

PART C – DECISION UNDER APPEAL

The decision under appeal is the Ministry of Social Development and Poverty Reduction's (the Ministry) reconsideration decision dated September 6, 2018, that denied the Appellant's request for a monthly nutritional supplement on the grounds that the Appellant did not meet the criteria of section 67(1.1) and section 7 of Schedule C of the *Employment and Assistance for Persons with Disabilities Regulation (EAPWDR)* in that the Appellant failed to establish that the supplements were required due to a progressive deterioration of health and to prevent imminent danger to life.

PART D – RELEVANT LEGISLATION

Employment and Assistance for Persons with Disabilities Regulation, Section 67(1)

Employment and Assistance for Persons with Disabilities Regulation, Section 67(1.1)

Employment and Assistance for Persons with Disabilities Regulation, Schedule C, section 7

PART E – SUMMARY OF FACTS

Evidence at the Time of Reconsideration

The evidence before the ministry at the time of Reconsideration consisted of:

A. The Appellant's application for monthly nutritional supplement containing a physician's report dated April 14, 2018, completed by a physician, in which it is stated:

- The Appellant has a significant neurological degeneration, specifically uncontrolled epilepsy;
- The Appellant has significant deterioration of a vital organ;
- The Appellant is maintained on an above maximum dose of a particular drug, as well as other drugs, in order to "barely achieve" seizure control;
- The Appellant requires supplements as pertain to a complete ketogenic diet and that these items will augment the effect of the antiepileptic treatment to achieve seizure control by reducing the risk of seizure recurrence;
- The Appellant does not have a medical condition resulting in an inability to absorb sufficient calories to satisfy daily requirements; specifically there is no issue with malabsorption;
- That if provided the nutritional items required will alleviate one or more of the Appellant's symptoms described in the application, specifically the significant neurological degeneration or significant deterioration of a vital organ, saying that there is evidence that a ketogenic diet will ensure adequate caloric supply to maintain overall adequate nutrition and is effective in controlling severe epilepsy;
- That the Appellant has had numerous incidents of head injuries, skeletal injuries and superficial wounds, cuts and concussions during seizures;
- That the Appellant has had risks in numerous situations including those related to basic activities of daily living such as bathing and commuting;
- That the Appellant experiences these things despite maintenance treatment on 3 antiepileptic medications.

B. The Request for Reconsideration Contained

(1) The Request for Reconsideration containing the original decision to be reconsidered, in which is stated that the Appellant's request was denied because the Appellant had not met all of the requirements of section 67 *EAPWDR*, including the requirements of section 7 of Schedule C, *EAPWDR*;

(2) The Appellant's a statement that the Appellant was advised by family physician that although the Appellant does not suffer from malabsorption syndrome, severe and chronic vomiting results in nutritional deficiencies similar to those caused by malnutrition syndrome, such that nutritional supplements are necessary for health.

C. Letter from a Physician dated August 28, 2018

The Appellant's physician wrote a letter on August 28, 2018 to support the Appellant's application for a dietary supplement; the physician wrote to that the Appellant has a very long history such that the Appellant requires neurological, neuropsychiatric and gastrointestinal care. The physician said that the Appellant suffers from intractable seizure disorder and treatment is challenging; the Appellant has had frequent seizures complicated by non-epileptic attack disorders and has, over the last several years, experienced a range of gastrointestinal symptoms complicating the pre-existing gastrointestinal symptoms that the Appellant has chronically experienced in the context of epilepsy. The physician stated that while the Appellant does not have malabsorption syndrome, the chronic vomiting is of such severity that the non-availability of nutritional supplements is likely to reflect on overall medical health and seizure management.

D. Letter from the Ministry to the Appellant dated August 1, 2018

The ministry wrote to the Appellant advising that they have approved a vitamin and mineral supplement of \$40 per month but has denied nutritional supplements.

E. Monthly Nutritional Supplement Reconsideration Decision Summary dated August 1, 2018

In the Reconsideration Decision Summary, the adjudicator indicates that

- The Appellant is a person designated as a Person with Disabilities receiving disability assistance
- The Appellant does not receive a supplement under *EAPWDR* section 66 (1) or (2) [diet supplement] or section 67 (3)(a) or (b) [short-term nutritional supplement] or Schedule C, schedule 2 (3) [appeal award]
- That there are no resources available to the family unit to pay for the requested items
- That the requested nutritional items are prescribed by a medical practitioner or nurse practitioner
- That the medical practitioner or nurse practitioner has listed and described a severe medical condition
- That as a direct result of the severe medical condition, the Appellant is being treated for a chronic progressive deterioration of health
- That the Minister is satisfied the Appellant displays two or more symptoms listed in section 67(1.1)(b) *EAPWDR*, specifically significant neurological degeneration due to uncontrolled epilepsy and significant deterioration of vital organs, specifically kidney and liver
- In answer to the question as to whether or not the person requires one or more of the items set out in section 7 of Schedule C, the Adjudicator concluded that in order to prevent imminent danger to the Appellant's life, a vitamin and mineral supplement was required, but additional nutritional items as part of a caloric supplementation to a regular dietary intake were not required because the ministry can only provide nutritional supplements in cases where someone is consuming a regular dietary intake but is experiencing weight loss, wasting or a nutrient deficiency despite consuming a regular dietary intake

Information Provided on Appeal

The Appellant did not attend the appeal. The Appellant's mother attended on the Appellant's behalf; there was a Release of Information signed October 1, 2018 by the Appellant appointing the mother as representative. The Appellant's mother was also assisted by an Advocate from a local advocacy agency.

In the Notice of Appeal, the Appellant stated that the Appellant was appealing because the Appellant vomits food and blood every single day, several times per day; has uncontrolled epilepsy, and the seizure control medication makes the Appellant feel very ill. The Appellant said that doctors continue to search for answers as to how to reduce the vomiting and why the Appellant is vomiting blood.

Appellant's Additional Evidence

The Appellant provided a note from a physician dated September 26, 2018, advising that the Appellant had a progressive neurological medical condition with persistent malnutrition and a requires heavy nutritional supplement in order to alleviate malnutrition. At reconsideration, the Appellant stated in the Request for Reconsideration that there is manifested "*severe and chronic vomiting, results in new nutritional deficiencies similar to those caused by malabsorption syndrome*". In addition, at reconsideration, a specialist physician wrote that he fears "*chronic vomiting is of such severity that non-availability of nutritional supplements is likely to reflect on overall medical health and seizure management*".

The panel finds that the physician's note is information in support of the information and records that were before the minister when the reconsideration decision was made, and as such is admissible pursuant to section 22(4) of the *Employment and Assistance Act*.

Ministry's Additional Evidence

The ministry did not submit any additional evidence at appeal.

PART F – REASONS FOR PANEL DECISION

Issue on Appeal

The issue on appeal is whether or not the Ministry of Social Development and Poverty Reduction's (the Ministry) reconsideration decision dated September 6, 2018, that denied the Appellant's request for a monthly nutritional supplement on the grounds that the Appellant did not meet the criteria of section 67(1.1) and section 7 of Schedule C of the *Employment and Assistance for Persons with Disabilities Regulation (EAPWDR)* in that the Appellant failed to establish that the supplements were required due to a progressive deterioration of health and to prevent imminent danger to life, was reasonably supported by the evidence or was a reasonable application of those enactments in the circumstances of the Appellant.

Relevant Legislation

Sections 67(1) and (1.1) *Employment and Assistance for Persons with Disabilities Regulation*

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, and

(b) is not described in section 8 (1) [people receiving special care] of Schedule A, unless the person is in an alcohol or drug treatment centre as described in section 8 (2) of Schedule A,

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.

Section 7, Schedule C *Employment and Assistance for Persons with Disabilities Regulation*

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.

General Scheme of the Legislation

The general scheme of the legislation is that if the Appellant is a family unit in receipt of disability assistance, and is designated as a Person with Disabilities who applies on a specified form for a nutritional supplement under *EAPWDR* section 7(a), the Appellant is entitled to that supplement if the appellant is being treated by a medical practitioner for a chronic progressive deterioration of health on account of a severe medical condition, and as a result of that condition the Appellant displays at least 2 of 7 listed symptoms under section 67(1.1)(b) *EAPWDR*, that the nutritional supplement is required to alleviate at least 1 of those symptoms, and failure to obtain the nutritional supplement will result in imminent danger to the Appellant's life.

Parties' Positions at Appeal

Appellant's Position

The Appellant's mother spoke of the Appellant during childhood, growing up with both grand mal and petit mal seizures, and the difficulties that the Appellant had in the Appellant's early years. The panel takes these comments, not as evidence, but as statements to place the Appellant's present medical issues in context.

The Appellant's mother reiterated that the many petit mal and grand mal seizures that the Appellant has experienced over time and still experiences, as set out in the original application for a monthly nutritional supplement, and the 3 different medications that the Appellant is required to take, also as set out in the original application for a monthly nutritional supplement, have resulted in the Appellant suffering chronic, frequent vomiting and therefore being unable to absorb very much nutritional value from the food that the Appellant consumes, reiterating the physician's opinion contained in the letter of August 28, 2018. The Appellant's mother further submitted the physician's note of September 26, 2018, in which the physician opined that the Appellant has persistent malnutrition, and a progressive neurological condition, which requires "*heavy nutritional supplement*" in support of her position. The Appellant's mother submitted that the \$758.42 assistance that the Appellant receives, plus the monthly allowance for a vitamin and mineral supplement is insufficient to purchase enough food for the Appellant. The Appellant's mother submitted that the appellant was left with about \$28 per day for food after the Appellant's fixed expenses, such as shelter allowance, are deducted from assistance and that the supplement of \$165 sought will be enough to provide about \$35 a day for food for the Appellant. The Appellant's mother submitted that the chronic vomiting occurs 4 to 7 times per day, that the Appellant vomits blood, and reiterated that the Appellant cannot keep down much of the food that the Appellant consumes. The mother argued that the Appellant requires much more food so the little the Appellant does not vomit up would be enough to provide sufficient nutrition.

In two written submissions, the Advocate from the local agency submitted that the supplement being sought is in addition to the vitamin and mineral supplement, and is being sought pursuant to the *Employment and Assistance for Persons with Disabilities Regulation*, section 67(1)(c) & (d) and Schedule C, section 7(a), which is the authority to provide additional nutrition up to \$165 per month. The Advocate submitted that it is the sum of \$165 per month which is being sought.

Ministry Position

The ministry agreed that the Appellant was a family unit, and that the Appellant was designated as a Person with Disabilities, that the Appellant was being treated by a medical practitioner for a chronic, progressive deterioration of health on account of the severe medical condition and as a result of being so treated, suffered from 2 of the 7 symptoms listed under section 67(1.1)(b) *EAPWDR*.

The ministry agreed that the sole issue on this appeal was whether or not the Appellant required additional nutrition as allowed under Schedule C section 7 (a) *EAPWDR* in order to alleviate at least 1 of the 2 symptoms from which the Appellant suffers, and that failure to obtain those items will result in imminent danger to the Appellant's life.

The ministry pointed out that at reconsideration, the ministry found that the physician did "*not provide enough evidence to demonstrate that the Appellant was displaying a symptom set that would indicate a need for caloric supplementation such as underweight status, significant weight loss, or significant muscle mass loss*"

Panel Finding

The legislation requires that:

- (a) An applicant request the nutritional supplement on a specified form completed by a medical practitioner or nurse practitioner [*EAPWDR* section 67 (1.1)]
- (b) An applicant for a nutritional supplement be a family unit, designated as a Person with Disabilities [*EAPWDR* section 67(1)(a)]
- (c) An applicant must be under treatment by the practitioner for a chronic, progressive deterioration of health on account of a severe medical condition [*EAPWDR* section 67(1.1)(a)]
- (d) An applicant must, as a result of that chronic progressive deterioration of health, the applicant must display 2 or more of 7 listed symptoms [*EAPWDR* section 67(1.1)(b)]
- (e) An applicant must need the nutritional supplement in order to alleviate at least 1 of those symptoms, and
- (f) If an applicant does not receive the nutritional supplement, then the applicant will be in imminent danger of the applicant's life.

The panel finds, and it was not in dispute, that the Appellant had applied on a specified form for a nutritional supplement completed by a medical practitioner, and that the Appellant is a family unit designated as a Person with Disabilities.

Further, the panel finds, and it was not in dispute, that the Appellant is being treated by a medical practitioner for a chronic, progressive deterioration of health on account of a severe medical condition; namely a long-standing, poorly controlled, intractable seizure disorder.

Further, the panel finds that as a result of that chronic progressive deterioration of health that the appellant displays not 1 but 3 symptoms of those 7 possible symptoms listed in *EAPWDR* section 67(1.1)(b), specifically malnutrition [*EAPWDR* section 67(1.1)(b)(i)], severe neurological degeneration [*EAPWDR* section 67(1.1)(b)(v)] and significant deterioration of a vital organ [*EAPWDR* section 67(1.1)(b)(vi)].

The panel finds that as a result of being treated with various medications for that seizure disorder, the Appellant vomits frequently, and because of this is unable to keep food down long enough to absorb sufficient nutrition, resulting in persistent malnutrition, neurological degeneration and significant deterioration of vital organs.

The panel finds that the ministry interpretation of requiring that only those 3 of the possible 7 symptoms set out in *EAPWDR* section 67(1.1)(b) when caloric supplementation is at issue (namely underweight status, significant weight loss or significant muscle mass loss), is not a reasonable interpretation of that section, as the legislation does not limit the requirement for caloric supplementation to only some of the 7 listed symptoms.

The panel finds that the ministry reason for denying the nutritional supplement, by stating that the physician “*does not specify the nutritional items required*” is not a reasonable interpretation of the legislation because there is no legislated requirement that the physician specify what nutritional items are required.

The reasoning in the ministry’s decision uses the physician’s statement that there are “*no malabsorption conditions*” to support the conclusion that the Appellant does not have a medical condition “*that results in the inability to absorb sufficient calories to satisfy daily requirements through a regular dietary intake*”. The panel finds that the ministry has not given adequate consideration to the physician’s statements that the Appellant’s chronic vomiting is of such severity that non-availability of nutritional supplements is likely to reflect on overall health and seizure management and that the appellant has persistent malnutrition.

The panel finds that the nutritional supplement sought would allow the Appellant to purchase more food, and that by consuming more food one or all of those symptoms would be alleviated, because the Appellant would be able to keep down a greater volume of food and thus absorb more nutrients. The panel finds that if the Appellant is not provided with the monthly nutritional supplement, the Appellant will not receive sufficient nutrition, and without sufficient nutrition, there will be imminent danger to the Appellant’s life. The panel therefore finds that the ministry’s decision is not a reasonable application of the legislation in the circumstances of the Appellant.

The panel finds that the ministry was not reasonable at reconsideration when it determined that the monthly nutritional supplement sought would not alleviate the Appellant’s symptoms.

The panel finds that the ministry was not reasonable at reconsideration when it determined that not providing the monthly nutritional supplement sought would not result in imminent danger to the Appellant’s life.

Conclusion

The panel finds that the ministry’s decision, in denying the Appellant a monthly nutritional supplement pursuant to *EAPWDR* section 67 and Schedule C section 7(a), was not reasonably supported by the evidence and was not a reasonable application of the applicable at enactment, namely *EAPWDR* section 67 and Schedule C section 7(a), in the circumstances of the appellant.

The panel rescinds the ministry decision, and the Appellant is successful on 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

Donald (Dan) McLeod

SIGNATURE OF CHAIR

DATE (YEAR/MONTH/DAY)

2018/October/05

PRINT NAME

Wesley Nelson

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2018/October/05

PRINT NAME

Anne Richmond

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2018/October/05