

PART C – DECISION UNDER APPEAL

The decision under appeal is the reconsideration decision of the Ministry of Social Development and Poverty Reduction (“Ministry”) dated June 22, 2020, in which the Ministry found that the Appellant was not eligible for the Monthly Nutritional Supplement (MNS) of nutritional items and vitamin/mineral supplementation.

The Ministry found that the Appellant did not meet the eligibility criteria in the *Employment and Assistance for Persons with Disabilities Regulation* (“EAPWDR”), section 67 (1.1)(b),(c) and (d), as follows:

- the Ministry held that a Medical Practitioner, Nurse Practitioner or Dietitian had not confirmed that the Appellant displayed at least 2 of the symptoms listed in s.67(1.1)(b);
- the Ministry held that the Appellant did not require additional nutritional items as part of caloric supplementation to a regular dietary intake and to prevent imminent danger to life.

PART D – RELEVANT LEGISLATION

Employment and Assistance for Persons with Disabilities Regulation - EAPWDR - section 61.01, section 67 and Schedule C section 7.

PART E – SUMMARY OF FACTS

The evidence and documentation before the Ministry at reconsideration was as follows:

- Information from the Ministry's record of decision indicating that the Ministry received the Appellant's Application for Monthly Nutritional Supplement (MNS) on April 27, 2020. The Ministry denied the application on May 5, 2020. On June 8, 2020, the Ministry received the Appellant's Request for Reconsideration (RFR)
- Appellant's Application for MNS for probiotics, dated April 24, 2020, signed by the Family Nurse Practitioner (FNP)
- The Ministry's Decision Summary with attached letter dated May 5, 2020, indicating that the Appellant is not eligible for the MNS of nutritional items and vitamin/mineral supplementation.
- Appellant's Request for Reconsideration (RFR), also signed by the FNP, dated June 4, 2020, and enclosing:
 - Surgeon's operative report dated October 25, 2012
 - Letter from Gastroenterologist dated November 26, 2012
 - Medical Imaging (CT Scan) Report dated May 13, 2020
 - Letter from gastroenterologist dated May 15, 2013
 - Review article: "Complementary and Alternative Medicine for Functional Gastrointestinal Disorders", Jill K. Deutsch et al, American Journal of Gastroenterology 2020:115:350-364.
 - Document titled "Probiotics for gastrointestinal diseases – Up to date"

Summary of Facts:

The Appellant is a Person with Disabilities in receipt of disability assistance, who is not residing in a special-care facility and is not in receipt of another nutrition-related supplement.

Application for MNS, signed by the FNP, dated April 24, 2020:

The FNP states that the Appellant has been diagnosed with severe Irritable Bowel Syndrome (IBS) causing severe bloating and abdominal pain, severe abdominal distention and mixed episodes of diarrhea and constipation. The Appellant is being treated with "dicyclomine for abdominal spasms, Metamucil for constipation, probiotics (Biogaia) helps control symptoms of bloating and helps maintain gut flora when experiencing diarrhea – client requires coverage." The Appellant is also following a low FODMAP (fermentable oligo-, di-, mono-saccharides and polyols) diet. The probiotic helps with absorption of nutrients by reducing symptoms of bloating and helping regulate the Appellant's bowel pattern. The Appellant has had 4 visits to emergency departments in the 3 months prior to the date of the application, due to abdominal pain and distention.

The FNP states that the Appellant displayed symptoms of significant deterioration of a vital organ, specifically, liver disease.

RFR:

The letters and reports from specialists in 2012 and 2013 confirm that the IBS is a longstanding condition.

The FNP provides additional details in response to questions on the Application. Regarding “severe, chronic, progressive deterioration of health”, the FNP provides additional information about the Appellant’s treatment for severe IBS, which the FNP describes as “mixed (constipation/diarrhea).” The FNP states that the Appellant was following a low FODMAP diet, is seeking acupuncture and psychosocial therapy, and is on a waitlist for a Cognitive Behavioral Therapy pain program, though the latter is delayed due to Covid restrictions. The Appellant is taking gabapentin, nabitone and trazadone for symptom control, as well as psyllium husk for constipation symptoms of IBS. Psyllium is “covered via plan w/ FNHA [First Nations Health Authority].” Since the date of the Application, the Appellant has had an additional visit to an emergency department due to abdominal pain and bloating relating to IBS.

The FNP emphasizes that probiotics have been effective in symptom control in episodes of diarrhea-related IBS.

With respect to symptoms, the FNP states that the Appellant is experiencing malnutrition, specifically iron and vitamin B12 deficiency due to gut malabsorption, and is taking iron and B12 supplements. The FNP stated that the Appellant is experiencing deterioration of vital organs, specifically the liver and GI system. The FNP lists “fatty liver infiltration (awaiting specialist consult), ? hepatitis of unknown origin, stenosis of intrarenal aorta (see CT scan).”

CT Scan, May 13, 2020:

The CT Scan confirms fatty infiltration of the liver parenchyma and mild to moderate grade stenosis on the left and moderate to severe stenosis on the right iliac artery.

Reconsideration decision:

Based on the information in the Application, that the Appellant is 150 cm. tall and weighs 60.4 kg., the Ministry calculated a Body Mass Index (BMI) in the overweight range.

Additional Information:

The Appellant submitted the following additional information:

- Letter from the FNP dated August 20, 2020
- Endoscopic procedure report dated August 12, 2020
- Surgical pathology report dated August 20,2020
- Document titled “Clinical Guide to Probiotic Products Available in Canada: 2020 Edition”
- Letter from the Appellant, dated August 20, 2020

Letter from the FNP, dated August 20, 2020:

The FNP repeats that the Appellant is not adequately absorbing iron and vitamin B12 due to IBS. The Appellant “is taking both of these supplements and cost of this [sic] supplements are covered through [the Appellant’s] disability benefits.”

The Appellant has seen a gastroenterologist, who confirms that the Appellant had tested positive for H. pylori. The Appellant has been treated for this infection on multiple occasions; it is resistant to treatment, and treatment options are complicated by the Appellant’s antibiotic allergies. The Appellant will be consulting with an infectious disease specialist for further treatment options.

The FNP states that, due to IBS and H. pylori, the Appellant displays symptoms of malnutrition and moderate immune suppression.

The FNP reiterates that the Appellant requires probiotics to assist with absorption of nutrients by alleviating symptoms of IBS, because when the Appellant experiences symptoms of severe diarrhea, bloating and abdominal pain, the Appellant is not able to eat or drink to meet caloric needs.

The FNP acknowledges that the request for probiotics does not meet the requirement of imminent danger to the Appellant's life. However, the FNP states that probiotics would alleviate the physical symptoms of IBS as well as the Appellant's anxiety and distress about those symptoms.

Endoscopic procedure report dated August 12, 2020:

The report states that biopsies had been taken for H. pylori, and suggested possible treatment with antibiotics. It also states that "the fatty liver is not causing damage. It is only lifestyle at this point such as mild weight loss that can help."

Surgical pathology report dated August 20, 2020:

The report confirms that the biopsy was "positive for H. pylori infection."

Document titled "Clinical Guide to Probiotic Products Available in Canada: 2020 Edition":

The document, the authorship and origin of which is not apparent on the excerpt provided, states that the probiotic the FNP requested, Biogaia, is indicated for treatment of IBS, and the probiotic mentioned in the Appellant's letter, Align, is indicated for treatment of H. pylori, among other conditions.

Letter from the Appellant, dated August 20, 2020:

The Appellant states "battling IBS for 23 years." The Appellant says that "heli-bacteria" has returned, is an ongoing disease and is very painful and difficult for the Appellant to deal with. The Appellant needs to take the probiotic for the rest of the Appellant's life, at a cost of \$65 for a supply that lasts a couple of weeks. Treatment for "heli-bacteria" affects the Appellant's stomach, requiring additional medication that is very painful.

Admissibility of Additional Information:

The Ministry did not indicate any objection to the new information in its appeal submission dated August 25, 2020. The panel determined that the additional documentary evidence was admissible as evidence under s.22(4) of the EAA because the additional information about the Appellant's medical condition, symptoms and treatment is relevant to the issues on appeal and is reasonably required for a full and fair disclosure of all matters related to the decision under appeal.

PART F – REASONS FOR PANEL DECISION

The issue on appeal is whether the Ministry was reasonable in its decision that the Appellant was not eligible to receive a MNS of nutritional items and vitamin/mineral supplementation because the Appellant had not met the following eligibility criteria in s. 67 of the EAPWDR:

- a Medical Practitioner, Nurse Practitioner or Dietitian had not confirmed that the Appellant displayed at least 2 of the symptoms listed in s.67(1.1)(b); and
- the Appellant did not require additional nutritional items as part of caloric supplementation to a regular dietary intake and to prevent imminent danger to life.

The legislation provides:

Employment and Assistance for Persons with Disabilities Regulation:

Definitions

61.01 In this Division:

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

- (a) a supplement under section 66 [*diet supplement*];
- (b) a supplement under section 67 [*nutritional supplement — monthly*], other than a supplement for vitamins and minerals;
- (c) a supplement under section 67.001 [*nutritional supplement — short-term*];
- (d) a supplement under section 67.01 [*tube feed nutritional supplement*];
- (e) a supplement under section 2 (3) of Schedule C that is related to nutrition;

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).

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.

Ministry's position:

The Ministry accepts that the Appellant is being treated for a chronic, progressive deterioration of health as a direct result of a severe medical condition, and therefore has met the criteria in s.67(1.1)(a). However, the Ministry maintained that the Appellant had not met the criteria in s.67(1.1)(b),(c) and (d), as follows:

s.67(1.1)(b):

The Ministry maintains that the Appellant displays only one of the symptoms listed, when the legislation requires that the person display 2 or more of those symptoms. While the Ministry accepted that the Appellant displays symptoms of malnutrition, the Ministry did not accept that the Appellant displays the symptom of significant deterioration of a vital organ. The Ministry maintains that neither fatty liver filtration nor moderate to severe stenosis establish significant [their emphasis] deterioration of a vital organ. For its Appeal Submission, the Ministry adopted the reconsideration summary in the Record of Ministry Decision, and did not comment on the additional symptom of moderate immune suppression reported by the FNP in the letter of August 20, 2020.

s.67(1.1)(c) & (d):

Vitamin/mineral supplements: Although the initial application only requested probiotics, because the FNP indicated in the RFR that the Appellant has iron and vitamin B12 deficiencies, the Ministry considered whether the Appellant is eligible for MNS for vitamin/mineral supplementation. The Ministry accepts that the Appellant requires iron and vitamin B12 to alleviate the symptom of malnutrition and that failure to obtain those items will result in imminent danger to the Appellant's life. However, in order to receive funding for vitamin/mineral supplementation, the Ministry maintains that Appellant would still need to display 2 or more of the symptoms listed in sub-section (b).

Nutritional items: The Ministry maintains that, while probiotics will help relieve malnutrition by improving gut flora and aiding in the absorption of nutrients, they are not "caloric supplementation," and the FNP has not indicated that the Appellant also requires additional nutritional items for caloric supplementation. The Ministry is not satisfied that the failure to take probiotics and [their emphasis] additional nutritional items would result in imminent danger to the Appellant's life.

Appellant's position:

s.67(1.1)(b):

In the RFR the FNP states that the Appellant displays symptoms of malnutrition and significant deterioration of a vital organ. In the Appeal Submissions the FNP does not mention significant deterioration of a vital organ but does maintain, on the basis of the more recent consultation with the gastroenterologist, that the Appellant displays 2 symptoms listed, specifically, malnutrition and moderate immune suppression. The gastroenterologist confirms a diagnosis of H. pylori infection. The FNP states that the Appellant has been treated for this infection on multiple

occasions, the infection is resistant to treatment, and treatment options are limited due to the Appellant's allergies to antibiotics.

s.67(1.1)(c):

The Appellant maintains that the probiotic is needed to assist with the absorption of nutrients by relieving symptoms of abdominal pain, bloating and diarrhea that prevent the Appellant from tolerating oral foods and meeting caloric needs when the Appellant is experiencing those symptoms.

s.67(1.1)(d):

The Appellant acknowledges that failure to obtain probiotics will not result in imminent danger to the Appellant's life. However, the Appellant maintains that probiotics would not only alleviate physical symptoms, but would also relieve progressive psychological distress arising from severe, progressive chronic abdominal pain due to IBS.

Panel's Reasons:

The Appellant has requested a MNS to cover the purchase of probiotics. The FNP requests a probiotic called "Biogaia"; the Appellant states that the Appellant needs a probiotic called "Align", at a cost of \$65 for a supply of a few weeks. The Panel finds that the Appellant has established the need for probiotics to treat the IBS. The issue is whether probiotics are an eligible nutritional supplement under the EAPWDR in the Appellant's circumstances.

The criteria for receiving a MNS are set out in s.67 of EAPWDR. The items that are eligible for coverage as MNS are listed in Schedule C, s.7. The Ministry is bound by the legislation and can only approve an application for a MNS when it meets all of the applicable criteria in s.67, and the request relates to items listed in Schedule C, s.7.

S.67(1.1)(a):

The Ministry accepted that the Appellant was being treated by a medical practitioner or nurse practitioner for a chronic, progressive deterioration of health on account of a severe medical condition, as required in s.67(1.1)(a), on the basis of the evidence of the FNP. In the Application, the FNP stated that the Appellant has been diagnosed with severe IBS, with symptoms of severe bloating and abdominal pain, severe abdominal distention and mixed episodes of diarrhea and constipation. In both the Application and the RFR, the FNP provided detailed information about the various medications and extensive treatments for those symptoms, including probiotics.

The Panel finds that the Ministry's conclusion that the Appellant met the criterion in s.67(1.1)(a) is reasonable.

S.67(1.1)(b):

The Ministry was not satisfied that the Appellant met the criterion in s.67(1.1)(b). The FNP stated in the Application that the Appellant displayed symptoms of significant deterioration of a vital organ, specifically liver disease. The CT scan also noted moderate to severe stenosis of the right iliac artery. In the RFR the FNP also reported that the Appellant displayed symptoms of malnutrition.

The Ministry was satisfied that the Appellant displayed symptoms of malnutrition, on the basis of the need for vitamins, minerals, probiotics and medications. The Ministry was not satisfied that the Appellant displayed symptoms of significant deterioration of a vital organ. The Ministry stated that neither of the 2 conditions identified, fatty liver filtration and stenosis, established a significant [their emphasis] deterioration of a vital organ. There is no confirmation from a physician that the Appellant's vital organs have significantly deteriorated, either at the time of the Reconsideration Decision or in the specialist consults that have taken place since. The Panel finds that the Ministry was reasonable in its determination that the Appellant displayed symptoms of malnutrition, but did not display symptoms of significant deterioration of a vital organ.

However, in the letter of August 20, 2020, the FNP provides additional information from the consult and testing the Appellant underwent on August 12, 2020. The Appellant tested positive for H. pylori infection, which the medical information indicates has proved resistant to treatment. The FNP notes that treatment options are limited because

the Appellant is allergic to certain antibiotics. As a result, the FNP states that the Appellant displays symptoms of moderate immune suppression, which is one of the symptoms listed in s.67(1.1)(b).

The Panel finds that the additional medical information in the FNP's letter of August 20, 2020, confirms that the Appellant displays at least 2 of the symptoms listed in s.67(1.1)(b), being malnutrition and moderate immune suppression. As a result, the decision of the Ministry that the Appellant does not meet the criteria of s.67(1.1)(b) is not reasonable in light of the additional information provided.

S.67(1.1)(c) and Schedule C, s.7:

Having found that the Appellant meets the criteria in s.67(1.1)(b), the next question is whether, for the purpose of relieving one of those 2 symptoms, the Appellant requires one of the items in Schedule C, s.7. Those items are: *"additional nutritional items that are part of a caloric supplementation to a regular dietary intake"* and *"vitamins and minerals."* While the FNP and the Appellant only requested coverage for probiotics, as a nutritional item, the Ministry noted the statement by the FNP in the RFR that the Appellant required iron and B12 supplements, and so the Ministry expanded its review to consider the need for vitamin and mineral supplements.

The Ministry was not satisfied that the Appellant required nutritional items as part of a caloric supplementation to a regular dietary intake. The Ministry accepted that probiotics help to relieve malnutrition, but says that probiotics are not "caloric supplementation." The Ministry noted that the FNP did not state that the Appellant needed caloric supplementation.

In the letter of August 20, 2020, the FNP states that the Appellant needs probiotics to assist with absorption of nutrients by alleviating symptoms of IBS, and that when the Appellant experiences those symptoms, the Appellant is not able to tolerate food; thus, the FNP maintains that the Appellant needs probiotics to meet the Appellant's caloric needs.

The Panel notes that the Appellant had a BMI in the overweight range at the time the Application was submitted. In the endoscopic procedure report of August 12, 2020, the specialist recommends mild weight loss. These facts support the conclusion that the Appellant does not need caloric supplementation. Under the legislation, it is not enough that the probiotics help the Appellant to absorb nutrients; the probiotics would also have to be part of "caloric supplementation to a regular dietary intake." The Panel reasons that, if the Appellant does not need caloric supplementation, probiotics alone do not meet the criteria in Schedule C, s.7. Therefore, the Panel finds that the Ministry decision that the Appellant does not require one of the items set out in Schedule C, s.7 is a reasonable application of the legislation in the circumstances.

S.67(1)(d):

The final criterion in the legislation is s.67(1.1)(d), which is that failure to obtain the item will result in imminent danger to the Appellant's life. The FNP acknowledges that "our request for probiotics does not meet the requirements of imminent [sic] danger to our client's life." The FNP goes on to emphasize the Appellant's need for probiotics to relieve not only the physical symptoms but also the "progressive psychological distress" the Appellant experiences as a result of "severe, progressive, chronic abdominal pain in relation to the IBS."

The Ministry can only make decisions within the limits of the legislation, and s.67(1.1)(d) sets out the requirement that "failure to obtain the items referred to in paragraph (c) will result in imminent danger to the person's life." Given that the FNP clearly states that failure to obtain the probiotic will not result in imminent danger to the Appellant's life, and there is no other information in the record to indicate imminent danger to life if the probiotic is not provided, the Panel finds that the Ministry's determination that the Appellant did not meet the criteria in s.67(1.1)(d) is reasonable.

s.67(1)(g):

The FNP, in the letter of August 20, 2020, states that the Appellant is taking iron and Vitamin B12 supplements "and cost of this [sic] supplements are covered through [the Appellant's] disability benefits." The Appellant has some coverage of another supplement through FNHA, and the Appellant has not requested MNS for

vitamin/mineral supplements. Thus there is a question as to whether the Appellant has “resources available to pay the cost of or to obtain the items for which the supplement may be provided.” The Panel has found that there is insufficient evidence to come to a conclusion about whether the criteria in s.67(1)(g) has been met and the Panel makes no finding on this point.

Summary:

The Panel holds that the Ministry’s decision that the request for probiotics as “a nutritional item that is part of a caloric supplementation to a regular dietary intake” did not meet the criteria in s.67(1.1) (c) is reasonably supported by the evidence.

The Panel holds that the additional medical information in the FNP’s letter dated August 20, 2020 establishes that the Appellant displays 2 symptoms listed in s.67(1.1)(b), being malnutrition and moderate immune suppression. As a result, the Ministry’s decision that the Appellant was not eligible for MNS for vitamins/mineral supplements because the Appellant displayed only 1 symptom listed in s.67(1.1)(b) is not reasonably supported by the evidence.

The Panel partially rescinds the decision and refers the decision back to the Ministry on amount. The Appellant is partially successful in the Appeal.

APPEAL NUMBER 2020-00176

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

Susan Ferguson

SIGNATURE OF CHAIR

DATE (YEAR/MONTH/DAY)

2020/09/18

PRINT NAME

Margaret Koren

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2020/10/01

PRINT NAME

Robert McDowell

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2020/09/21