

PART C – DECISION UNDER APPEAL

The decision under appeal is the Ministry of Social Development and Poverty Reduction's ("ministry") reconsideration decision dated May 14, 2020, in which the ministry found the appellant was not eligible for a diet supplement (*high protein diet*) under:

- subsection 66(1)(a) of the Employment and Assistance for Persons with Disabilities Regulation ("EAPWDR") because a medical practitioner did not confirm that the appellant needs a high protein diet for one of the medical conditions listed in section 6(2) of Schedule C.
- subsection 66(1)(b) of the EAPWDR because the appellant was residing in a special care facility.

The ministry also found that the appellant is not eligible for a short-term nutritional supplement under section 67.001 of the EAPWDR because a medical practitioner did not confirm that the appellant has an acute short-term need for extra calories (*caloric supplementation*) to prevent critical weight loss while recovering from surgery; a serious disease, a severe injury, or the side effects of medical treatment.

PART D – RELEVANT LEGISLATION

Employment and Assistance for Persons with Disabilities Regulation - EAPWDR - sections 66 and 67.001; Schedule A, and Schedule C

PART E – SUMMARY OF FACTS

The evidence and documentation before the minister at the reconsideration consisted of:

1. Information from the ministry's record of decision stating that:

- The appellant is a sole recipient of disability assistance.
- On January 24, 2020, the appellant was admitted to a special care facility operated by a charity. On February 14, 2020, the appellant was transferred to another special care facility operated by the same charity.
- While residing in the special care facilities the appellant receives disability assistance from the ministry including a comfort allowance (\$222 per month), transportation supplement (\$52 per month), alcohol and drug supplement (\$70 per month), a shelter allowance (\$375 per month), and the cost of accommodation and care for the facility.
- On March 20, 2020, the appellant submitted a note from a doctor ("Dr. L.") indicating that the appellant will benefit from oral protein supplementation.
- On April 2, 2020, the ministry advised that the appellant is ineligible for a diet supplement because he is residing in an adult care facility.
- On May 4, 2020, the appellant submitted a *Request for Reconsideration* ("RFR") with a submission describing his dietary restrictions and the impact of improper nutrition on his health.
- On May 14, 2020, the ministry completed the reconsideration decision noting that the appellant continues to reside at the same special care facility.
- The ministry explains the eligibility criteria for a diet supplement and a short-term nutritional supplement and states that the appellant is welcome to submit new information from his doctor.

2. An RFR signed by the appellant on May 3, 2020, with a hand-written submission in which the appellant provides argument for the reconsideration and includes the following information:

- The appellant resides in a recovery centre that is not run by the government. The centre is funded mostly by a charity and the food bank.
- Individuals "cook for the house" by taking turns preparing the food they are given that day.
- Due to a stomach problem the appellant cannot eat a lot of the food.
- The appellant is on medication for his stomach problem as well as hyperthyroidism. The appellant has been off of his addiction medication for 6 weeks resulting in unhealthy weight loss.
- The appellant's family doctor is located in the appellant's home community. The appellant will be at the recovery house for only a short time before he goes home.
- The appellant's medical conditions (for which is taking medication) include a mental health condition, hyperthyroidism, high cholesterol, and a stomach problem. The appellant also has arthritis in one of his legs as well as problems with addictions.

3. A *Certificate of Health Status* ("doctor's note") from Dr. L. dated March 20, 2020, stating that "the patient will benefit from oral protein supplementation."

4. A letter from the ministry dated April 2, 2020, advising the appellant that he is not eligible for an oral protein supplement. The letter states that the appellant is not eligible for a diet supplement while residing in an adult care facility.

*Additional information**Appellant*

Subsequent to the reconsideration decision, the appellant filed a *Notice of Appeal* with a handwritten submission which the panel accepts as argument. Neither party provided additional documents but they gave oral testimony that requires an admissibility determination under section 22(4) of the *Employment and Assistance Act* ("EAA").

The appellant stated that the facility he resides in is a drug and alcohol treatment centre that is run by a charity, not the government. The facility depends on donations and the residents do volunteer work at the food bank. The facility does not have a cook and the residents take turns cooking with food that is donated.

The appellant explained that he has to cook for himself and purchase food with his own funds because he cannot eat a lot of the food at the facility due to his stomach problem. The appellant stated that he has been on medication for hyperthyroidism all of his life (prescribed by his psychiatrist) and he always had a problem "keeping weight on."

The appellant explained that Dr. L. is a "recovery house doctor" who treats the appellant's addictions. The appellant stated that he could not get in touch with his family doctor because the doctor was not taking calls due to the Covid-19 pandemic. The appellant said that he will not be able to see his family doctor until he moves back home. The appellant expects to return home in July 2020.

The ministry asked the appellant if any of the diet supplements listed in the Regulation (other than a *high protein diet*) would be applicable to the appellant's circumstances. The appellant answered "no" but indicated that a *restricted sodium diet* could be helpful because he can't eat a lot of food due to his stomach problem.

The ministry asked the appellant if he is recovering from any of the situations listed in the Regulation that may indicate a need for the short-term nutritional supplement (*surgery, severe injury, serious disease, or side effects of medical treatment*). The appellant described past surgeries and injuries that have healed but stated he still has a lot of leg pain. The appellant said that he is dealing with his mental health condition and hyperthyroidism on an ongoing basis by taking medication. The appellant said that he has been off of his addiction medication but is still followed by Dr. L. for the withdrawal effects; the appellant described going without sleep for 11 days and not getting enough pain relief without medication.

The ministry asked the appellant if he had talked to the care facility about his nutritional needs as recommended by the reconsideration officer. The appellant explained that the facility's "hands are tied" because they depend on donations and cannot go out and get special food for him. The appellant noted that because of his stomach problem he cannot eat lasagna or spaghetti which are often on the menu at the house.

In response to questions from the panel, the appellant confirmed that he is still residing at the facility which is a "recovery house" for a group of residents with addictions. When asked about the process that was followed to get the note from Dr. L., the appellant explained that he met with Dr. L. about his weight loss because he "looks like a bean pole." The appellant said that getting enough protein has been an issue for a long time and he got a high protein diet supplement from the ministry 10 years ago.

The appellant testified that he sees Dr. L. once a week for his addictions but Dr. L. said she does not know him well enough to describe the issues with weight loss. The appellant said that Dr. L. told him that he "could use gaining weight" so he applied to the ministry for the diet supplement after Dr. L. gave him the note stating the benefit of extra protein.

When asked if the recovery house provides *care* as well as *accommodation* (pursuant to section 1(3) of the Regulation) the appellant explained that the residents “do everything to help each other” but they are not professional counsellors. The appellant explained that one client, who has been at the facility for a long time, acts as a monitor for the chores. The “client monitor” makes a schedule for meals, cleaning, yard work, etc. A certified counsellor comes to see clients occasionally and a “house manager” comes in during the day to put appointment information into the computer and let the monitor know when the residents have appointments. The monitor reminds residents of appointments and the appellant volunteers to drive them there.

Ministry

The ministry relied on the information in the reconsideration decision but also provided the following information in response to questions and discussion at the hearing:

- The facility where the appellant resides is a licensed care facility, registered with the Ministry of Health.
- The ministry would accept information on the appellant’s medical conditions and dietary needs from a psychiatrist.
- The reconsideration decision was based on the appellant residing in the facility as well as the information provided by Dr. L. The ministry has information sheets that summarize the information that is required for the prescription or note from the medical practitioner, but the ministry does not think the appellant was given the information sheet because he was found ineligible for the supplement based on his residence at the facility.

Admissibility of oral evidence

Neither the appellant nor the ministry raised objections to the other’s testimony. The panel admits the submissions under section 22(4) of the EAA as evidence that is reasonably required for a full and fair disclosure of all matters related to the decision under appeal. Specifically, the panel finds that the submissions on the appellant’s medical conditions and dietary needs are relevant to the criteria that allow the ministry to provide different types of supplements for specified medical conditions under section 66, Schedule C, and section 67.001 of the EAPWDR.

In addition, the panel views the information on the type of facility and how it operates as relevant to the definition of *special care facility* and whether the appellant is receiving *care* in the facility under section 1 and section 8 of Schedule A of the Regulation. The panel further finds that the details about the appellant’s contact with medical professionals are relevant to the legislative requirements for a diagnosis and other information from a medical practitioner.

Both parties provided argument at the hearing which the panel addresses in Part F - *Reasons for panel decision*.

Procedural matters

The ministry attended the hearing with an observer for training purposes. The appellant consented to allowing the observer to listen in on the teleconference.

PART F – REASONS FOR PANEL DECISION

The issue on appeal is whether the ministry's decision that found the appellant was not eligible for a diet supplement (*high protein diet*) under subsection 66(1)(b) of the EAPWDR because the appellant was residing in a special care facility was reasonably supported by the evidence, or was a reasonable application of the legislation.

The panel will also determine whether the ministry was reasonable in finding that:

- the appellant's request for a diet supplement (*high protein diet*) did not meet the requirements under subsection 66(1)(a) of the EAPWDR because a medical practitioner did not confirm that the appellant needs a high protein diet due to one of the medical conditions listed in section 6(2) of Schedule C.
- the appellant was not eligible for a short-term nutritional supplement under section 67.001 of the EAPWDR because a medical practitioner did not confirm that the appellant has an acute short-term need for extra calories (*caloric supplementation*) to prevent critical weight loss while recovering from surgery; a serious disease; a severe injury, or the side effects of medical treatment.

The ministry based the reconsideration decision on the following legislation:

Definitions

1(1) In this regulation:

"special care facility" means a facility that is a licensed community care facility under the *Community Care and Assisted Living Act* or a specialized adult residential care setting approved by the minister under subsection (3);

(3) For the purposes of the definition of "special care facility", the minister may approve as a specialized adult residential care setting a place that provides accommodation and care for adults and for which a licence under the *Community Care and Assisted Living Act* is not required.

Diet supplement

66(1) Subject to subsection (2), the minister may pay for a diet supplement in accordance with section 6 [*diet supplements*] of Schedule C that is provided to or for a family unit in receipt of disability assistance or hardship assistance, if the supplement is provided to or for a person in the family unit who

(a) is described in section 6 (1) of Schedule C, and

(b) is not described in section 8 (1) [*people receiving special care*] of Schedule A.

(2) A person is not eligible to receive a supplement under subsection (1) unless

(a) the person is not receiving another nutrition-related supplement, and

(b) a medical practitioner, nurse practitioner or dietitian confirms in writing the need for the special diet.

Nutritional supplement — short-term

67.001 The minister may provide a nutritional supplement for up to 3 months to or for a family unit in receipt of disability assistance or hardship assistance, if

- (a) the supplement is provided to or for a person in the family unit who is not receiving another nutrition-related supplement, and
- (b) a medical practitioner, nurse practitioner or dietitian confirms in writing that the person has an acute short-term need for caloric supplementation to a regular dietary intake to prevent critical weight loss while recovering from
 - (i) surgery,
 - (ii) a severe injury,
 - (iii) a serious disease, or
 - (iv) side effects of medical treatment.

Schedule A**People receiving special care**

8 (1) For a person with disabilities who receives accommodation and care in a special care facility (other than a special care facility described in subsection (3)) or a private hospital or who is admitted to a hospital because the person requires extended care, the amount referred to in section 24 (a) [*amount of disability assistance*] of this regulation is the sum of

- (a) the actual cost, if any, to the applicant or recipient of the accommodation and care at the rate approved by the minister for the type of facility, plus
- (b) a comforts allowance of \$222 for each person for each calendar month.
- (c) Repealed. [B.C. Reg. 193/2017, s. 12.]

(2) If the special care facility under subsection (1) is an alcohol or drug treatment centre, the minister may, in addition, pay either or both of the following while the applicant or recipient is in the alcohol or drug treatment centre:

- (a) actual shelter costs for the applicant's or recipient's usual place of residence up to the amount under section 4 for a family unit matching the applicant's or recipient's family unit;
- (b) a monthly support allowance for the applicant's or recipient's family unit, equal to the amount calculated under sections 2 and 3 of this Schedule minus the portion of that allowance that would be provided on account of the applicant or recipient.

Schedule C**Diet supplements**

6 (1) The amount of a diet supplement that may be provided under section 66 [*diet supplements*] of this regulation is as follows:

- (a) \$10 for each calendar month for a person who requires a restricted sodium diet;
- (b) \$35 for each calendar month for a person who has diabetes;
- (c) \$30 for each calendar month for a person who requires kidney dialysis if the person is not eligible under the kidney dialysis service provided by the Ministry of Health Services;
- (d) \$40 for each calendar month for a person who requires a high protein diet;
- (e) \$40 for each calendar month for a person who requires a gluten-free diet;
- (f) \$40 for each calendar month for a person who has dysphagia;
- (g) \$50 for each calendar month for a person who has cystic fibrosis;
- (h) \$40 for each calendar month for which a person requires a ketogenic diet;
- (i) \$40 for each calendar month for which a person requires a low phenylalanine diet.

(2) A diet supplement under subsection (1) (d) may only be provided if the diet is confirmed by a medical practitioner, nurse practitioner or dietitian as being necessary for one of the following medical conditions:

- (a) cancer [...]
- (b) chronic inflammatory bowel disease;
- (c) Crohn's disease;
- (d) ulcerative colitis;
- (e) HIV positive diagnosis;
- (f) AIDS;
- (g) chronic bacterial infection;
- (h) tuberculosis;
- (i) hyperthyroidism;
- (j) osteoporosis;
- (k) hepatitis B;
- (l) hepatitis C.

(3) A person who is eligible for a supplement under subsection (1) (d) or (f) is also eligible for a \$30 payment towards the purchase of a blender.

(4) If a person has more than one of the medical conditions set out in subsection (1), the person may receive only the amount of the highest diet supplement for which the person is eligible.

Analysis and panel's decision***Diet supplement - EAPWDR section 66***

Section 66(1) authorizes the ministry to pay for a diet supplement for persons in receipt of disability benefits. The parties do not dispute that the appellant was receiving disability benefits at the time of the reconsideration. The reconsideration decision specifies the amounts of the appellant's benefits.

In order to receive a diet supplement, the requirements in subsections 66(1)(a) **and** 66(1)(b) must also be met.

Under subsection 66(1)(a), the person must be described in section 6(1) of Schedule C which means they require one on the special diets set out in that section of the EAPWDR.

At the same time, under subsection 66(1)(b) of the EAPWDR, the person cannot not be described in section 8(1) of Schedule A which deals with *people receiving special care*.

Section 66(2) sets out further eligibility requirements for the diet supplement such as the requirement to not be receiving another nutrition-related supplement. The ministry has not made any determinations under section 66(2) and, therefore, the panel does not consider the requirements in section 66(2) of the Regulation to be at issue in this appeal.

Subsection 66(1)(a) - requires a special diet

The ministry acknowledges that the appellant submitted a note from Dr. L. indicating a need for "oral protein supplementation." The ministry notes that a high protein diet is covered in subsection 6(1)(d) of Schedule C which authorizes the ministry to provide *\$40 for each calendar month for a person who requires a high protein diet*. The panel notes that any other requirements for the protein supplement must also be met in accordance with the legislation.

The ministry argues that even though the doctor indicates a need for a high protein diet the appellant is not eligible for that diet supplement pursuant to section 6(2) of Schedule C because Dr. L. did not specify that the supplement is required for the appellant's hyperthyroidism or for any of the medical conditions listed in clauses (a) to (l).

Section 6(2) of Schedule C sets out an additional requirement for the high protein supplement in that the diet must be confirmed by a medical practitioner (or other specified health professional) as being necessary for at least one of the medical conditions listed in clauses (a) to (l). The appellant states that he has hyperthyroidism [clause (i)] and argues that he needs a protein supplement because of his stomach condition and weight loss. The appellant argues that due to the stomach problem and hyperthyroidism, he is unable to eat a lot of the food that is served at the facility and is therefore not getting "three squares a day." The appellant states in his *Notice of Appeal* that he is "losing weight in an unhealthy way."

The panel is sympathetic to the appellant's circumstances but finds that the ministry was reasonable in finding that the request for the supplement does not meet the information requirements under the EAPWDR. The Regulation requires the doctor to confirm that the diet is necessary for one of the medical conditions listed in Schedule C but the note from Dr. L. only states that a protein supplement will benefit the appellant and contains no other information. The panel therefore finds that the ministry reasonably applied the legislation which clearly states that the ministry may only provide the supplement for a high protein diet if a medical professional confirms that the diet is necessary for at least one of the conditions listed on section 6(2) of EAPWDR Schedule C.

The appellant argues that the only doctor he could get a note from during the Covid-19 pandemic was the “recovery house doctor”, Dr. L. who did not have enough information about the appellant’s medical conditions other than his addiction. The appellant stated that he can obtain the required information from his family doctor or psychiatrist once he returns home.

The panel acknowledges the difficulty the appellant would have in accessing his regular doctors during the pandemic but notes that the appellant testified that he sees Dr. L. weekly. There is no new evidence on appeal indicating the appellant went back to Dr. L. after he received the reconsideration decision. The reconsideration decision advises the appellant that the doctor needs to state what medical condition the protein supplement is for. The decision states that the appellant is welcome to submit new information from the doctor but none was submitted on appeal.

Subsection 66(1)(b) - is not a person requiring special care

The ministry indicates that even if the appellant had submitted a doctor’s note confirming that a protein supplement is necessary for one of the medical conditions listed in section 6(2) of Schedule C, the appellant was not eligible for the diet supplement because he is residing in a *special care facility*. The ministry argues that residing such a facility is contrary to the requirement in the legislation to not be receiving special care.

To explain what *requiring special care* means, subsection 66(1)(b) of the EAPWDR references section 8(1) of Schedule A.

Section 8(1) of Schedule A prescribes the amounts of disability assistance that people who are receiving accommodation and special care in a *special care facility* are eligible for. Section 8(2) of the Schedule prescribes additional amounts of assistance where the *special care facility* is an *alcohol or drug treatment centre*.

Section 1(1) of the EAPWDR defines a *special care facility* as either a licensed care facility under Ministry of Health legislation, or a specialized residential care setting for adults that is approved by the Minister of Social Development and Poverty Reduction. Under section 1(3) of the EAPWDR, the minister may approve an unlicensed residential care setting that provides *accommodation and care* for adults. Therefore, clients who require special care under the legislation are residing in either a licensed care facility or an unlicensed specialized care setting pursuant to section 1 of the EAPWDR and section 8(1) of Schedule A.

The ministry states in the reconsideration decision that the appellant’s facility is a *special care facility* but the decision does not indicate whether the appellant’s facility is licensed or approved by the minister. The appellant argues that his recovery house is not a government run facility that provides a chef to cook meals and accommodate special diets. The appellant argues that the house only has to meet minimum standards for meals under the Canada Food Guide; is run by residents, and “there is nothing special about it.”

At the hearing, the ministry stated that the facility is licensed and registered with the Ministry of Health. The panel finds no reason not to accept that evidence. Both the ministry and the appellant indicate that the facility is run by a recognized charity. In the panel’s view, even if the facility was not licensed the evidence indicates the appellant receives both *accommodation and care* at the facility pursuant to section 1(3) of the EAPWDR. The appellant explained that the facility is run by residents but there is also a house manager and a monitor who coordinate schedules and appointments. A counsellor also serves the clients at the facility.

Based on the testimony of both parties, the panel finds that the ministry was reasonable in determining that the appellant was residing in a *special care facility* at the time of the reconsideration. Even though the appellant's facility is a "recovery house" for addictions that is operated by a charity and funded largely by donations, it meets the definition of *special care facility* because it is a licensed community care facility under section 1(1) of the EAPWDR.

Accordingly, the panel finds that the ministry was reasonable in concluding that the appellant is not eligible for the diet supplement under subsection 66(1)(b) of the EAPWDR because the requirement to not be a person receiving special care as described in section 8(1) of Schedule A was not met. The panel finds that the ministry reasonably applied the legislation in the circumstances of the appellant by finding that it is not authorized to provide a diet supplement to clients who reside in a licensed recovery house.

Short-term nutritional supplement - EAPWDR section 67.001

Section 67.001 authorizes the ministry to provide a nutritional supplement for up to 3 months for a client in receipt of disability assistance if the client is not receiving another nutrition-related supplement. A medical practitioner (or other specified health care professional) must also confirm an acute short-term need for extra calories (*caloric supplementation*) to *prevent critical weight loss* while the client recovers from surgery, a severe injury or serious disease, or the side effects of medical treatment.

The appellant testified that he has had longstanding issues with "keeping weight on" but he is currently experiencing weight loss due to withdrawing from his addiction medication. The appellant argued that he is so underweight that he "looks like a bean pole" and Dr. L. said that he could stand to gain some weight.

The ministry states in the reconsideration decision that a short-term supplement of additional protein (e.g., nutritional drinks such as *Boost* or *Ensure*) may be applicable to the appellant's request for a diet supplement. The ministry argued that it is unable to find the appellant eligible for the short-term supplement at this time because there was insufficient information from the appellant's doctor about the appellant's medical condition and need for the protein supplement.

The evidence from Dr. L. is that the appellant will benefit from protein supplementation but the doctor's note does not provide any information about the appellant's medical condition or the reasons why the appellant needs a protein supplement. The appellant may be experiencing *critical weight loss* while recovering from the side effects of his addiction medication but this needs to be confirmed by a doctor or other specified health care professional in order to meet the eligibility requirements for the short-term nutritional supplement under the EAPWDR.

The panel finds that the ministry was reasonable in finding that the specific information requirements under subsection 67.001(b) of the EAPWDR were not met because the doctor did not confirm that the appellant is experiencing *critical weight loss* due to the side effects of withdrawing from his medication or because of any other medical event. The appellant testified that he has had no current surgeries or injuries (only past ones) and his medical conditions are ongoing and treated with medications. The panel finds that the ministry reasonably applied the legislation in the circumstances of the appellant by determining that it is not authorized to provide the appellant with a short-term protein supplement at this time because there was insufficient information from his doctor to meet the legislative requirements.

Conclusion

The panel considered the information in its entirety and finds that the ministry's reconsideration decision that determined the appellant ineligible for a diet supplement (*high protein diet*) and a short-term nutritional supplement for extra protein was reasonably supported by the evidence and was a reasonable application of the legislation. To be eligible for the diet supplement, the EAPWDR requires the appellant not to be residing in a special care facility. The appellant was residing in a licensed drug and alcohol treatment facility that meets the definition of *special care facility* under the Regulation.

In addition, to meet the eligibility requirements for both types of supplements, the legislation requires a medical professional to confirm specific information such as the person's diagnosis and reason for needing the supplement. The ministry found that the doctor's note the appellant submitted did not mention his medical condition at all. The panel confirms the reconsideration decision. The appellant is not successful on appeal.

PART G – ORDER	
THE PANEL DECISION IS: (Check one) <input checked="" type="checkbox"/> UNANIMOUS <input type="checkbox"/> BY MAJORITY	
THE PANEL <input checked="" type="checkbox"/> CONFIRMS THE MINISTRY DECISION <input type="checkbox"/> 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? <input type="checkbox"/> Yes <input type="checkbox"/> No	
LEGISLATIVE AUTHORITY FOR THE DECISION:	
<i>Employment and Assistance Act</i>	
Section 24(1)(a) <input type="checkbox"/> or Section 24(1)(b) <input checked="" type="checkbox"/>	
and	
Section 24(2)(a) <input checked="" type="checkbox"/> or Section 24(2)(b) <input type="checkbox"/>	

PART H – SIGNATURES	
PRINT NAME Margaret Koren	
	DATE (YEAR/MONTH/DAY) 2020-06-24

PRINT NAME Daniel Chow	
SIGNATURE OF MEMBER	DATE (YEAR/MONTH/DAY) 2020-06-24
PRINT NAME Diane O'Connor	
SIGNATURE OF MEMBER	DATE (YEAR/MONTH/DAY) 2020-06-24