

## PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the “ministry”) reconsideration decision dated August 4, 2016, which denied the appellant’s request for a Monthly Nutritional Supplement (MNS) of nutritional items on the basis that the appellant did not meet the criteria set out in section 67(1.1)(c) and (d) and Schedule C, section 7(a) of the *Employment and Assistance for Persons With Disabilities Regulation* (“EAPWDR”).

In particular, the ministry found that the information provided did not demonstrate that the appellant’s medical practitioner had described how the specified items would alleviate a specific symptom set out in EAPWDR section 67(1.1)(b), as is required by EAPWDR section 67(1.1)(c), or that the failure to obtain the specified items would result in imminent danger to the appellant’s life as required by EAPWDR section 67(1.1)(d). In addition, the ministry determined that there was insufficient evidence to establish that the requested MNS were required as part of a caloric supplementation to a regular dietary intake as required by EAPWDR Schedule C section 7(a).

## PART D – Relevant Legislation

EAPWDR, section 67 and Schedule C section 7

## PART E – Summary of Facts

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

- Application for Monthly Nutritional Supplement dated April 6, 2016 in which the appellant's nurse practitioner indicates that the appellant had a brain tumour and neurocognitive issues with multiple and severe consequences of her cancer treatment as a child. The nurse practitioner indicates that the cranial radiation she received has profoundly affected her endocrine and neurological systems and she requires supplements to support these symptoms. The nurse practitioner indicates that the appellant has malnutrition (metabolic abnormalities, hypertension and hyper lipidemia) and significant neurological degeneration (radiation-induced progressive neurological dysfunction). The nurse practitioner indicates that the appellant is 171 cm tall and weighs 84.6 kg. The nurse practitioner recommends that the appellant have long term use of protein powders and Ensure as they will alleviate malnutrition and significant neurological degeneration and provide caloric supplementation to the regular diet by supporting the body's entire endocrine and chemistry systems. The nurse practitioner indicates that the nutritional items will prevent imminent danger to the appellant's life by supporting neurological functioning and preventing cardiovascular disease. The nurse practitioner also states that increased commorbidities and metabolic abnormalities have been found in the literature to form a metabolic syndrome that is associated with cardiovascular mortality (the "MNS Application").
- On the appellant's Request for Reconsideration dated July 20, 2016, she states that she believes she is eligible for the MNS because she has metabolic syndrome, which poses a significant health risk.
- Letter from an oncologist dated July 22, 2016 (the "Oncologist Letter") indicating that appellant's medical condition of metabolic syndrome results in chronic and progressive neurological deterioration over time, which is a severe consequence of the cranial radiation that the appellant received as a child. The oncologist indicates that because of the neurological dysfunction (brain damage caused by cranial radiation), the appellant has metabolic abnormalities that result in chronic, low levels of calcium, vitamins A, C, D, E, and magnesium as well as high cholesterol and hyperlipidemia and is at high risk of cardiovascular disease. The oncologist states that it is well documented in the literature that a person does not have to be underweight to be malnourished and require supplementation. The oncologist states that the appellant belongs to a population of adult survivors of childhood cancer who received cranial radiation, which directly affects the ability of the hypothalamus to regulate the body's metabolic, endocrine and neurological processes. The oncologist states that the literature shows that metabolic syndrome is associated with cardiovascular mortality, which is a severe medical condition that can result in death. The oncologist states that the appellant has a severe medical condition and as a direct result of her chronic, progressive deterioration of health she has malnutrition/metabolic abnormalities and significant neurological deterioration.

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*.

### **Additional information provided**

The appellant's Notice of Appeal dated August 8, 2016 indicates that additional medical information will be provided from the oncologist.

The appellant also provided a letter from the oncologist dated August 24, 2016 (the "Oncologist Submission"). The oncologist provides additional information regarding the consequences of the appellant's severe medical condition of metabolic syndrome that results in continuous and progressive neurological degeneration over time. The oncologist states that it is well documented that a person does not have to be underweight to be malnourished and require protein/caloric supplementation. The oncologist indicates that muscle wasting is one of the consequences of malnutrition and is mitigated by caloric/protein supplementation. The oncologist states that due to damage to the hypothalamus caused by cranial radiation, the appellant's metabolic processes are impaired and cause her body to convert calories into lipids and she is unable to absorb the necessary vitamins and minerals from food. The oncologist states that this results in malnutrition due to malabsorption; the inability to absorb sufficient calories and necessary nutrients. The oncologist also states that because the calories are converted into lipids, the appellant is part of a patient population that has higher caloric needs, specifically protein calories in order to counteract the conversion of calories into lipids. The oncologist states that the appellant requires caloric/protein supplementation to her diet to mitigate loss of muscle mass, malnutrition, and prevent fatigue.

The oncologist also states that the literature shows that metabolic syndrome in this population is associated with a significantly increased risk of cerebrovascular and cardiovascular mortality both of which are severe medical conditions that can result in death.

The ministry provided a submission dated September 8, 2016 stating that had the ministry had the Oncologist Submission at the time of reconsideration, the ministry may have found that the appellant met the criteria of MNS for a monthly nutritional supplement.

### **Admissibility of New Information**

The ministry did not object to the information in the appellant's Notice of Appeal or the Oncologist Submission. As the information in the Notice of Appeal and the Oncologist Submission corroborates the information before the ministry at the time of reconsideration regarding the appellant's medical condition and need for MNS, the panel has admitted the Oncologist Submission into evidence pursuant to section 22(4) of the *Employment and Assistance Act*. The panel has accepted the ministry's submission as argument.

## PART F – Reasons for Panel Decision

The issue on this appeal is whether the ministry's decision to deny the appellant funding for the MNS of nutritional items on the basis that the appellant did not meet the criteria set out in section 67(1.1)(c) and (d) and Schedule C, section 7(a) of the EAPWDR was reasonable. In particular, was the reconsideration decision in which the ministry determined that the information provided did not demonstrate that the appellant's medical practitioner had described how the specified items would alleviate a specific symptom set out in EAPWDR section 67(1.1)(b), that the failure to obtain the specified items would result in imminent danger to the appellant's life and that there was insufficient evidence to establish that the requested MNS were required as part of a caloric supplementation to a regular dietary intake was reasonable.

The relevant legislation is as follows:

### **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 person with disabilities in a family unit who receives disability assistance under

(a) section 2 [monthly support allowance], 4 [monthly shelter allowance], 6 [people receiving room and board] or 9 [people in emergency shelters and transition houses] of Schedule A, or

(b) section 8 [people receiving special care] of Schedule A, if the special care facility is an alcohol or drug treatment centre,

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 a supplement under section 2 (3) [general health supplement] of Schedule C,

(e) the person is not receiving a supplement under subsection (3) or section 66 [diet supplements],

(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.

(B.C. Reg. 68/2010)

(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). (B.C. Reg. 68/2010)

### **EAPWDR Schedule C, Health Supplement - MNS**

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.C. Reg. 68/2010)

(b) Repealed (B.C. Reg. 68/2010)

(c) for vitamins and minerals, up to \$40 each month. (B.C. Reg. 68/2010)

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### Nutritional Items

The appellant's position is that the information provided by the nurse practitioner and the oncologist demonstrates that she qualifies for the MNS of nutritional items.

The ministry's position is that the information provided does not establish 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 symptoms referred to in EAPWDR section 67(1.1)(b) and that failure to obtain the requested items would result in imminent danger to the appellant's life. In particular the reconsideration decision notes that it is not evident that the appellant is underweight as her body mass index is 28 which is above normal range and it is not evident that the appellant has wasting or weight loss or a significant nutrient deficiency resulting in the need for caloric supplementation. In particular, the reconsideration decision states that the oncologist does not speak to a need for caloric supplementation to a regular dietary intake to alleviate symptoms set out in EAPWDR Section 67(1.1)(b) due to a progressive deterioration of health and to prevent imminent danger to life.

The ministry's position at reconsideration was that the information provided does not establish that EAPWDR section 67(1.1)(c) and (d) have been met so the appellant is not eligible for the MNS of nutritional items.

### Panel Decision:

#### EAPWDR Section 67(1.1)(c)

In the MNS Application, the nurse practitioner specifies that the appellant requires long term use of protein powders and Ensure because cranial radiation as a child has significantly impaired the

appellant's body's metabolic and endocrine processes. The nurse practitioner recommends that the appellant has long term use of protein powders and Ensure as they will alleviate one or more of the symptoms set out in EAPWDR section 67(1.1)(b) being malnutrition and significant neurological degeneration, and provide caloric supplementation to the regular diet by supporting the body's entire endocrine and chemistry systems.

The Oncologist Letter indicates that the appellant does not have to be underweight to be malnourished and that she belongs to a population of adult survivors of childhood cancer who received cranial radiation which directly affects the ability of the hypothalamus to regulate the body's metabolic, endocrine and neurological processes.

The panel finds that when considered together, the information in the MNS application, the Oncologist Letter and the Oncologist Submission indicate that the appellant requires long term use of protein powders and Ensure as part of a caloric supplementation to a regular dietary intake needed to alleviate a symptom referred to in EAPWDR section 67(1.1)(b), particularly malnutrition and significant neurological degeneration. In particular, the Oncologist Submission confirms that the appellant requires the recommended nutritional items to alleviate symptoms of malnutrition and significant neurological degeneration and that the nutritional items are required as part of a caloric supplementation to a regular dietary intake as required by EAPWDR Schedule C, section 7(a). The oncologist states that the appellant does not have to be underweight to be malnourished and require protein/caloric supplementation and that muscle wasting is one of the consequences of malnutrition that is mitigated by caloric/protein supplementation.

The oncologist states that due to damage to the hypothalamus caused by cranial radiation, the appellant's metabolic processes are impaired and cause her body to convert calories into lipids and she is unable to absorb the necessary vitamins and minerals from food. The oncologist states that this results in malnutrition due to malabsorption; the inability to absorb sufficient calories and necessary nutrients. In addition however, the oncologist also states that because the calories are converted into lipids, the appellant is part of a patient population that has higher caloric needs, specifically protein calories in order to counteract the conversion of calories into lipids. The oncologist states that the appellant requires caloric/protein supplementation to her diet to mitigate loss of muscle mass, malnutrition, and prevent fatigue.

As the information provided confirms that the MNS is required as part of a caloric supplementation to a regular dietary intake as required by Schedule C, section 7(a), for the purpose of alleviating a symptom referred to in EAPWDR section 67(1.1)(b), the panel finds that the ministry was not reasonable in determining that the information provided did not meet the legislative criteria of EAPWDR section 67(1.1)(c).

EAPWDR section 67(1.1)(d) – imminent danger to life

The nurse practitioner indicates that the nutritional items will support the body's entire endocrine and chemistry systems and will prevent imminent danger to the appellant's life by supporting neurological functioning and preventing cardiovascular disease.

The oncologist indicates that metabolic syndrome in this population is associated with cardiovascular mortality which is a severe medical condition that can result in death. The oncologist also states that

the literature shows that metabolic syndrome in this population is associated with a significantly increased risk of cerebrovascular and cardiovascular mortality both of which are severe medical conditions that can result in death.

The panel notes that in its submission the ministry has indicated that had it had the Oncologist Submission at the time of reconsideration it may have found that the appellant was eligible for the MNS of nutritional items. However, the term “imminent” requires some degree of immediacy and while the information provided by the nurse practitioner and the oncologist indicate that the appellant’s condition is associated with cardiovascular disease, cardiovascular mortality and neurological degeneration, there is no information to indicate that the appellant has cardiovascular disease or that she is facing imminent danger to her life as a result of the neurological degeneration. While the oncologist indicates that the appellant’s condition will progressively get worse the oncologist does not provide information to indicate that there is an imminent danger to the appellant’s life.

The panel finds that the ministry was reasonable in determining that the legislative requirements of EAPWDR section 67(1.1)(d) were not met.

### **Conclusion**

Having reviewed and considered all of the evidence and the relevant legislation, the panel finds that the ministry’s reconsideration decision finding the appellant ineligible for MNS of nutritional items on the basis that the legislative criteria of EAPWDR section 67(1.1)(c) and Schedule C section 7(a) were not met was not a reasonable application of the legislation in the circumstances of the appellant. However the panel finds that the ministry’s reconsideration decision finding the appellant ineligible or MNS of nutritional items on the basis that the legislative criteria set out in EAPWDR section 67(1.1)(d) was not met was reasonable.

The panel therefore confirms the ministry’s decision and the appellant is not successful in her appeal.