bio K yoghurt, green leafy vegetables (etc.), tuna, chicken, and beef.

3. Laboratory test results dated June 12, 2018 and April 16, 2018, indicating findings consistent with mild osteoarthritis and minor arthropathy of the hip joint.

4. A RFR signed by the appellant on June 28, 2018 with attached 5-page submission in which the appellant provides her argument and lists her medical conditions including the date of onset, her symptoms, and the required medication/therapies/vitamins. The appellant states that her health has deteriorated significantly in the past year and she needs to take more vitamins, minerals, and other nutritional supports to reduce the inflammation, pain, and fatigue in her body and help her cope better with daily life. The appellant includes a chart with her submission, summarizing the nutritional items she requires for each of her conditions. In addition to vitamins and minerals, the appellant lists specific nutritional items including Biotin, Coenzyme10, distilled water, fish oil, milk thistle, probiotics, curcumin, and a glucose-free, high protein diet that includes glucose-free pasta, rice, bread, etc. The appellant states that the cost for "all the vitamins, minerals, nutritional supports, and foods" is more than \$200 per month and the MNS will help ease her financial stress as she is currently not working.

5. An application for MNS signed by the appellant on February 27, 2018, and completed by her family physician on March 28, 2018. The physician lists the appellant's medical conditions and indicates she is being treated by a rheumatologist for a severe, progressive deterioration of health. The physician indicates (from a list of symptoms) that the appellant displays *significant muscle mass loss* and *moderate to severe immune suppression*. The physician indicates that vitamin and mineral supplementation and nutritional items are required.

Nutritional items

- When asked to specify the additional nutritional items required and expected duration of need, the physician left the form blank.
- When asked whether the applicant 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, “needs diabetic diet, high protein, gluten-free.”
- When asked to describe how the nutritional items required will alleviate one or more of the symptoms specified in Question 3 (loss of muscle mass and immune suppression) and provide caloric supplementation to the regular diet, the physician refers to the previous page where she states:
 - The recommended supplements will “improve strength, prevent osteoporosis, management of [diabetes] very important. If fatty liver not treated patient may develop cirrhosis of the liver...Patient has Type 2 DM with risk of CVA, MI, and chronic kidney disease, CRP elevated. Patient can only take limited amount of prescription drugs due to fatty liver.”
- When asked to describe how the nutritional items requested will prevent imminent danger to the applicant’s life, the physician wrote, “as above.”
- Under *Additional Comments*, the physician wrote, “DM - life-threatening disease ultimately...important to address fatty liver, may lead to cirrhosis of liver.”

6. A letter dated May 23, 2018 in which the ministry advises the appellant that she is eligible for vitamins/minerals (\$40 per month) but her request for nutritional items was denied. The attached MNS Decision Summary indicates the appellant is in receipt of a \$40 per month diet supplement and remains eligible for the diet supplement as the nutrition portion of the MNS is not approved. The attached Decision Summary also indicates that the Ministry is satisfied there are no resources available to pay for the requested items.

Additional information

On August 14, 2018, the Tribunal received the Notice of Appeal which the panel accepts as argument. At the hearing, the appellant provided a 4-page submission dated September 14, 2018. In the submission, the appellant asks questions regarding the ministry’s decision-making process. She also provides a table of “Main Necessary Vitamins, Minerals, Supplements, Food Nutrients” which includes a breakdown of the cost per month for each of the vitamins, minerals, and nutritional items listed in the table. The appellant states that the total cost of the items in the table is \$136.38 per month. The appellant states that the cost does not include gluten-free food, meat, vegetables, and lactose and milk thistle for her fatty liver that her doctor recommended. In her oral testimony, the appellant summarized her arguments and reviewed the table which she confirmed she had prepared herself.

The appellant’s submission inter-mingles evidence with argument on appeal. The panel finds that the chart listing specific supplements, with a cost breakdown for each item, supplies additional detail about supplements that can help alleviate the appellant’s symptoms and is therefore in support of the information and records that were before the minister when the decision being appealed was made. The panel admitted this information as evidence under section 22(4) of the *Employment and Assistance Act*.

The ministry did not submit any new evidence.

Procedural matters

The hearing was originally scheduled for September 5, 2018. On September 4, 2018, the Tribunal chair granted an adjournment at the request of the appellant and the hearing was rescheduled for September 14, 2018. The ministry did not attend the hearing. Upon confirming that the ministry was notified of the re-scheduled date and time, the panel proceeded to consider the appeal in a party’s absence as it is authorized to do under section 86(b) of the *Employment and Assistance Regulation*.

PART F – REASONS FOR PANEL DECISION

The issue on appeal is whether the ministry reasonably concluded that the appellant is not eligible for the MNS of nutritional items because not all of the criteria in section 67(1.1) and section 7 of Schedule C of the EAPWDR were met. Specifically, was the reconsideration decision reasonably supported by the evidence or was it a reasonable application of the Regulation in the circumstances of the appellant?

The ministry based its reconsideration decision on the following legislation:

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...

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.

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 accepts that some of the criteria in section 67(1) of the EAPWDR are met; in particular, the appellant is a Person with Disabilities and she does not have resources to pay for or obtain the recommended nutritional supplements. The ministry was not satisfied that the requirement set out in section 67(1)(c) was met. This section requires the minister to be satisfied that "the requirements set out in subsection (1.1) (a) to (d) are met in respect of the person with disabilities" based on the information in the MNS application. Of these requirements, the ministry found that a medical practitioner has confirmed that the appellant is being treated for a chronic, progressive deterioration of health on account of a severe medical condition as required by section 67(1.1)(a); and the appellant displays two or more of the symptoms listed in section 67(1.1)(b).

Section 67(1.1) requires all of the criteria to be confirmed by the applicant's medical practitioner. The ministry determined that the requirements in section 67(1.1) (c) and (d) and section 7 of Schedule C of the EAPWDR were not met with respect to the appellant's request for nutritional items. Specifically, the ministry was not satisfied that the appellant requires nutritional items as part of a caloric supplementation to a regular dietary intake to alleviate the symptoms of her chronic progressive deterioration of health and to prevent imminent danger to life. The ministry states that the information from the appellant's family physician "demonstrates that you need to eat specific foods as part of a balanced diet." The ministry argues that the physician makes diet recommendations "that involve appropriate food choices within your regular dietary intake", rather than caloric supplementation, i.e., "extra calories...over and above those found in your regular diet."

Regarding the prevention of imminent danger to life as set out in section 67(1.1)(d), the ministry acknowledges that the appellant "would benefit from a specific dietary composition" to help mitigate her symptoms. The ministry was not satisfied the appellant requires caloric supplementation to a regular dietary intake and argues that "therefore, the minister is not satisfied that you require additional caloric supplementation to prevent imminent danger to your life."

In the Notice of Appeal, the appellant disagrees with the ministry decision because the \$40 per month that she receives for vitamins/minerals is not enough to cover the cost of all the items that she needs (vitamins, supplements, gluten-free food, and nutritional items). At the hearing, the appellant provided a breakdown of the costs for each nutritional item. The appellant indicates that her total cost of \$136.38 per month is for "just vitamins, minerals, and water that doctor recommended" and does not include "gluten-free food, and meat and veggies and lactose and milk thistle for fatty liver." The appellant asks whether the actual costs of the vitamins, minerals, and foods are taken into consideration for her individual needs.

In her submissions, the appellant states that even though she is not losing weight and is not diagnosed with “wasting away illnesses” such as cancer or hepatitis, she is in fact “wasting away daily” due to severe pain, fatigue, and lack of strength. The appellant argues that wasting away “shouldn’t just be based on weight loss.” The appellant states that while her diabetes accounts for weight gain, wasting away “can also be attributed to how much a person struggles with health challenges and how much they have deteriorated in physical and mental health and managing daily life activities.”

The appellant states that her doctor has listed the severe, life-threatening illnesses the appellant suffers from and that her doctor describes how much she has “wasted away physically” in her strength level, muscle use and mass in her lower limbs, pain level, mental capacity, and ability to work as before. The appellant argues that she does need additional nutrients to help her gain strength, energy, and relief from pain.

Panel’s decision

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

Section 67(1.1)(c) references nutritional items that are described in section 7 of Schedule C. The items set out in section 7 of Schedule C are “additional nutritional items that are part of a caloric supplementation to a regular dietary intake” and vitamins and minerals. As noted earlier, the ministry approved a vitamin/mineral supplement in the amount of \$40 per month.

Regarding additional nutritional items, section 67(1.1)(c) requires the items to be for the purpose of alleviating a symptom referred to in paragraph (b): (in the appellant’s case, *significant muscle mass loss* and *moderate to severe immune suppression* are the symptoms confirmed by her physician). Section 7(a) of Schedule C sets out an additional requirement: the nutritional items specified in the request for MNS must also be for the purpose of caloric supplementation to a regular dietary intake. The ministry therefore requires evidence from a medical practitioner that indicates the applicant needs additional calories above those obtained from a regular diet.

In the MNS application, the appellant’s physician specifies various types of diets (“diabetic, high protein, gluten-free”) to alleviate the symptoms of *significant muscle mass loss* and *moderate to severe immune suppression* by improving the appellant’s strength, preventing osteoporosis, and managing her diabetes. In the letter provided for the reconsideration, the physician recommends a diet “high in fruit and vegetables, high protein and low carbohydrate.” The physician also specifies a low glucose, low/gluten-free diet that includes specific foods such as spinach, cucumber, shrimp, meats, green leafy vegetables, and Bio K yoghurt.

The ministry found that the recommendations for a specific type of diet and specific foods do not confirm that the appellant requires caloric supplementation to her regular diet as required under the Regulation. The panel finds that the ministry’s conclusion is reasonable. The physician emphasizes the appellant’s need for a specific type of diet as well as nutritious foods to alleviate her symptoms, improve her strength, manage her conditions, and prevent osteoporosis. The physician does not indicate that the appellant requires extra calories above her regular dietary intake.

The appellant argues that the ministry denied her the MNS of nutritional items because she is not losing weight and does not have “wasting away illnesses” and that the ministry overlooks the evidence of an overall deterioration in her health. The panel is sympathetic to the appellant’s circumstances but notes that the ministry has no discretion under 67(1.1)(c) which requires evidence from a medical professional to confirm that the applicant needs additional nutritional items as part of a caloric supplementation to a regular dietary intake. While the appellant emphasizes that she cannot afford the cost of the supplements and foods that she needs, the panel notes that the ministry accepts she does not have resources to pay for or obtain the recommended nutritional supplements. As there is insufficient evidence confirming the need for caloric supplementation, the panel finds that the ministry reasonably determined the criteria in section 67(1.1)(c) were not met.

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 panel finds that the ministry reasonably determined the “imminent danger” requirement under section 67(1.1)(d) of the EAPWDR was not met. This section requires a medical practitioner to confirm that the failure to obtain the items specified in section 67(1.1)(c) will result in imminent danger to the person’s life. As noted earlier, the items referred to in section 67(1.1)(c) include additional nutritional items that are part of a caloric supplementation to a regular dietary intake. The appellant’s physician states that diabetes is a life-threatening disease with a risk of cardiac events and other dangers to health but the physician does not mention a need for caloric supplementation. Despite any evidence of imminent danger to life, the “caloric supplementation” requirement in section 67(1.1)(c) would still need to be confirmed by a medical professional. The panel therefore finds that the ministry reasonably determined the criteria in section 67(1.1)(d) were not met.

Conclusion

For the reasons set out above, the panel finds that the ministry reasonably determined the information provided by the physician in the MNS application does not confirm all of the requirements for nutritional items under the EAPWDR. The ministry is not authorized to provide the MNS for nutritional items unless all of the legislative requirements are met. The panel finds that the reconsideration decision is reasonably supported by the evidence and confirms the decision. The appellant is not successful in her appeal.

PART G – ORDER**THE PANEL DECISION IS: (Check one)** **UNANIMOUS** **BY MAJORITY****THE PANEL** **CONFIRMS THE MINISTRY DECISION** **RESCINDS THE MINISTRY DECISION**If the ministry decision is rescinded, is the panel decision referred back to the Minister for a decision as to amount? Yes No**LEGISLATIVE AUTHORITY FOR THE DECISION:***Employment and Assistance Act*Section 24(1)(a) or Section 24(1)(b)

and

Section 24(2)(a) or Section 24(2)(b) **PART H – SIGNATURES**

PRINT NAME

Margaret Koren

SIGNATURE OF CHAIR

DATE (YEAR/MONTH/DAY)

2018-09-14

PRINT NAME

Susan Ferguson

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2018-09-14

PRINT NAME

Connie Simonsen

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2018-09-14