

APPEAL NUMBER

**PART C -- DECISION UNDER APPEAL**

The decision under appeal is the Ministry of Social Development and Poverty Reduction (the "ministry") reconsideration decision of May 1, 2019 (the "Reconsideration Decision"), which denied the appellant a nutritional supplement because the appellant had not satisfied the ministry that she required caloric supplementation to alleviate a symptom set out in section 67(1.1)(b) of the Employment and Assistance for Persons with Disabilities Regulation ("EAPWDR"), as required by section 67(1.1)(c) of the EAPWDR and that failure to obtain caloric supplementation would result in imminent danger to the appellant's health, as required by section 67(1.1)(d) of the EAPWDR.

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**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**

With the consent of both parties, the appeal hearing was conducted as a written hearing, pursuant to Section 22 (3)(b) of the Employment and Assistance Act.

The evidence before the ministry at the time of the reconsideration consisted of the following:

1. Appellant's application dated 4<sup>th</sup> February 2019 (MNS Application) for monthly nutritional supplement, completed by a clinical dietician and signed by a medical practitioner;
2. A letter dated 16<sup>th</sup> April 2019 from the appellant's clinical dietician, which was also signed by the medical practitioner (First Medical Submission); and
3. A letter dated 18<sup>th</sup> April 2019 from the appellant's Health Authority,

-all of the three (3) documents described above, amongst other matters, stated that:

- as a direct result of the appellant's chronic, progressive deterioration of health, the appellant has displayed symptoms of malnutrition, significant neurological degeneration, and moderate to severe immune suppression;
- with respect to malnutrition, the appellant has gastrointestinal dysfunction, possibly related to stress/anxiety affecting the appellant's ability to eat normally (nausea, bloating, severe constipation, vomiting and heartburn);
- the appellant suffered a severe concussion in late 2017. There was significant trauma to right side of face and head of the appellant, and the appellant has ongoing symptoms of headache and nausea which are exacerbated by anxiety;
- appellant has ongoing symptoms associated with concussion, which are aggravated by anxiety and stress (headaches and nausea);
- in relation to moderate to severe immune suppression, the appellant is HIV positive currently stable on medications, but this is a life-long illness;
- the appellant's HIV can decrease integrity of the gut epithelial cells. Furthermore, the appellant suffers from chronic nausea with intermittent vomiting, affecting nutrient absorption;
- the appellant's symptoms often result in an inability to get out of bed in the morning. Once out of bed, the appellant becomes over-hungry, resulting in overeating/binge eating to help manage gastrointestinal as well as mental health symptoms, which has caused unintentional weight gain;
- the appellant has also been experiencing nausea associated with a medication prescribed for the appellant;
- a nutritional item, such as "Ensure scFOS" (a prebiotic formula, fibre) would benefit (the applicant) in the mornings daily;
- the supplement would provide to the appellant the required calories, protein, probiotics and fibre needed for an overall balanced diet, thereby avoiding the over-hungry, bloating symptoms and reduce binge eating later in the day;

- the nutritional item, such as Ensure scFOS supplement would benefit the applicant in the mornings or when experiencing nausea.
  - adequate nutritional status is not only important in preventing HIV disease progression but also promotes mental health status;
  - the nutritional items *"promote nutritional status by providing calories, protein and nutrients at times when the appellant is unable to tolerate solid foods. The nutritional items also contain probiotics which may promote healthy gut bacteria and GI health";*
  - a nutritional supplement would:
    - provide to the appellant the required calories, protein, probiotics and fibre needed for an overall balanced diet thereby avoiding the over-hungry, bloating symptoms and reduce binge eating later in the day;
    - prevent imminent danger to life, as *"adequate nutrition status, which can be improved through these supplements will optimize immune function and gut function, decreasing the risk of morbidity and mortality;"* and
    - would aid the appellant in weight stabilization, peripheral muscle gain and prevent further health complications of overweight/obesity such as diabetes, which the appellant has a family history of.
4. A letter dated 19<sup>th</sup> March 2019 from the ministry addressed to the appellant (i) confirming approval of \$40.00 per month for vitamins and minerals, as supplements for the appellant; and (ii) denying the appellant's request for nutritional supplements;
  5. A Monthly Nutritional Supplement Decision Summary dated 20<sup>th</sup> March 2019;
  6. Appellant's request for reconsideration dated 15<sup>th</sup> April 2019, which attached a letter, dated 18<sup>th</sup> April 2019 from the appellant's Health Authority (mentioned in item 3 above).

In addition to the evidence stated above, the panel had the following evidence and new documentary evidence (NDI) before it at the time of the appeal:

7. Reconsideration Decision dated 1<sup>st</sup> May 2019, which, amongst other matters, denied the appellant a nutritional supplement because the appellant had not satisfied the ministry that she required caloric supplementation to alleviate a symptom set out in section 67(1.1)(b) of the Employment and Assistance for Persons with Disabilities Regulation ("EAPWDR"), as required by section 67(1.1)(c) of the EAPWDR and that failure to obtain caloric supplementation would result in imminent danger to the appellant's health, as required by section 67(1.1)(d) of the EAPWDR. The ministry acknowledged that the clinical dietician and the medical practitioner indicated the health benefits of consuming a nutritional supplement, but noted that no indication has been provided to suggest that a nutritional supplement will prevent *"imminent danger to life"*, as that phrase is defined in a dictionary to mean *"impeding/soon to happen"*. Neither the clinical dietician nor the medical practitioner has provided any evidence that life threatening consequences would occur very soon if the appellant did not receive the nutritional supplement;
8. Appellant's Notice of Appeal dated 9<sup>th</sup> May 2019, which stated that the ministry is underestimating and downgrading how her mental illness and subsequent treatment is affecting the appellant's nutrition status and need for supplements which would prevent future health consequences long term;
9. An additional submission dated 23<sup>rd</sup> May 2019 (Second Medical Submission) from the appellant's same clinical dietician, but not reviewed or signed by a medical practitioner, as was the case with the letter dated 16<sup>th</sup> April 2018 described above; and

10. An additional submission dated 4<sup>th</sup> June 2019 from the ministry (Additional Ministry Submission) responding to the new submission of the clinical dietician dated 23<sup>rd</sup> May 2019.

The panel noted that the Monthly Nutritional Supplement Decision Summary is dated 20<sup>th</sup> March 2019, a day after the ministry communicated its original decision to the appellant by a letter dated 19<sup>th</sup> March 2019, but do not consider the discrepancy in the dates to be material for the consideration of this appeal.

#### New Documentary Evidence

Having carefully considered the contents of the Second Medical Submission dated 23<sup>rd</sup> May 2019 made on behalf of the appellant by her clinical dietician and the Additional Ministry Submission dated 4<sup>th</sup> June 2019, the panel finds that:

- the Second Medical Submission is admissible as additional evidence under Section 22(4) of the Employment and Assistance Act, as it is in support of the records of information and records, corroborating the information before the minister at reconsideration; and
- the Additional Ministry Submission is also admissible as a response to and arguments against the Second Medical Submission, as it is in support of the records of information and records, corroborating the information before the ministry at reconsideration.

Having regard to the relevant issues it has to decide, the panel finds that the evidence before it establishes the following facts:

11. The appellant is currently a person with disabilities in receipt of disability assistance;
12. As a direct result of chronic progressive deterioration of health, the appellant displays the symptoms of malnutrition and moderate to severe immune suppression; and
13. On 19<sup>th</sup> March 2019, the ministry approved \$40.00 per month for vitamins and minerals, as supplements for the appellant.

**PART F – REASONS FOR PANEL DECISION**

The issue on appeal is whether the Reconsideration Decision, which denied the appellant a nutritional supplement because the appellant had not satisfied the ministry that she required caloric supplementation to alleviate a symptom set out in section 67(1.1)(b) of the EAPWDR, as required by section 67(1.1)(c) of the EAPWDR, or that failure to obtain caloric supplementation would result in imminent danger to the appellant's life, as required by section 67(1.1)(d), was reasonably supported by the evidence before the ministry or was a reasonable application of the relevant statutory provisions in the appellant's circumstances.

The relevant applicable legislation is as follows:

The requisite criteria for a monthly nutritional supplement, as sought by the appellant, is described in Section 67 of the 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, and ~~(b)~~ (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)~~

(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)~~
- (ii) underweight status, ~~(iii)~~
- (iii) significant weight loss, ~~(iv)~~
- (iv) significant muscle mass loss, ~~(v)~~
- (v) significant neurological degeneration, ~~(vi)~~
- (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;<sup>11</sup>

(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).

Section 7 of Schedule C to the EAPWDR sets out the amount of that may be paid towards nutritional items that are part of a caloric supplementation and for vitamins and minerals:

#### 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)].<sup>11</sup> (c) for vitamins and minerals, up to \$40 each month.

#### Panel's Decision

The ministry found that the appellant's request for Monthly Nutritional Supplements (MNS) for vitamins/minerals meets the eligibility criteria set out in Section 67(1.1) of the EAPWDR and approved it on 19<sup>th</sup> March 2019.

With regard to additional nutritional items described in Section 67(1.1) (a) and (b), the ministry acknowledged that as a direct result of chronic progressive deterioration of health, the appellant displays the symptoms of malnutrition and moderate to severe immune suppression, and thereby meets the eligibility criteria for monthly nutritional supplements prescribed under Section 67 (1.1) of the EAPWDR.

However, to qualify for the MNS, the appellant must also meet the criteria set out in Section 67 (1.1) (c) and (d), that is to say that:

- to alleviate the symptoms of the appellant, the appellant requires the additional nutritional items that are part of a caloric supplementation to a regular dietary intake as specified in the request; and
- failure to obtain the items referred to in paragraph (c) will result in imminent danger to the appellant's health.

Section 7(a) of Schedule C and Section 67(1.1) (c) of EAPWDR stipulate that a medical nurse or practitioner must confirm that, for the purposes of *alleviating* a symptom referred to in sub-section (b), the relevant applicant requires additional nutritional items that are part of a caloric supplementation to a regular dietary intake, as specified in the MNS application.

In this context the panel notes that:

1. In the MNS Application, the clinical dietician and the medical practitioner have stated that:

*" My (the appellant) requires a nutritional supplement, such as Ensure SCFoS Fibre (prebiotic formula) in addition to regular dietary intake until gastrointestinal symptoms resolve and stress anxiety resolve enough that her ability to eat improves"*

*"These nutritional items will promote nutritional status by providing calories, protein and nutrients at times when the appellant is unable to tolerate solid foods. The nutritional items also contain probiotics which may*

*promote healthy gut bacteria and GI health."*

2. In the First Medical Submission dated 16<sup>th</sup> April 2019 the clinical dietician and the medical practitioner have stated that:

*"A nutritional item, such as Ensure SCFoS (prebiotic formula, fibre) would benefit the appellant in the mornings daily. This supplement would provide required calories, protein, probiotics and fibre needed for an overall balanced diet, avoiding the over-hungry, bloating symptoms and reduce binge eating later in the day. This supplement, in addition to regular follow up with her registered dietician, would aid the (appellant) in weight stabilization, peripheral muscle gain and prevent further health complications of overweight/obesity, such as diabetes which (the appellant) has family history of. Adequate nutrition status is not only important in preventing HIV disease progression but also promotes mental health status."*

3. In the Second Medical Submission dated 23<sup>rd</sup> May 2019, the Clinical dietician has stated that:

*"A nutritional item, such as Ensure SCFoS (prebiotic formula, fibre) would benefit the appellant in the mornings daily or when experiencing nausea. This supplement would provide required calories, protein, probiotics and fibre needed for an overall balanced diet, avoiding the over-hungry, bloating symptoms and binging tendencies. This supplement, in addition to regular follow up with her registered dietician, would aid the (appellant) in weight stabilization, peripheral muscle gain, and prevent further health complications of over weight/obesity, such as diabetes which (the appellant) has family history of. We have discussed alternative methods to reduce binging through various foods but often the appellant's mental status has limited her ability to follow through with these recommendations. Adequate nutritional status is not only important in preventing HIV disease progression but also promotes mental health status."*

Having regard to all the evidence before it, the panel finds that the medical evidence in the First Medical Submission dated 16<sup>th</sup> April 2019 and the Second Medical Submission dated 23<sup>rd</sup> May 2019, when read together, does reasonably establish that the nutritional supplement specified for the appellant by the clinical dietician is required to alleviate at least one of the two symptoms namely, i.e. nausea inherent in "moderate to severe immune suppression" displayed by the appellant. In particular:

- the appendix (Post Concussion Symptoms Questionnaire) to the letter dated 18<sup>th</sup> April 2019 from the appellant's Health Authority, which was completed by the appellant, states that the appellant has "a severe problem" with "nausea and/or vomiting."
- the First Medical Submission dated 16<sup>th</sup> April 2019 states that the appellant:
  - "suffered a severe concussion as a result of a physical assault ...in late 2017. There was significant trauma to the right side of the face and head. She has ongoing symptoms of headache and nausea, which are exacerbated by anxiety;"
  - "experiences ongoing nausea, intermittent vomiting, bloating, constipation and stomach pains related to headaches, concussion symptoms and anxiety/depression, which often result in inability to get out of bed in the morning;"
- The Second Medical Submission dated 23<sup>rd</sup> May 2019 states that:
  - "the applicant has also been experiencing nausea associated with a medication prescribed for the applicant:
  - "a nutritional item, such as Ensure scFOS (prebiotic formula, fibre) would benefit (the appellant) in the mornings daily or when experiencing nausea."



Having regard to the foregoing evidence, which directly relates to the symptom of *nausea* inherent in the appellant's medical condition of moderate to severe immune suppression, the panel finds that the ministry's conclusion, that there was not sufficient information from the clinical dietician and the medical practitioner that the additional nutritional items are required by the appellant as a part of a caloric supplementation to a regular dietary intake to alleviate the said symptom, as required by Section 67 (1.1) (c) of EAPWDR, is reasonably supported by evidence.

Hence, the panel finds that the ministry's decision that the appellant does not require the nutritional supplement of Ensure scFOS for the purposes of alleviating a symptom of the appellant (*nausea*) was not reasonably supported by evidence.

Secondly, Section 67(1.1)(d) of the EAPWDR requires that a nurse or a medical practitioner confirm that the failure to obtain the nutritional item that are part of a caloric supplementation to a regular dietary intake will result in "*imminent danger*" to the relevant applicant's life. In this context, the panel notes that in answer to a question on the MNS Application to describe how the nutritional items required by the appellant will prevent imminent danger to the appellant's life, the clinical dietician and the medical practitioner stated that:

- the appellant's "*adequate nutrition status, which can be improved through these supplements will optimize immune function and gut function, decreasing the risk of morbidity and mortality.*"

The panel did not find any other direct medical evidence relating to "*imminent danger*" to the applicant's life, as that phrase is described in the ministry's reconsideration decision i.e. "*impeding/soon to happen*". Therefore, the panel finds that the ministry reasonably relied on the medical evidence before it and did not draw inferences or connections that failure to obtain the nutritional items that are part of a caloric supplementation to a regular dietary intake will result in "*imminent danger*" to the applicant's life. The panel finds that the evidence, as described above, reasonably supported the ministry's reliance upon the dictionary definition of the phrase "imminent danger".

The panel finds that neither the clinical dietician nor the medical practitioner has provided any evidence that life threatening consequences would occur very soon if the appellant did not receive the nutritional supplement.

Having considered the contents of the Reconsideration Decision and all the other relevant evidence before the panel, and circumstances of the appellant, the panel finds that the ministry reasonably determined that there was insufficient medical information to establish that failure to obtain the nutritional items, as a part of a caloric supplementation to a regular dietary intake, will result in "*imminent danger*" to the applicant's life, as required under Section 67(1.1)(d) of the EAPWDR and as that phrase is defined in a dictionary to mean "*impeding/soon to happen*".

Bearing in mind the foregoing analysis of the evidence before the panel and the findings of fact made by the panel in Part E above, the panel finds that the ministry's decision was reasonably supported by evidence and also a reasonable application of the applicable legislation to the circumstances of the appellant. The panel confirms the reconsideration decision.

APPEAL NUMBER

**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

TAJDIN MITHA

SIGNATURE OF CHAIR

DATE (YEAR/MONTH/DAY)

2019-06-17

PRINT NAME

KATHERINE WELLBURN

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2019-06-17

PRINT NAME

DAVID ROBERTS

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2019-06-17