

PART C – DECISION UNDER APPEAL

The decision under appeal is the Ministry of Social Development and Poverty Reduction (the Ministry) Reconsideration Decision dated June 10, 2019, which held that the Appellant is not eligible for a monthly nutritional supplement (MNS) for nutritional items pursuant to Section 67(1) and Section 7 of Schedule C of the Employment and Assistance for Persons with Disabilities Regulation (EAPWDR).

The Ministry found that, while the evidence provided by the Appellant's medical practitioner confirms that she met most of the legislative criteria and requires vitamin and mineral supplements, the Ministry was not satisfied that the Appellant's medical practitioner had provided evidence that the Appellant met all of the legislative criteria for the MNS. Specifically, the Ministry was not satisfied that the Appellant's medical practitioner provided evidence to confirm that the Appellant required the MNS for the purposes of alleviating a symptom referred to in EAPWDR Section 67(1.1)(b), and that failure to obtain the MNS would result in imminent danger to her life.

PART D – RELEVANT LEGISLATION

EAPWDR – Sections 67 and Section 7 of Schedule C.

PART E – SUMMARY OF FACTS

The Appellant is a person with disabilities in receipt of disability assistance.

The evidence before the Ministry at the time of reconsideration included:

1. Application for MNS (the Application) dated March 1, 2019 and signed by the Appellant and the Appellant's medical practitioner (the Doctor), which lists the Appellant's severe medical conditions as:
 - Spontaneous coronary artery dissection (SCAD) heart attack and high blood pressure;
 - Depression, anxiety, attention deficit disorder (ADD), and obsessive compulsive disorder (OCD) resulting in a reduced appetite and "no motivation to cook";
 - Lung nodules; and,
 - Renal artery stenosis.

In response to the question "*As a direct result of (these) severe medical conditions ... is the applicant being treated for a chronic, progressive deterioration of health?*" the Doctor writes "*See cardiologist – myself – medication for hypertension. Seen Respirologist for lung nodule. Blood pressure (medication) was increased. Vitamin & Minerals.*" In the application for MNS, the Doctor further indicates (*comments in parentheses*) that the Appellant demonstrates the following symptoms: significant weight loss (*weight loss about 20 lbs in the past 6 months*), significant muscle mass loss (*mild [to] moderate muscle loss*), and significant neurological degeneration (*memory affected*).

In addition, in the section of the Application dealing with "Nutritional Items", the Doctor has specified that the following additional nutritional items are required:

- High calorie, high protein, low salt, high fruit & vegetable diet; and
- Boost (*2-3 times per day*).

By answering "No" to that question in the Application, the Doctor also indicates 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, but does indicate that the nutritional items required will prevent weight and muscle mass loss and improve the Appellant's cognition and mental health. Where asked to describe how the nutritional items requested will prevent imminent danger to the Appellant's life, the Doctor writes "*in long term prevent heart attack – stroke, aortic dissection, prevent weight loss*", and under "Additional Comments" writes "*I highly recommend high calorie – high protein diet, high vegetables & fruit, multivitamin supplement to improve her physical & mental status and improve her general health.*"

2. Request for Reconsideration signed and dated May 10, 2019, in which the Appellant states that she is currently consuming a full dietary intake and that ongoing additional supplemental calories will be required. She also provides details about her medical condition and includes the comment "*I do need nutritional caloric supplements (items) on an ongoing basis to my regular diet to prevent imminent danger to my life. To help prevent a heart attack, stroke, aortic dissection and aneurysm. Also, to prevent more significant weight loss. I have lost 20 pounds over the last 8 months ...*"

3. Documents titled "Cardiology Patient Page - SCAD" and "Fibromuscular Dysplasia (FMD) Fact Sheet" providing generalized information about SCAD and FMD respectively;
4. Letter to the Doctor dated September 8, 2017 and signed by a case manager at the Appellant's Community Health Authority (HA) stating that the Appellant is currently enrolled at the HA's cardiovascular rehabilitation clinic and that SCAD patients are advised to avoid isometric exercises and refrain from pushing, pulling or lifting weight loads in excess of 30 lbs;
5. Letter to the Doctor signed by a Cardiologist at the HA summarizing the results of a follow-up examination of the Appellant on September 14, 2018;
6. Letter to the Doctor dated December 18, 2018 and signed by a Respiriologist at the HA summarizing the results of a follow-up physical examination of the Appellant and an interpretation and copy of a Computerized Tomography (CT) Scan done on June 27, 2018; and
7. Ministry MNS Decision Summary dated April 9, 2019 confirming that the Ministry was not satisfied "*that for the purpose of alleviating a symptom referred to in [EAPWDR Section 67 (1.1)(b), the Appellant] requires one or more of the items set out in [EAPWDR Schedule C Section 7], and stating the reasons for that decision as provided in the Ministry's Reconsideration Decision and as summarized below.*

Additional Information

In her Notice of Appeal dated June 21, 2019, the Appellant stated that she thought she was eligible for the MNS because she has "*issues with absorption and need(s) caloric supplements to a regular diet*" and that she is "*currently consuming a full dietary intake*".

The following additional documents were provided by the Appellant in a submission (the Appellant Submission) received after the Reconsideration Decision on July 11, 2019:

1. One page letter from the Doctor to the Ministry dated June 12, 2019 (the Doctor's Letter) in which the Doctor states that she is preparing the letter on behalf of the Appellant with respect to the Appellant's appeal of the Ministry's Reconsideration Decision. The letter contains the following evidence, further supported by documents appended to the Doctor's Letter and listed below:
 - A summary of the Appellant's severe medical conditions, as previously provided in the Application;
 - With respect to the Appellant's current dietary intake and nutritional requirements, she states: "*(The Appellant) is consuming a full dietary intake, and due to her medical condition of FMD it would be beneficial for (the Appellant) to have additional nutritional supplementation on an ongoing basis, for the prevention of any cardiac distress, such as heart attack, aortic dissection, stroke and aneurism. (The Appellant) has the inability to absorb sufficient calories to satisfy daily requirements through a regular dietary intake.*" (emphasis added); and
 - Details concerning the impacts of FMD on an individual's medium and large arteries, the weight loss experienced by the Appellant as previously reported in the Application, and a

statement indicating that the Appellant might also be experiencing malabsorption syndrome, which the Doctor says can be associated with FMD.

2. A prescription slip dated June 11, 2019 signed by the Doctor stating: "*(The Appellant) is under my care. She is suffering from absorption issues (FMD)*";
3. Letter to the Doctor signed by the Cardiologist at the HA summarizing the results of another follow-up examination of the Appellant on April 25, 2019, indicating that the Appellant had recently "*experienced a type 2 SCAD event*" and "*had been experiencing palpitations sporadically for the past month. Typically her palpitations will last for 2 minutes and has (sic) occurred 5 to 10 times per day in the past two weeks. Two weeks ago she felt she had some palpitations continuously for a couple of hours ... (and) was brought into the emergency room by ambulance (where it was determined that) she had a normal (electrocardiogram test result) and a normal troponin (test result).*" In the "Assessment & Plan" section of the letter the Cardiologist states "*Overall, (the Appellant) is stable from a cardiac perspective, but she continues to experience palpitations in the context of anxiety ... From a cardiac perspective (she) seems to be doing well, so we have not changed her medications.*"; and
4. Two Medical Imaging Reports (MRIs) dated June 23, 2017 and July 5, 2017, in which the principal interpreters conclude that an analysis of the imaging in the June 23, 2017 report is "*in keeping with FMD*" and, in the July 5, 2017 report, that "*there are features consistent with FMD*".

At the hearing, the Appellant stated that she had suffered a heart attack in 2016 and subsequently she had spent a lot of time learning about her medical condition. One of the things she had learned was that 70-90% of people who have SCAD have FMD as well. She referred to the April 25, 2019 letter from the Cardiologist to the Doctor included in the Appellant Submission and explained that she used to visit the Cardiologist once a year but was now seeing her once every 6 months. She also stated that she has to have her kidneys checked every several months due to her renal artery stenosis. She said that she suffers from many stressors concerning money, her health and her son, resulting in anxiety and weight loss. When asked by the Ministry if she had any plans for dealing with her weight loss issue, the Appellant stated that she has been checking her weight, doing aerobic exercises, lifting light (under 30 lb.) weights and seeing the Doctor on a regular basis, but has not had any tests on her bone mass, etc. She explained that she takes 15-30 minute walks an average of twice a week for exercise, but that exercising varies from no weekly activity to four times a week depending on how she is feeling.

Regarding her request for the Ministry to reconsider its decision, she explained that she has asked her Doctor to provide a letter confirming that she met the requirements for an MNS, but that her Doctor was difficult to reach due to illness, and as a result the Appellant had not been able to obtain and provide the Doctor's Letter until after the extended deadline for filing her Request for Reconsideration had passed and the Reconsideration Decision had been made.

The Appellant explained that she had filled out the Application with her Doctor at the Doctor's office. (Later, when asked by a Panel member for confirmation of this, the Appellant stated that she had left the Application with her Doctor several days earlier, that the Doctor had completed most of the Application on her behalf without her present, and that she recalls having met with the Doctor to go over some of the Application questions with which the Doctor had needed help.) When asked by a Panel member why

there was a contradiction between the evidence in the Application and the Doctor's Letter regarding her ability to absorb sufficient calories, she explained that she had spoken to an advocate who had suggested she do some additional research on SCAD and FMD and she had learned that an inability to absorb sufficient calories from a regular dietary intake was a common condition associated with FMD. As a result, subsequent to the completion of the Application, she had convinced her Doctor that the MNS would be necessary for this purpose.

At the hearing, the Ministry relied on its Reconsideration Decision and explained that, while it had been satisfied that there was a need for vitamin and mineral supplements, it had determined that there was not sufficient evidence provided prior to the Reconsideration Decision that the Appellant's weight loss was directly related to caloric supplementation needs, as her weight loss could be related to another medical condition such as stress. In addition, the Ministry stated that there was insufficient evidence that the Appellant's life was in imminent danger without the MNS.

The Ministry also explained that if an application for health supplements "*falls short*" but new evidence comes to light regarding an applicant's medical condition after the Reconsideration Decision has been made, the Ministry recommends that the client talk to his or her medical practitioner and reapply for the supplement if it might be expected that all of the legislative criteria have now been met.

Admissibility of Additional Information

Section 22(4) of the 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 Ministry when the decision being appealed was made and "*oral and written testimony in support of the information and records*" before the Ministry when the decision being appealed was made – i.e. information that substantiates or corroborates the information that was before the Ministry at reconsideration. Because a panel can accept oral and written testimony in support of the information and records before the Ministry when it made the decision, there is limited discretion for a panel to admit new evidence. Accordingly, instead of asking whether the decision under appeal was reasonable at the time it was made, panels must determine whether the decision under appeal was reasonable based on all admissible evidence, including any new evidence admitted under EAPWDA Section 22(4).

The Panel considered the written information in the NOA to be argument. With respect to the written evidence contained in the Appellant Submission, the Panel notes that the sentence in the Doctor's Letter in which the Doctor states "*(the Appellant) has the inability to absorb sufficient calories to satisfy daily requirements through a regular dietary intake*" directly contradicts the Doctor's answer to the question "*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.*" in the Application, where the Doctor has written "No".

As Section 22(4) of the EAA provides that panels may only admit as evidence oral and written testimony **in support of** the information and records before the Ministry when the decision being appealed was made, which is information that **substantiates or corroborates the information that was before the Ministry at reconsideration**, and, at the time that the Reconsideration Decision was made, because the only evidence with respect to whether the Appellant has a medical condition that results in her inability to

absorb sufficient calories to satisfy daily requirements through a regular dietary intake is what is contained in the Application (i.e., that she did not have such a medical condition), the Panel finds that the evidence provided by the Doctor in the Doctor's Letter stating that the Appellant is not able to absorb sufficient calories to satisfy daily requirements through a regular dietary intake is inadmissible as it does not satisfy the requirements set out in EAA Section 22(4).

The Panel finds that all of the other evidence contained in the Appellant Submission, including all of the other evidence in the Doctor's Letter and the evidence in the prescription slip, the letter from the Cardiologist to the Doctor, and the information in the two MRIs, to be evidence in support of the information and records that were before the Ministry at reconsideration) and therefore admitted that additional evidence in accordance with Section 22(4)(b) of the EAA.)

PART F – REASONS FOR PANEL DECISION

The issue on appeal is whether the Ministry's decision, which held that the Appellant is not eligible for the MNS because she failed to meet the legislative criteria set out in the EAPWDR, was reasonably supported by the evidence or was a reasonable application of the applicable enactment in the circumstances of the Appellant.

In particular, was the Ministry reasonable in determining that the evidence provided by the Appellant's Doctor does not confirm that there are additional nutritional items which are part of a caloric supplementation to a regular dietary intake and which are necessary for the purpose of alleviating a symptom referred to in EAPWDR Section 67(1.1)(b), and that failure to obtain the items requested would result in imminent danger to her life?

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 ...

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.

(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).

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; ...

* * * *

The Panel's Decision

Is the MNS required for the purposes of alleviating a symptom referred to in the legislation? [EAPWDR Section 67(1.1)(c)]

The Ministry's position is that there was not sufficient evidence to show that the Appellant needs the MNS to provide additional calories above those obtained from a regular dietary intake. The Ministry also notes in the Reconsideration Decision that the Appellant's height and weight recorded in the Application provides a Body Mass Index (BMI) that is within the normal range, and that, even though the Appellant lost 20 lbs over a short period, the Doctor has not provided enough evidence that the Appellant requires a high calorie diet because her weight is normal. The Appellant's position is that the Doctor was incorrect when she indicated in the Application that the Appellant was able to absorb sufficient calories to satisfy daily requirements through a regular dietary intake, that the Doctor had corrected this assessment in the Doctor's Letter submitted after the Reconsideration Decision, and that as a result there was

sufficient evidence to show that she (the Appellant) required the MNS to alleviate her significant weight loss.

The Panel finds that the Ministry was not reasonable in determining that, despite significant weight loss over a short period, the Doctor has not provided enough evidence that the Appellant requires a high calorie diet. The Panel notes that, despite the Appellant's BMI falling currently within the normal range, there is no evidence that additional weight loss might not be expected, potentially taking the Appellant's BMI to a value significantly below the normal range for a person of her height and weight.

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", vitamins and minerals. In this instance, the Ministry approved a vitamin/mineral supplement of \$40 per month. Regarding additional nutritional items, EAPWDR Section 67(1.1)(c) requires that items be necessary for alleviating a symptom referred to in paragraph (b). In the Appellant's case, significant weight loss [Section 67(1.1)(b)(iii)] and significant deterioration of a vital organ [Section 67(1.1)(b)(vi)] are the symptoms identified by the Doctor which the Ministry has determined were confirmed by the evidence provided. 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 for the purpose of caloric supplementation. In this case, the Ministry found that the evidence suggested that the Appellant did not need additional calories above those obtained from a regular diet for the purpose of caloric supplementation. The Panel notes that the Doctor stated in the Application that the Appellant did not have a medical condition that results in the inability to absorb sufficient calories to satisfy daily requirements through a regular dietary intake. Therefore, the Panel finds that the Ministry reasonably determined that the nutritional items specified in the request for MNS were not required for the purpose of caloric supplementation to a regular dietary intake.

**Will failure to obtain the MNS result in imminent danger to the person's life?
[EAPWDR Section 67(1.1)(d)]**

The Ministry's position is that the Appellant's medical practitioner has not provided sufficient evidence to confirm that failure to obtain the MNS would result in imminent danger to her life. The Appellant's position is that her medical condition puts her in significant risk of a heart attack, stroke, aortic dissection and aneurysm, all of which are potentially life threatening, and that she needs MNS to supplement her regular diet to prevent imminent danger to her life.

"Imminent" is not a defined term in the EAPWDR. The Cambridge Dictionary defines "imminent" to mean "coming or likely to happen very soon".

In its Reconsideration Decision, the Ministry states "*In describing how nutritional items will prevent imminent danger to your life, (the Doctor) writes "In long term prevents heart attack – stroke, aortic*

dissection, prevent weight loss.”... *This statement does not establish that failure to obtain nutritional items will result in an imminent danger to your life.*” As the Doctor has indicated that obtaining the nutritional items would have a *long term* positive effect on reducing the risk of a life threatening condition, and because the legislation requires that failure to obtain the items would result in a danger which is “*likely to happen very soon*”, the Panel finds that the Ministry reasonably determined that failure to obtain the MNS would not result in *imminent* danger to the Appellant’s life, and that therefore the Ministry reasonably determined that the requirement set out in EAPWDR Section 67(1.1)(d) has not been met.

Conclusion

Having reviewed and considered all of the evidence and relevant legislation, the Panel finds that the Ministry’s Reconsideration Decision, which determined that the Appellant was not eligible for the MNS pursuant to Section 67(1) and Section 7 of Schedule C of the EAPWDR, was reasonably supported by the evidence and was a reasonable application of the EAPWDA in the circumstances of the Appellant, and therefore confirms the decision. The Appellant’s appeal, therefore, is not successful.

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

Simon Clews

SIGNATURE OF CHAIR

DATE (YEAR/MONTH/DAY)

2019/07/17

PRINT NAME

Kulwant Bal

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

PRINT NAME

Vivienne Chin

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)