

APPEAL NUMBER

PART C – DECISION UNDER APPEAL

The decision under appeal is the Ministry of Social Development and Poverty Reduction (the ministry) reconsideration decision dated April 3, 2019 which denied the appellant's request to receive a Monthly Nutritional Supplement (MNS) of vitamin/mineral supplementation and additional nutritional items under sections 7(a) of Schedule "C" of the *Employment and Assistance for Persons with Disabilities Regulation* (EAPWDR) because the appellant does not meet the legislated requirements in sections 67(1.1)(b), (c) and (d) of the EAPWDR.

PART D – RELEVANT LEGISLATION

Employment and Assistance for Persons with Disabilities Regulation (EAPWDR) Section 67(1)(1.1)

Employment and Assistance for Persons with Disabilities Regulation (EAPWDR) Schedule C Section 7

PART E – SUMMARY OF FACTS

This appeal was held by written hearing by consent of the parties in accordance with section 22(3)(b) of the *Employment and Assistance Act*.

The appellant is a Person with Disabilities in receipt of disability assistance.

January 29, 2019- the appellant submitted an application for the Monthly Nutritional Supplement items of vitamin/mineral supplements and nutritional items.

January 31, 2019- the ministry denied the appellant's request for the Monthly Nutritional Supplement items of vitamin/mineral supplements and nutritional items.

March 26, 2019- the ministry received a Request for Reconsideration.

April 3, 2019- the ministry completed its review of the Request for Reconsideration. The appellant was not successful in his request.

In his appeal dated April 8, 2019, the advocate for the appellant stated the reason for appeal was:

- The decision was cruel and short sighted
- Even with a nutritional supplement the appellant will die from his illness within 18 months and it will be a painful and extremely unpleasant death.
- As the doctor notes, his death will involve worsening pain with swallowing, dysphagia, and eventual airway obstruction.
- The appellant is currently subsisting entirely on Ensure provided by the ministry, when this supply runs out, he will very quickly begin to exhibit the symptoms the ministry requires.

In his appeal the appellant submitted the following material:

- A written statement by the appellant's advocate dated April 26, 2019 which stated that at the time of the original application for the Monthly Nutritional Supplement (MNS), the appellant was denied as he was not displaying two or more symptoms as per legislated criteria. The appellant does not dispute this fact but contends there are additional factors the minister should consider in determining if the appellant is eligible for MNS. These factors include:
 - In the opinion of three medical practitioners the appellant will experience increasing dysphagia as his cancer progresses and as a result he will not be able to eat solid food and will require caloric supplementation.
 - In the opinion of one medical practitioner, the appellant has no more than 6-24 months to live and will die a slow and painful death by worsening pain with swallowing, dysphagia, and eventual airway obstruction.
 - It has been 6 months since the doctor made the prognosis (6-24 months to live), and the appellant is now experiencing difficulty swallowing solid food and is subsisting almost entirely on Ensure meal replacement.

- The appellant does not have the resources to purchase Ensure without additional support from the ministry.
- The advocate submitted that it is inevitable that the appellant will display two or more of the legislated symptoms within a period of a few months and that by denying the appellant his supplement simply because he was asymptomatic at the time of his original application is unnecessarily cruel as it demands the appellant suffer a painful deterioration of health to qualify for the MNS.
- Concluding comments added the absence of any assistance in accessing caloric supplementation in liquid form constitutes an imminent danger to the appellant's life. The advocate has asked the ministry's assistance in alleviating the appellant's suffering and delaying his end by helping him access adequate caloric supplementation in liquid form.

Admissibility of New Information

Section 22(4) of the *Employment and Assistance Act* states that the panel is empowered to admit as evidence only "the information and records that were before the minister when the decision being appealed was made" and "oral or written testimony in support of" the record of the ministry decision. If the additional evidence substantiates or corroborates the information and records before the minister at the reconsideration stage, the evidence should be admitted; if it does not, then it does not meet the test of admissibility under s. 22(4)(b) of the *Employment and Assistance Act* and should not be admitted.

In this appeal, additional new information included the following:

- Progress note dated March 27, 2019 in response to a request from the appellant's advocate was completed by a Dr. of Oncology as the appellant's cancer doctor was not available, stated:
 - The appellant has declined treatment for his cancer.
 - Without treatment, his cancer will progress and will make swallowing solid food difficult. This will necessitate caloric supplementation by means of meal replacement, such as Ensure or Boost, or other soft food and liquid supplementation.
- As the Physician notes further details "in support of" statements made by other physicians in terms of the appellant's condition, the panel finds the progress note admissible.
- Video conference notes dated October 31, 2018 completed by appellant's cancer agency doctor which stated:
 - Symptoms- when asked what symptoms the appellant was currently experiencing he stated he wasn't experiencing any and he feels great. The appellant attributes his state is from using CBD.
 - Diagnosis- The appellant has squamous cell carcinoma in his epiglottis. It is treatable with a +70% success rate.
 - Treatment- The doctor outlined two treatment options, Radiation and surgery

- CBD- The appellant asked about the effectiveness of CBD treatment, the doctor noted that CBD may alleviate some symptoms but stated there is no evidence that CBD slows or stops growth and speed of cancer cells.
- Declining Treatment- By declining treatment the appellant can expect to live 6 months to 2 years. As well, the appellant will experience increasing pain, difficulty eating and then increasing difficulty breathing.
- Next Steps- The appellant is unsure about the treatment and is inclined to stick with CBD
- As the Video conference notes further details “in support of” statements made by other physicians in terms of the appellant’s condition, the panel finds the progress note admissible.
- Product Distribution Centre(PDC) authorization- was approved by the ministry from January 31, 2019 through to April 30, 2019. The form indicates the appellant was successful in his request for a Short Term Nutritional Supplement. The appellant was able to obtain Ensure/Boost as a short term Nutritional Supplement. As there is mention of the appellant’s medical condition effecting his ability to “eat, swallow, speak, and breath, (October 31, 2018, consultation note completed by appellant’s cancer agency doctor), the panel concluded this information was “in support” of the information before the ministry at the time of reconsideration, the panel finds the PDC authorization admissible.
- Statements made on the Appeal form and the advocates statement “The appellant is currently subsisting entirely on Ensure provided by the ministry, when this supply runs out, he will very quickly begin to exhibit the symptoms the ministry requires.” As there is no evidence this information was before the ministry at the time of reconsideration decision, the panel finds that this document cannot be “in support of” the evidence that was before the ministry at the time of the decision and is therefore new evidence and is not admissible.

The ministry response dated May 6, 2019, to the appellant’s submission stated:

- “Had the ministry had this information at the time of the reconsideration decision, the ministry may have found his request had met the criteria for a monthly supplement (nutritional items).”

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

- A Memo from the appellant’s family doctor dated January 29, 2019 which states:
 - Three doctors state if left untreated, the appellant’s health will deteriorate and an early death will occur.
 - The appellant is not displaying symptoms yet but it is guaranteed that he will in the very near future.
 - The appellant has limited time left and requires a monthly nutritional supplement so he can transition a nutrient-rich, liquid diet as his throat becomes inflamed and constricted.
- A letter from an Ear, Nose & Throat doctor dated September 5, 20118 which states:

- The appellant has cancer though treatable.
- If the appellant declines treatment he may have tracheotomy, laryngectomy surgery -will end in early death.
- A letter from an Ear, Nose & Throat doctor dated August 16, 2018 which states:
 - Post-surgery notation.
 - The appellant does not want a referral for further cancer treatment.
- A letter from an Ear, Nose & Throat doctor dated July 5, 2018 which states:
 - Medical procedure in terms of the appellant's Chronic sinusitis
 - Under "Impression", the doctor mentions his concern of the appellant's sore throat and the likelihood of squamous cell carcinoma affecting the left lateral aspect of the epiglottis.
- Progress note dated November 5, 2018 completed by the appellant's cancer agency doctor which stated:
 - Without treatment, the appellant will experience worsening pain with swallowing, dysphagia, and eventual airway obstruction.
- Consultation note dated October 31, 2018 completed by the appellant's cancer agency doctor which stated:
 - History of Presenting Illness- August 7th appellant underwent micro laryngoscopy and biopsy as well as sinus surgery. Biopsy showed squamous cell carcinoma, negative.
 - Current Status- Appellant feels well, shows no symptoms of sore throat, weight loss. He is taking CBD oil to address his condition.
 - Social History- Lives alone appellant states he is a bit of a loner.
 - Impression- tentative clinical stage T2 tumor in contact...., N2c (CT
 - July 9th described bilateral lymphadenopathy), squamous cell carcinoma of the supraglottic larynx.
 - Plan- Estimated the appellant will live from 6 months to two years if not treated. The doctor stressed death from untreated head and neck cancer is terribly morbid because of the tumor affecting one's ability to eat, swallow, speak, and breath.
- Application for Monthly Nutritional Supplement dated January 27, 2019 which states:
 - Section 1, Diagnosis- Squamous cell carcinoma of supraglottic larynx
 - Section 2, Treatments- limited diet, Appellant has declined conventional treatment. Loss of appetite weight loss reported but has stabilized. Concern for nutrition/swallowing should tumour enlarge
 - Section 3, Symptoms- Significant weight loss- reported to have dropped to NADIR 118lb, appellant is now 159lb.
 - Section 4- Height 6'5", weight 159lb
 - Section 5, Vitamin or Mineral Supplementation- no comments were made.
 - Section 6, Nutritional Items:
 - *Does applicant have medical condition that results in the inability to absorb calories to satisfy daily requirements through a regular dietary intake?* Limited diet currently. If laryngeal mass should enlarge, swallowing will be affected and diet will be further reduced to liquids (Ensure).

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- *Describe how the nutritional items required will alleviate one or more symptoms specified in question 3 and provide caloric supplementation to the regular diet: Ensure/Boost will bypass laryngeal mass obstruction.*
- Additional Comments
 - Appellant reports limited diet
 - Low social economic status
 - Advocate encouraging submission of the nutritional application so will be prepared for anticipated deterioration of status and limitation to liquids only in the future.

PART F – REASONS FOR PANEL DECISION

The issue under appeal is the reasonableness of the ministry's reconsideration decision dated April 3, 2019, finding the appellant is not eligible to receive a Monthly Nutritional Supplement (MNS) of vitamin/mineral supplementation and additional nutritional items under sections 7 of Schedule C of the EAPWDR as the appellant does not meet the legislated requirements in section 67(1.1)(b), (c) and (d) of the EAPWDR.

Relevant legislation***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.

(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).

(3) Repealed. [B.C. Reg. 145/2015, Sch. 2, s. 8.]

[am. B.C. Regs. 317/2008, s. 8; 68/2010, ss. 1 and 2; 145/2015, Sch. 2, ss. 7 and 8.]

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.

Appellant's Position

In the written submission the appellant's advocate does not dispute the appellant does not meet the legislative requirements but contends there are additional factors the minister should consider in determining if the appellant is eligible for MNS. These factors include the agreement of the medical professionals that the appellant will, as the cancer progresses, require nutritional supplements such as Ensure/Boost. The advocate states, the absence of any assistance in accessing caloric supplementation in liquid form constitutes an imminent danger to the appellant's life. The advocate has asked the ministry's assistance in alleviating the appellant's suffering and delaying his end by helping him access adequate caloric supplementation in liquid form.

Ministry's Position

In its reconsideration decision the ministry has confirmed the appellant is being treated for a chronic, progressive deterioration of health on account of a severe medical condition, specifically squamous cell carcinoma of supraglottic larynx.

The ministry also notes, as per Section 67(1.1)(b) of the EAPWDR, to be eligible for the MNS the appellant must display two or more symptoms as a result of his chronic, progressive deterioration of health. As the appellant does not display two symptoms, he does not meet the legislated criteria and is therefore not eligible to receive the MNS.

Panel's Decision

Section 67 of the EAPWDR states 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;

The appellant meets the requirement of part (a) chronic, progressive deterioration of health on account of a severe medical condition but has not supplied evidence that would confirm he meets the criteria of part (b), two or more symptoms. It appears obvious to the medical professionals and others, that without treatment the appellant will in time experience two or more of the listed symptoms and will likely face imminent danger to his life.

The new evidence offered by the appellant in his appeal confirms the appellant will likely, but has not yet developed, two or more of the required symptoms as set out in Section 67 of the EAPWDR. As the ministry is bound by the criteria set out in the legislation of the EAPWDR "*the practitioner has confirmed... the person displays two or more of the following symptoms...*" the Panel finds that the ministry's reconsideration decision was reasonably supported by the evidence and confirms the ministry's reconsideration decision. The appellant is not successful in his appeal.

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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

Charles Schellinck

SIGNATURE OF CHAIR

DATE (YEAR/MONTH/DAY)

2019/05/28

PRINT NAME

Carman Thompson

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2019/05/23

PRINT NAME

Gurjit Chaplin

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2019/05/30