

**PART C – DECISION UNDER APPEAL**

The decision under appeal is the Ministry of Social Development and Poverty Reduction (the Ministry) Reconsideration Decision (RD) dated June 16, 2020, which denied the Appellant a Monthly Nutritional Supplement (MNS) because the criteria set out in section 67(1.1)(a), (b), (c) and (d) of the Employment and Assistance for Persons with Disabilities Regulation were not met.

Specifically, the Ministry found that a medical practitioner, a nurse practitioner or a dietitian (a Prescribed Professional) had not confirmed that:

- The Appellant is being treated for a chronic, progressive deterioration of health on account of a severe medical condition;
- As a direct result of the chronic, progressive deterioration of health, the Appellant displays two or more of the prescribed symptoms;
- For the purpose of alleviating a symptom set out above, the Appellant requires one or more of the items set out in section 7 of Schedule C to the EAPDWR and specified in the request for a supplement; and
- Failure to obtain the requested item will result in imminent danger to the Appellant's life.

**PART D – RELEVANT LEGISLATION**

Employment and Assistance for Persons with Disabilities Regulation (EAPWDR), Sections 61.01, 67(1) and 67(1.1)

EAPWDR Schedule C Section 7

## **PART E – SUMMARY OF FACTS**

### ***Background***

The Appellant is a recipient of disability assistance.

On May 5, 2020, the Appellant applied for an MNS and submitted an application which was completed by the Appellant's medical practitioner (GP).

On May 12, 2020, the Ministry denied the Appellant's request for an MNS, having found that the Appellant had not satisfied the legislated requirements and advised the Appellant of that decision on May 20, 2020.

On June 8, 2020, the Appellant submitted a Request for Reconsideration ("RFR").

### ***Information Before the Ministry at Reconsideration***

The information before the Ministry at the time of the RD included:

1. An Application for MNS (the Application), dated May 5, 2020 and completed by the GP, in which the GP identified the Appellant's fibromyalgia as a severe medical condition, and in which the GP indicated that the Appellant is being treated for a chronic progressive deterioration of health, adding "*(Appellant) must adhere to specialized diet ... and ... needs MNS to allow (her) to eat food that will not further compromise (her) health*". The GP also identified the symptoms directly displayed as a result of the Appellant's chronic progressive deterioration of health to be significant muscle mass loss, moderate to severe immune suppression and significant deterioration of a vital organ. In addition, where asked to specify the "significant deterioration of a vital organ", the GP wrote "*Yes – (patient) has been incontinent*"; and
2. A one page letter of support dated June 4, 2020 (the Support Letter) and signed by a registered social worker (SW) "*offering more in-depth information towards (the Appellant's) needs and meeting the criteria for this greatly needed benefit*". The SW states that the Appellant has additional medical conditions not identified by the GP in the Application, specifically arthritis, anxiety disorders, major depressive disorders and post-traumatic stress disorder and that the Appellant "*has recently been referred to a general surgeon for further investigation*" of unspecified "*chronic and progressive conditions that are deteriorating (her) health*".

### ***Additional Information Submitted after Reconsideration***

Section 22(4) of the EAA says that a panel may consider evidence that is not part of the record that the panel considers to be reasonably required for a full and fair disclosure of all matters related to the decision under appeal. Once a panel has determined which additional evidence, if any, is admitted under EAA Section 22(4), instead of asking whether the decision under appeal was reasonable at the time it was made, a panel must determine whether the decision under appeal was reasonable based on all admissible evidence.

In the Notice of Appeal (NOA), the Appellant states that she is "*on a special diet of dark leafy greens and (Mediterranean) diet which is very expensive ... I have applied for (extra) money because the food (is needed) for my everyday health ... (I am) on a limited budget*".

Both the Ministry and the Appellant attended the hearing and the Appellant was also represented at the hearing by the SW.

At the hearing the Appellant stated that she suffers from a number of medical conditions which she described as bowel problems, vomiting, severe anxiety, chronic diarrhea and poor absorption of food. As a result, she had been put on a Mediterranean diet by the GP, which she couldn't afford because she is single and designated as a person with disabilities (PWD). The Appellant stated that she was unable to eat at all when she was anxious, and when she did eat she could only eat fish, chicken and vegetables, which were expensive. She also said that over the past few weeks she had lost a lot of hair. The SW said that her bowel problems left the Appellant unable to leave the house and that the SW had noticed that the Appellant had lost weight recently. In response to a question from the Panel the Appellant stated that she had lost 16 lbs in the past three weeks.

Regarding the Appellant's anxiety and trauma, the SW explained that the Appellant had been diagnosed with an anxiety disorder and was suffering from severe post-traumatic stress disorder (PTSD) as a result of "*severe and horrible things that have happened in her life*". In response to a question from the Panel the Appellant and the SW said that the Appellant had applied for and received the PWD designation from the Ministry within the last year based on both a severe physical impairment (fibromyalgia) and a severe mental impairment. The SW also stated that she had acted as the assessor on the Appellant's PWD application.

The Appellant also said that she had only discovered that her application for an MNS had been denied when she provided the Ministry with a copy of a one year prescription for a nutritional drink diet supplement in May or June 2020. The Appellant said she was told that her MNS application had been denied and that a diet supplement "*was not for people who are overweight like you*". The Appellant was offended by this remark and felt it was inappropriate. In response to questions from the Panel the Ministry said that the nutritional drink was considered a diet supplement and not an MNS. The Ministry explained that clients might be eligible for reimbursement of the cost of such a prescription even if they were not designated as a PWD or determined by the Ministry to be eligible for an MNS. The Ministry undertook to assist the Appellant in re-submitting the prescription for reimbursement through the Ministry's health services branch.

At the hearing the Ministry relied on its RD.

The Panel considered the Appellant's reasons expressed in the NOA to be argument. The Panel considered the new verbal evidence provided by the Appellant at the hearing, with the exception of the new evidence regarding the Ministry's denial of reimbursement for the cost of the dietary supplement, to be admissible because it was required for a full and fair disclosure of everything related to the decision under appeal. The Panel did not admit the new evidence regarding the Ministry's denial of reimbursement for the cost of the dietary supplement as, because a dietary supplement is not considered an MNS, it did not relate to the decision under appeal.

## **PART F – REASONS FOR PANEL DECISION**

The issue under appeal is whether the Ministry's RD, which found that the Appellant is not eligible for an MNS, was reasonably supported by the evidence or was a reasonable application of the applicable enactment in the circumstances of the Appellant. Was it reasonable for the Ministry to determine that the evidence does not establish that a Prescribed Professional has confirmed that the Appellant is being treated for a chronic, progressive deterioration of health on account of a severe medical condition? Was it reasonable for the Ministry to determine that the Appellant does not display two or more of the prescribed symptoms as a direct result of the chronic, progressive deterioration of health? Was it reasonable for the Ministry to determine that failure to obtain the requested item will not result in imminent danger to the Appellant's life?

The criteria for being eligible to receive an MNS are as follows:

### **EAPWDR**

#### **Definitions**

**61.01** In this Division:

... "nutrition-related supplement" means any of the following supplements:

- (b) a supplement under section 67 [*nutritional supplement — monthly*], other than a supplement for vitamins and minerals ...

#### **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 ... 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.

### **Schedule C**

#### **Health Supplements**

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

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##### ***Panel Decision***

The Ministry did not deny that the Appellant met the requirements set out in EAPWDR 67(1)(a), (b), (d) and (g), namely that the Appellant is designated as a PWD, is not receiving special care, is not receiving another nutrition-related supplement, and does not have any resources available to pay the cost of or to

obtain the items for which the supplement may be provided. Therefore the Panel will assess the reasonableness of the Ministry's RD with respect to the other criteria specified in EAPWDR 67(1)

For the Ministry to be "satisfied" that the requirements are met in respect of a PWD applying for the MNS, the legislation requires that the Ministry rely on the evidence provided by a Prescribed Professional completing the prescribed form referred to in EAPWDR 67(1)(c), in this case the GP. Section 67(1.1) requires that the Prescribed Professional confirm that the applicant is being treated by a medical practitioner or a nurse practitioner for a chronic, progressive deterioration of health due to a severe medical condition. It also requires that as a direct result of that deterioration of health the applicant must display two or more of a prescribed list of symptoms. In addition, that Section requires that failure to obtain the items will result in imminent danger to the applicant's life.

#### *Chronic, Progressive Deterioration of Health*

The Appellant's position is that, in addition to her fibromyalgia, she has arthritis, anxiety disorders, a major depressive disorder and PTSD, and has recently been referred to a general surgeon for further investigation. In addition, as a result of the Appellant's symptoms relating to her fibromyalgia (bowel problems, vomiting, chronic diarrhea and poor absorption of food), she had been put on a Mediterranean diet by the GP, which she couldn't afford.

The Ministry's position is that fibromyalgia is generally not considered a severe medical condition. While it is recognized that aches and pains, stiffness etc. are common symptoms of fibromyalgia, those symptoms can be treated with analgesics and are typically not progressive or deteriorating. The Ministry has also determined that, while the Appellant has modified her diet to reduce the symptoms of fibromyalgia, treatment for a progressive deterioration of health is not indicated. In addition, regarding the medical conditions other than fibromyalgia and the other new information contained in the Support Letter, the SW is not one of the Prescribed Professionals. The Ministry notes that the Appellant's GP, a nurse practitioner or dietitian has not confirmed the new information from the SW contained in the Support Letter. The Ministry concluded that the information provided by the GP does not establish that the Appellant has a severe medical condition that has resulted in a chronic, progressive deterioration of health.

The Panel finds that the Ministry reasonably determined that the SW is not a prescribed professional. In addition, as the GP identified the Appellant's severe medical condition for which she required an MNS as fibromyalgia with no reference to any other medical conditions, the Panel finds that the Appellant's other reported medical conditions have not been diagnosed by a Prescribed Professional and are therefore not relevant in determining her eligibility for an MNS.

The Panel notes that the legislation requires that a Prescribed Professional has confirmed that an applicant is being treated by a medical practitioner or a nurse practitioner for a chronic, progressive deterioration of health due to a severe medical condition. The Panel further notes that the GP, as a Prescribed Professional, has done this by indicating that this is the case in the form specified by the Ministry, as required. The Ministry adjudicator determined in the RD that fibromyalgia is generally not considered a severe medical condition and that the GP has not provided details about the Appellant's medical condition to establish a chronic, progressive deterioration of health. The Panel notes that there is no evidence to indicate that the Ministry adjudicator has expressed this opinion based on the contrary

evidence of another Prescribed Professional. The Panel also notes that the legislation does not require that a Prescribed Professional provide details to establish the diagnosis; the Prescribed Professional is simply required to confirm the diagnosis in the prescribed form, which the GP has done. Accordingly, the Panel finds that the Ministry was not reasonable in finding that the Appellant does not have a severe medical condition that has resulted in a chronic, progressive deterioration of health.

### *Symptoms*

The Appellant's position is that she is displaying the symptoms of significant muscle mass loss, moderate to severe immune suppression, and significant deterioration of a vital organ (incontinent of bowel).

The Ministry's position is that it does not accept the GP's confirmation that:

- The Appellant has experienced significant muscle mass loss, because there is no indication of how this is a direct result of a chronic, progressive deterioration of health in the Application;
- The Appellant has moderate to severe immune suppression, because there is no reason given for why this is occurring, it is not linked to a chronic, progressive deterioration of health and there is no explanation provided as to how this presents or how moderate to severe immune suppression is diagnosed; and
- The Appellant has experienced a significant deterioration of a vital organ because the bowel is not considered a vital organ.

In addition, the Ministry found that it is not possible to confirm that the Appellant's symptoms were a result of a chronic, progressive deterioration of health this because there is no diagnosis confirming it.

As mentioned above, the legislation requires that a Prescribed Professional has confirmed that, as a direct result of the chronic, progressive deterioration of health, an applicant displays two or more of seven specific symptoms. The Panel notes that the GP has done this by indicating that this is the case in the Application. Furthermore, as mentioned above, the legislation does not require that a Prescribed Professional provide how or why an applicant's symptoms are a direct result of a chronic, progressive deterioration of health; the Prescribed Professional is simply required to confirm the linked symptoms in the prescribed form, which he has done. The Panel notes that the requirements set out in the legislation for confirmation of the diagnosis and treatment of an MNS applicant rely on the expertise of trained specialists and do not require the additional explanations and justifications expected by the Ministry as expressed in the RD.

The Panel finds that the Ministry was not reasonable in determining that, as a direct result of the chronic, progressive deterioration of health, the Appellant does not display two or more of the necessary symptoms.

### *Vitamin/Mineral and Nutritional Item Supplementation*

The Appellant's position is that the Appellant requires specified vitamins and minerals to balance hormone levels and boost her immune system and overall health.

The Ministry's position is that the Appellant does not meet these eligibility criteria for these supplements because the Appellant did not meet the other criteria (as summarized above) and because the supplements indicated are required to balance hormones and boost the immune system, which were not accepted symptoms. In its analysis, the Ministry also provides a calculation of the Appellant's then current (i.e. in early May 2020) body mass index (BMI), noting that her BMI is in the overweight range and concluding that "*the information does not demonstrate you currently have an inability to absorb sufficient calories to satisfy daily requirements through a regular dietary intake*".

With respect to the Appellant's BMI, the Panel notes that two BMIs at two different points in time would be necessary to identify any trend in weight gain or loss. The Panel also notes that at the hearing both the Appellant and SW identified the Appellant's significant weight loss over the past three weeks. In light of the GP's evidence and the lack of any evidence that the Appellant was not experiencing significant weight or muscle mass loss, the Panel finds that the Ministry had no basis upon which to conclude that the Appellant is able to absorb sufficient calories to satisfy daily requirements through a regular dietary intake.

The Panel also notes that the GP identified 3 specific vitamins and one mineral that were required to alleviate one or more of the symptoms directly resulting from a chronic, progressive deterioration of the Appellants' health. The Panel also notes that the GP did not specify any additional nutritional items required other than specifying the necessary vegetable and meat diet.

Based on all of the available evidence, the Panel finds that the Ministry was not reasonable in determining that, for the purpose of alleviating a specified symptom, the Appellant does not require one or more of the vitamins or minerals specified in the Application.

#### *Imminent Danger to the Appellant's Life*

The Appellant's position is that she needs the MNS to help her be as healthy as possible, to manage her symptoms and to prevent further deterioration of her physical health.

The Ministry's position is that the GP has indicated that the Appellant requires access to food that will manage her symptoms of bloating, nausea, incontinence, stomach pain, and swelling in the hands, feet and legs, which does not refer to one of the prescribed symptoms. Therefore the Ministry is not satisfied this information constitutes confirmation that failure to provide additional nutritional items will result in an imminent danger to her life.

The Panel notes that EAPWDR Section 67(1.1)(d) requires that failure to obtain vitamin, mineral and/or nutritional supplementation will result in imminent danger to the person's life. The GP has not stated in the Application that the Appellant's life is in imminent danger if the required vitamins and minerals are not provided, and Panel has been presented with no evidence that this is the case.

Having reviewed all of the available evidence, the Panel finds that the Ministry reasonably determined that the requirement that failure to obtain vitamin, mineral and/or nutritional supplementation will result in imminent danger to the person's life has not been demonstrated.

*Conclusion*

Having reviewed and considered all of the evidence and relevant legislation, the Panel finds that the Ministry's RD, which determined that the Appellant was not eligible for an MNS under Section 67(1) of the EAPWDR, was reasonably supported by the evidence and was a reasonable application of the legislation in the circumstances of the Appellant, and therefore confirms the decision. The Appellant's appeal, therefore, is not successful.

APPEAL NUMBER  
2020-00179

**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)

2020/09/05

PRINT NAME

John Pickford

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2020.09.08

PRINT NAME

Katherine Wellburn

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2020/09/05