

APPEAL NUMBER
2020-00180

PART C – DECISION UNDER APPEAL

The decision under appeal is the Ministry of Social Development and Poverty Reduction (the “Ministry”) reconsideration decision dated July 7, 2020 which held that the appellant was not eligible for the Monthly Nutritional Supplements (“MNS”) for vitamin/mineral supplements and additional nutritional items for caloric supplementation by reason that the appellant did not meet the criteria set out in s.67(1.1) Employment and Assistance For Persons With Disabilities Regulation (“EAPWDR”)

PART D – RELEVANT LEGISLATION

s. 22(4) Employment and Assistance Act (“EAA”)
Sections 61.01, 67, and Schedule C section 7 Employment and Assistance for Persons with Disabilities Regulation (“EAPWDR”)

PART E – SUMMARY OF FACTS

The evidence before the Ministry at reconsideration was:

Feb 21, 2020 letter from the appellant stating:

- She is affected by several medical conditions: disc herniation L3-L5, bilateral adult acquired flatfoot deformity, left stage 2 posterior tendon dysfunction 2, migraine, cervical disc prolapse with lumbar post-laminectomy stenosis, and fibromyalgia;
- She has fibromyalgia symptoms that include burning pain in the trunk, neck, low back, hips, and shoulders, trigger points on the body that hurt when pressed, fatigue, sleep problems, morning stiffness, headaches, memory problems, trouble concentrating and depression;
- To ease the symptoms she should take a multivitamin that includes antioxidant vitamins A, B, C, D, E as well as calcium, magnesium, selenium, zinc, Coenzyme Q10, Pnanaz ginseng, St. John's wort, Melatonin Chlorella pyrenoidosa, ALCAR, Alpha-lipoic acid, Fish Oil, SAME, Ribose, Brown Seaweed Extract, and Capsaicin Cream; and
- She requested the Application for Monthly Nutritional Supplement to be filled in by her family doctor.

Feb 26, 2020 Application for Monthly Nutritional Supplement Form (the "MNS Form"):

- Part B of the form is signed by the appellant;
- Part C of the form indicates that it must be completed by a physician and this part of the form is signed by the appellant's physician. Part C is a series of questions and responses which are partially reproduced below:
- Question one asks for a list of the appellant's severe medical conditions:
 - o irritable bow(e)l syndrome (chronic diarrhea, constipation, and pain);
 - o migraine (2-3 x weekly lasting 4 hours each);
 - o cervical disc prolapse with post-laminectomy stenosis (severe chronic pain); and
 - o disc herniation L3-L5 (severe chronic pain)
- Question two asks if the appellant is being treated for a chronic, progressive deterioration of health?
 - o zolmitriptan, Gaviscon, anti-nauseant, esomeprazole, diclofenac, had gastric banding & anti-reflux surgery in 2017. The Physician also provides an attached list of medications and medical conditions.
- Question three asks if the appellant displays any symptoms as a result of the chronic, progressive deterioration?
 - o Malnutrition: chronic diarrhea: poor absorption of nutrients;
 - o Significant muscle mass loss: generalized muscle weakness;
 - o Significant neurological degeneration: chronic migraine; and
 - o Significant deterioration of a vital organ: history of stomach ulcer and ongoing digestive problem,
- Question 4 asks what is the height and weight?
 - o 170 cm and 76 kg.
 - o A note that the appellant lost 15 kg in the past two years
- Question 5 asks what vitamins or supplements are required and for how long?
 - o They are required long term. In addition to regular dietary intake, needs daily intake of vitamin D3, Biotin, Vit B6, Zinc, Magnesium citrate and melatonin;
 - o Needed daily to prevent or alleviate further wasting and deterioration caused by severe health conditions listed under 1 that result in symptoms listed under 3; and
 - o Her medical condition is at a stage where nutritional intervention is required to alleviate the wasting symptoms and reduce rate of further deterioration and health risks.
- Question 6 asks to specify the nutritional items required and for how long?
 - o Required for long term in addition to regular dietary intake requires daily intake of extra calories in form of fresh produce, fish, poultry and lean red meat;
 - o IBC causes chronic severe diarrhea and poor absorption of nutrients;
 - o Extra calories address malnutrition, muscle wasting, neurological deterioration, and damage to stomach; and

- Her medical conditional is at a stage where a nutritional intervention is required to prevent or alleviate further wasting & deterioration and subsequent health risks.
- The attached list to question 2 lists the appellant's other medical conditions and medications is included at the end of the document
- Medical conditions:
 - Irritable bowel syndrome (IBS)
 - Dyspepsia
 - Disc herniation L3-L5
 - Bilateral adult acquired flatfoot deformity
 - Left stage 2 posterior tendon dysfunction 2
 - Migraine
 - Cervical disc prolapse with lumbar post-laminectomy stenosis
 - Fibromyalgia

June 2, 2020 denial letter from the Ministry to the appellant with the decision summary attached.

June 5, 2020 letter from the appellant to the Ministry requesting a request for (re)consideration.

The appellant's notice of appeal is blank, but the appellant's counsel submitted a written submission on July 29, 2020 (the "Written Submission"). The Written Submission did not contain any additional evidence other than what was already part of the panel record.

At the hearing the interpreter and the appellant's counsel confirmed that the appellant did not need everything interpreted. She only wanted questions to her and questions from her to be interpreted.

At the hearing the appellant relied mostly on the Written Submission. The appellant submitted that the Ministry decision was not reasonable supported by the evidence or a reasonable application of the legislation in the circumstances of the appellant.

When the appellant was asked about the reasons for her stomach surgery, she replied that it was a surgery for medical conditions. It was not a surgery for the purposes of losing weight. The surgery did not completely fix her issues because she still struggles with acid reflux.

The Ministry relied on their reconsideration decision, however clarified aspects of the Ministry decision.

On page 3, appendix A of the reconsideration decision, the Ministry states that the appellant "meets the eligibility criterion set out in EAPWDR s.67(1.1)(a). This was a confusing part of the decision because in the same line the decision indicates that the "Ministry determines the information provided with your application does not demonstrate you are being treated for a chronic, progressive deterioration of health on account of a severe medical condition." Further when summarizing their decision at page 5 they indicate that the appellant did not meet the conditions set out in s.67(1.1)(b)(c) and (d) of EAPWDR, therefore implying that the appellant *had* met the requirement in s.67(1.1)(a)

The Ministry representative stated that it was the Ministry's position that the appellant *had* met the requirements set out in s.67(1.1)(a) EAPWDR.

When asked if the Ministry considered the weight loss of the appellant to be significant, the Ministry found that the appellant's weight loss was significant. The Ministry agreed that significant weight loss was demonstrated by this appellant.

PART F – REASONS FOR PANEL DECISION

The issue on appeal is whether the Ministry's decision to deny the appellant Monthly Nutritional Supplements ("MNS") for vitamin/mineral supplements and additional nutritional items for caloric supplementation by reason that the appellant did not meet the criteria set out in s.67(1.1) Employment and Assistance For Persons With Disabilities Regulation ("EAPWDR") is reasonably supported by the evidence or a reasonable application of the applicable legislation in the circumstances of the appellant.

Legislation

Employment and Assistance Act, Section 24(2)

(2) For a decision referred to in subsection (1), the panel must

(a) confirm the decision if the panel finds that the decision being appealed is reasonably supported by the evidence or is a reasonable application of the applicable enactment in the circumstances of the person appealing the decision, and

(b) otherwise, rescind the decision, and if the decision of the tribunal cannot be implemented without a further decision as to amount, refer the further decision back to the minister.

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, nurse practitioner or dietitian, in which the practitioner or dietitian has confirmed all of the following:

(a) the person with disabilities to whom the request relates is being treated by a medical practitioner or nurse 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, nurse practitioner or dietitian other than the medical practitioner, nurse practitioner or dietitian who completed the form referred to in subsection (1.1).

(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; 123/2019, App. 2, s. 3.]

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;

(b)Repealed. [B.C. Reg. 68/2010, s. 3 (b).]

(c)for vitamins and minerals, up to \$40 each month.

The panel finds:

At the hearing, and based on the response from the Ministry representative, the Ministry clarified that the appellant had in fact met the condition set out in s.67(1.1)(a) EAPWDR. Despite that confirmation from the Ministry representative, the panel will still review the reasonableness of the Ministry decision with respect to s.67(1.1)(a) EAPWDR.

With respect to s.67(1.1)(a) EAPWDR the appellant argues that the when the Ministry receives an MNS request completed by a Physician, the physician's evidence must be accepted by the Ministry. The appellant argues that the Physician speaks to malnutrition, chronic diarrhea, poor absorption of nutrients, muscle weakness, and ongoing digestive problems. The Physician also gives information that the appellant has lost 15 kilograms over a two year period which the appellant argues is 20% of the appellant's body weight. The appellant argues that the MNS form doesn't ask the Physician to say yes or no to whether the applicant is being treated for a chronic, progressive, deteriorating condition. Instead, the MNS form instructs the Physician only to fill certain portions of the MNS Form

if the appellant in fact has a chronic, progressive, deteriorating conditions. The appellant argues that this is throughout the MNS Form and if the Physician fills in the form, he is doing so on the assumption that the appellant has chronic, progressive deteriorating conditions. The appellant argues that the MNS Form reflects the language of the EAPWDR, which requires the Ministry to defer to the Physician. The appellant submits that if the Physician confirms that the illnesses are chronic and progressive deteriorating condition, the Ministry must accept that.

The panel accepts that this Physician provided substantial evidence about the appellant suffering from a chronic, progressive deterioration of health on account of a severe medical condition. The panel finds that it was not reasonable for the Ministry to require specific evidence of wasting because this was not required by s.67(1.1)(a) EAPWDR. Even if it was reasonable for the Ministry to require this specific evidence of wasting, the appellant's significant weight loss does show a loss of 20% of the appellant's total body weight. The appellant's weight loss was not referenced by the Ministry, and the panel finds that it was not reasonable for the Ministry to determine there was no wasting when there was clear evidence of such significant weight loss from the Physician.

Given the Physician's evidence in the MNS Form where he responds in the positive in numerous places on the MNS Form to the question "is the applicant being treated for a chronic, progressive deterioration of health", the panel finds that it was not reasonable for the Ministry to determine that in the opinion of this physician there was not evidence of chronic progressive deterioration of health.

The panel also notes that within the reconsideration decision itself, it is unclear what the Ministry finding is on if this appellant met the requirement of s.67(1.1)(a) EAPWDR. As indicated above, the Ministry representative confirmed at the hearing that this appellant *had* met the requirement of s.67(1.1)(a) EAPWDR, despite the fact that the reconsideration decision said in at least one instance that the appellant had not met the requirement of s.67(1.1)(a) EAPWDR. The panel finds that an inconsistency of this magnitude, where the decision indicates yes in one instance and no in another instance, should be found in favour of the appellant.

With respect to s.67(1.1)(b) EAPWDR, the Ministry accepted only the symptom of malnutrition and determined that the appellant had not demonstrated that she had two or more symptoms caused by chronic, progressive deterioration of health. The Ministry was not satisfied that there were symptoms of significant muscle mass loss, significant neurological degeneration, and significant deterioration of a vital organ. At the hearing the Ministry representative confirmed that there was a symptom of severe weigh loss given that the appellant lost 15 kg over a two-year period.

Pursuant to s.67(1.1)(b) EAPWDR, the Physician must confirm that the appellant meets 2 of the symptoms set out in the list of symptoms. The MNS Form states that the Physician should describe how the appellant meets the symptoms "in detail" but only $\frac{3}{4}$ of a line is given for the Physician to provide comments.

With respect to muscle mass loss, the appellant argues that the Physician describes generalized muscle weakness. In another area of the MNS Form the Physician describes the 15 kg weight loss. The Ministry makes no notation of the 15 kg weight loss in their decision. When asked about this at the hearing the Ministry representative explained that weight loss and muscle mass loss were not the same thing. The Ministry representative was not able to point to any medical evidence that supported this statement. The panel finds that given the evidence of the Physician about muscle weakness and significant weight loss, as well as the fact that the Physician filled in the information next to "significant muscle mass loss" on the MNS Form, it was not reasonable for the Ministry to determine that the Physician had not confirmed that this appellant had suffered from significant muscle mass loss.

With respect to significant deterioration of a vital organ, the Ministry wrote that the stomach was not a vital organ and that there were only five vital organs. There was no medical evidence supporting the Ministry's determination that the stomach is not considered a vital organ. The Physician indicates that there is significant deterioration to the appellant's stomach and the Physician fills in this information under "significant deterioration of a vital organ". The Physician refers to the appellant's on-going stomach problems and addresses the history of the appellant's stomach surgery. Vital is not defined in the legislation. The dictionary defines vital as "absolutely necessary or important; essential." The panel finds that given the Physician's evidence, the importance of the stomach in bodily function, and the definition of vital as something essential, it was not reasonable for the Ministry to determine that the stomach wasn't a vital organ and it also wasn't reasonable for the Ministry to determine that there was not significant deterioration of the stomach when the Physician provided evidence that there was.

The panel therefore finds that it was not reasonable for the Ministry to determine that this appellant was not displaying at least two symptoms set out in s.67(1.1)(b) EAPWDR.

With respect to s.67(1.1)(c) EAPWDR the Ministry found that the appellant requires vitamin/mineral supplementation set out in Schedule C, section 7(c) to alleviate symptoms set out in s.67(1.1)(b) and to prevent imminent danger to life. However later in the decision the Ministry states the opposite of this finding and that the Ministry is “unable to conclude that a failure to obtain vitamin/mineral supplementation would result in imminent danger to your life.” Again, the panel finds that an inconsistency of this magnitude, where the decision indicates yes in one instance and no in another instance, should be found in favour of the appellant.

According to the Physician, the appellant “needs [vitamins and mineral supplements] daily to prevent or alleviate further wasting and deterioration caused by the health conditions listed under #1 and #3 [of the MNS Form].” The legislation requires a Physician to confirm imminent danger to the life of the appellant and the panel finds that the Physician has done that in the MNS Form. The panel finds that it was not reasonable for the Ministry to ignore this confirmation of the Physician and given the words of the Physician, the reasonable interpretation would be that without these vitamins or minerals the appellant’s life will be in imminent danger. The panel also finds that the Ministry decision that the appellant had not met s.67(1.1)(d) because the appellant hadn’t met the criteria of s.67(1.1)(a) an (b) to no longer be reasonable now that the panel has found those portions of the Ministry decision to be unreasonable.

With respect to s.67(1.1)(c) the Ministry did not find that the appellant required nutritional items set out in Schedule C, section 7(a) as part of a caloric supplementation. The Ministry relies on the fact that the appellant is overweight according to a Body Mass Index (“BMI”) calculation. The source of how this calculation was conducted was not provided as evidence in the hearing. The Ministry doesn’t reference the appellant’s weight loss, only the appellant’s current BMI. The appellant argues that the Ministry relied on a calculation of the appellant’s BMI while ignoring all of the other evidence from the Physician which confirms that the appellant requires “extra calories [to] address malnutrition, muscle wasting, neurological deterioration, and damage to stomach.” The Physician goes on to state “her medical condition is at a stage where a nutritional intervention is required to prevent or alleviate further wasting & deterioration and subsequent health risks”. The panel finds that it was not reasonable for the Ministry to determine that the Physician had not confirmed that the appellant required nutritional items to prevent imminent danger to the appellant’s life. The panel also finds the Ministry decision that the appellant had not met s.67(1.1)(d) because the appellant hadn’t met the criteria of s.67(1.1)(a) an (b) to no longer be reasonable now that the panel has found those portions of the Ministry decision to be unreasonable.

For these reasons, the panel finds the Ministry’s decision was not reasonably supported by the evidence and was not a reasonable application of the applicable enactment in the circumstances of the appellant and thereby rescinds the decision.

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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

MEGHAN WALLACE

SIGNATURE OF CHAIR

DATE (YEAR/MONTH/DAY)

August 7, 2020

PRINT NAME

Linda Smerychynski

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

August 7, 2020

PRINT NAME

Kenneth Smith

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

August 7, 2020