

APPEAL NUMBER
2021-00035

PART C – DECISION UNDER APPEAL

The decision under appeal is the Ministry of Social Development and Poverty Reduction (the “ministry”) January 26, 2021 reconsideration decision which determined the appellant was not eligible for a Tube Feed Nutritional Supplement (TFNS) because:

- the appellant is not a recipient of income assistance (IA) or hardship assistance, therefore they are not eligible for the TFNS pursuant to section 74.01 of the Employment and Assistance Regulation (EAR); and
- the appellant’s request cannot be granted under section 76 (Life Threatening Health Need) as TFNS are not set out under Schedule C which is a requirement of section 76 of the EAR.

PART D – RELEVANT LEGISLATION

Employment and Assistance Regulation Section 74.01, 76 and Schedule C

PART E – SUMMARY OF FACTS

Background Information

- The appellant is not in receipt of income, hardship, or disability assistance but is in receipt of federal benefits (CPP/OAS).
- On December 5, 2020 the appellant's physician wrote a letter that states because of the appellant's medical condition ongoing tube feeding is required as this is the only method in which he gets nutrition into his body. The letter also indicates the appellant's spouse has been trained to assist and manage this process of feeding.
- On December 11, 2020 the ministry's Health Assistance Branch (HAB) denied the appellant's request for tube feeding supplies and nutrition. HAB wrote in their summary:
 - The appellant does not qualify for either section 67.01(2)(a) or (b) of the Employment and Assistance for Persons with Disabilities Regulations (EAPWDR) because they are not in receipt of disability assistance nor are they a person in receipt of medical services only (MSO) who was in receipt of tube feeding nutritional supplement before transferring to MSO.
 - The need for tube feeding was confirmed by a medical practitioner and because the appellant's primary source of nutrition was through tube feeding, section 67.01(3) of the EAPWDR had been met.
 - The appellant was not receiving any other nutrition-related supplement so section 67.01(3)(b) of the EAPWDR had been met.
 - The appellant had no other resources available to pay for the cost so section 67.01(3)(c) of the EAPWDR had been met.
 - TFNS is not eligible for coverage as a Life-Threatening Health Need.
- On January 11, 2021 the appellant submitted a Request for Reconsideration (RFR) of the decision writing:
 - We are agreed that I qualify for nutritional feed assistance under Regulations 74.01(3)(a)(b)(c).
 - Regulation gives the Minister the discretion to grant the requested assistance.
 - He sees nothing in the Regulations that prevents the reviewer from forwarding the application to the Minister and giving him/her the opportunity to exercise that discretion and grant the funding.
 - They are requesting this application be forwarded to the Minister for review and granting of funding.
- On January 26, 2021 a Reconsideration Officer completed a Reconsideration Decision noting:
 - Under Section 34 of the EAA and applicable Regulations, the ministry may authorize any person or category of persons to take on any or all of the minister's powers, duties or functions. In the case of reconsideration decisions, the minister's powers duties or functions are assigned to Reconsideration Officers, which is who completed this decision.
 - A medical practitioner has confirmed the primary source of nutrition is through tube feeding so the requirement of section 74.01(3)(a) has been met.
 - The appellant is not receiving another nutrition-related supplement so the requirement of section 74.01(3)(b) of the EAR has been met.
 - There are no resources available to the appellant so the requirement of section 74.01(3)(c) has been met.
 - The appellant is not a recipient of income or hardship assistance and is not a continued person under section 66.3 so the requirement of section 74.01(2)(a) has not been met.
 - The appellant's file is open only to assess eligibility for supplements based on a life threatening health need under section 76 of the EAR.
 - Section 76 of the EAR states the ministry may provide a health supplement set out in section 2(1)(a) and (f) and section 3 of Schedule C of the EAR. TFNS is not set out in these sections so therefore the ministry is not authorized to provide the TFNS as a life threatening health need.

On the Notice of Appeal (NOA) form dated February 6, 2021 the appellant wrote:

- The ministry is misreading the regulations 74.01(3)(a)(b)(c) and failing to exercise the minister's discretion to award funding because his cancer did not appear before he reached age 65.
- They agree I qualify in every other aspect.

At the hearing, the appellant stated that he has met all the requirements of section (3) of 74.01 because he has a life threatening condition that requires tube feeding, it was prescribed by a doctor, and he has no resources to pay for it. The appellant argues it is not written in section (3) that section (3) is subject to section (2). The appellant

considers that section (2) applies to persons in receipt of assistance, which is not his situation. The appellant stated the tribunal has the authority to overturn the ministry's decision. The appellant considers that the two sections are not linked, that section (2) may be their policy, but it is not legislation.

At the hearing, the ministry reviewed section 74.01 and stated that all subsections of 74.01 are linked together and must be considered in their entirety. The ministry explained that subsection (2) allows the minister to provide a TFNS to a person in receipt of assistance, but the appellant is not in receipt of assistance and is not a continued person so does not meet the requirements of subsection (2). The ministry argues that although the appellant has met the requirements of subsection (3), it is subject to subsection (2) requirements being met.

The panel asked the ministry to clarify the note made in the decision in regards to Delegation of Authority because the appellant had written in his reasons for requesting a reconsideration of the decision that he would like the Minister to review his request for TFNS. The ministry explained that the Minister has delegated responsibility to various positions to determine eligibility for assistance or benefits, and that written decisions must be provided. The appellant commented that he understands the decision had been delegated, and added that the panel must look at regulations.

Admissibility of Additional Information

The panel accepted the appellant's NOA statement and oral testimony as argument. With no new evidence being presented a determination of admissibility under section 22(4) of the Employment and Assistance Act, which allows for the admission of evidence reasonably required for a full and fair disclosure of all matters related to the decision under appeal, is not required.

PART F – REASONS FOR PANEL DECISION

The issue on appeal is whether the ministry's reconsideration decision dated January 26, 2021, which denied the appellant's request for TFNS because:

- the appellant is not a recipient of IA or hardship assistance, therefore they are not eligible for the TFNS pursuant to section 74.01 of the EAR and
- the appellant's request cannot be granted under section 76 (Life Threatening Health Need) as TFNS are not set out under Schedule C which is a requirement of section 76 of the EAR,

was reasonably supported by the evidence or was a reasonable application of the legislation in the appellant's circumstances.

Panel Decision

In the initial denial of the appellant's request for TFNS made by HAB, the panel notes that the EAPWDR legislation was referenced. In the Reconsideration Decision the legislation referenced was the EAR. There is no evidence the appellant has the ministry's disability designation, and the reconsideration decision cited the EAR, therefore the panel will review the EAR when considering this appeal.

Tube Feed Nutritional Supplement

Section 74.01 of the EAR consists of three subsections.

Subsection (1) sets out that a TFNS may be provided to a person who requires a liquid nutritional product that is fed via a tube.

Subsection (2) requires that, subject to subsection (3), the person who requires the TFNS is in receipt of IA or hardship or is a person who is a "continued" person who was, on the person's continuation date, receiving the TFNS.

Subsection (3)(a) requires the TFNS to be prescribed by a medical practitioner, nurse practitioner or a dietician, (3)(b) requires the person to not be receiving another nutrition-related supplement and (3)(c) requires the person to have no resources available to pay for the TFNS.

The appellant argues that subsection (3) of 74.01 should be considered on its own and because he has met all the requirements of subsection (3) that he is eligible to receive a TFNS. The panel considers that section 74.01 is the section of the EAR that allows the ministry to provide a TFNS. However, the panel considers there are requirements that must be met to qualify, and these are outlined in the subsections. Section 74.01(1) starts out with, "In this section," and goes on to identify the type of medical condition a person must have to qualify, so it is reasonable to set out additional requirements in subsections (2) and (3). The panel finds it reasonable for the ministry to determine that all subsections of section 74.01 must be taken into consideration when determining eligibility for a TFNS.

The ministry has determined the appellant requires a liquid nutritional product that is fed via a tube, is prescribed by a physician, and there are no resources available to the appellant to pay for the TFNS. Because section 74.01 subsections (1) and (3) have been met, only subsection (2) is at issue.

The appellant is not in receipt of income assistance, hardship assistance and is not a continued person. A continued person is someone who was previously in receipt of assistance who was eligible for a TFNS at the time they went off assistance. As none of these apply in the appellant's circumstance, the panel finds the ministry was reasonable to determine that section 74.01 subsection (2) has not been met.

TFNS as a Life Threatening Health Need

Section 76 of the EAR sets out that the ministry may provide a health supplement that is set out in sections 2(1)(a) and (f) [general health supplements] or section 3 [medical equipment and devices] of Schedule C of the EAR

providing certain conditions are met. There must be a direct and imminent life threatening need and no resources available to meet that need.

The ministry determined the appellant faces a direct and imminent life threatening need and does not have resources available to meet that need, however, because a TFNS is not one of the listed health supplements that is eligible for consideration, they could not approve the appellant's request.

Section 2(1)(a) of Schedule C lists medical or surgical supplies required for specific medical purposes. The purposes listed are for wound care, ongoing bowel care, catheterization, incontinence, skin parasite care, and limb circulation care. The panel notes none of these listed purposes are applicable in the appellant's request for TFNS.

Section 2(1)(f) of Schedule C pertains to a request for medical transportation expenses and is not applicable in the appellant's request for TFNS.

Section 3 of Schedule C pertains to a request for medical equipment and devices and is not applicable in the appellant's request for TFNS.

The panel finds the ministry was reasonable to determine a request for TFNS does not meet the requirements section 76 of the EAR because TFNS are not set out in section 2(1)(a), (f) or section 3 of Schedule C.

Conclusion

The panel finds the ministry's reconsideration decision that the appellant was not eligible for a Tube Feed Nutritional Supplement was a reasonable application of the legislation in the circumstances of the appellant. The panel confirms the reconsideration decision. The appellant is not successful on appeal.

Relevant Legislation

Employment and Assistance Regulations

Definitions

66.1 In this Division:

"continuation date",

(a) in relation to a person who is a main continued person under section 66.3 (1) [*access to medical services only*] or 66.4 (1) [*access to transitional health services*] as a result of having been part of a family unit on the date the family unit ceased to be eligible for income assistance, means that date, and

(b) in relation to a dependent continued person under section 66.3 (2) or 66.4 (2) of a main continued person, means the continuation date of the main continued person;

"continued person" means

(a) a main continued person under section 66.3 (1) or 66.4 (1), or

(b) a dependent continued person under section 66.3 (2) or 66.4 (2);

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

(a) a supplement under section 73 [*diet supplement*];

(b) a supplement under section 74 [*nutritional supplement — short-term*];

(c) a supplement under section 74.01 [*tube feed nutritional supplement*];

(d) a supplement under section 2 (3) of Schedule C that is related to nutrition;

Tube feed nutritional supplement

74.01 (1) In this section, "tube feed nutritional supplement" means a liquid nutritional product that is fed to a person via a tube to the stomach or intestines of the person and the pumps, tubes, bags and other medical equipment or supplies that are required to feed the liquid nutritional product to the person.

(2) Subject to subsection (3), the minister may provide a tube feed nutritional supplement to or for

- (a) a family unit in receipt of income assistance or hardship assistance, if the supplement is provided to or for a person in the family unit who is not described in section 8 (1) [*people receiving special care*] of Schedule A, or
- (b) a family unit, if the supplement is provided to or for a person in the family unit who
 - (i) is a continued person, and
 - (ii) was, on the person's continuation date, receiving the supplement.

(3) The minister may provide a tube feed nutritional supplement under this section if

- (a) a medical practitioner, nurse practitioner or dietitian confirms in writing that the person's primary source of nutrition is through tube feeding,
- (b) the person is not receiving another nutrition-related supplement, and
- (c) there are no resources available to the person to pay for the tube feed nutritional supplement.

Health supplement for persons facing direct and imminent life threatening health need

76 (1) The minister may provide to a family unit any health supplement set out in sections 2 (1) (a) and (f) [*general health supplements*] and 3 [*medical equipment and devices*] of Schedule C, if the health supplement is provided to or for a person in the family unit who is otherwise not eligible for the health supplement under this regulation, and if the minister is satisfied that

- (a) the person faces a direct and imminent life threatening need and there are no resources available to the person's family unit with which to meet that need,
- (b) the health supplement is necessary to meet that need,
- (c) the adjusted net income of any person in the family unit, other than a dependent child, does not exceed the amount set out in section 11 (3) of the Medical and Health Care Services Regulation, and
- (d) the requirements specified in the following provisions of Schedule C, as applicable, are met:
 - (i) paragraph (a) or (f) of section (2) (1);
 - (ii) sections 3 to 3.12, other than paragraph (a) of section 3 (1).

Schedule C

General health supplements

2 (1) The following are the health supplements that may be paid for by the minister if provided to a family unit that is eligible under section 67 [*general health supplements*] of this regulation:

(a) medical or surgical supplies that are, at the minister's discretion, either disposable or reusable, if the minister is satisfied that all of the following requirements are met:

- (i) the supplies are required for one of the following purposes:
 - (A) wound care;
 - (B) ongoing bowel care required due to loss of muscle function;
 - (C) catheterization;
 - (D) incontinence;
 - (E) skin parasite care;
 - (F) limb circulation care;
- (ii) the supplies are
 - (A) prescribed by a medical practitioner or nurse practitioner,
 - (B) the least expensive supplies appropriate for the purpose, and
 - (C) necessary to avoid an imminent and substantial danger to health;
- (iii) there are no resources available to the family unit to pay the cost of or obtain the supplies;

- (f) the least expensive appropriate mode of transportation to or from
- (i) an office, in the local area, of a medical practitioner or nurse practitioner,
 - (ii) the office of the nearest available specialist in a field of medicine or surgery if the person has been referred to a specialist in that field by a local medical practitioner or nurse practitioner,
 - (iii) the nearest suitable general hospital or rehabilitation hospital, as those facilities are defined in section 1.1 of the Hospital Insurance Act Regulations, or
 - (iv) the nearest suitable hospital as defined in paragraph (e) of the definition of "hospital" in section 1 of the *Hospital Insurance Act*,

provided that

- (v) the transportation is to enable the person to receive a benefit under the *Medicare Protection Act* or a general hospital service under the *Hospital Insurance Act*, and
- (vi) there are no resources available to the person's family unit to cover the cost.

Employment and Assistance Act

Delegation of minister's powers and duties

34 (1) Subject to the regulations, the minister may delegate to any person or category of persons any or all of the minister's powers, duties or functions under this Act except

- (a) the power to prescribe forms,
- (b) the power to appoint members to the tribunal, and
- (c) the power to enter into an agreement under section 30 (2) or (2.1), unless section 30 (2.2) applies in relation to the agreement.

(2) A delegation of the powers, duties or functions of the minister must be in writing and may include any limits or conditions the minister considers advisable.

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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

Janet Ward

SIGNATURE OF CHAIR

DATE (YEAR/MONTH/DAY)

2021 March 4

PRINT NAME

Inge Morrissey

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2021 March 4

PRINT NAME

Charlie Schellinck

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2021 March 4