

**PART C – DECISION UNDER APPEAL**

The Ministry of Social Development and Poverty Reduction (the ministry) reconsideration decision dated February 10, 2021 determined that the appellant was not eligible for the Monthly Nutritional Supplement (MNS) for nutritional items under section 7 of Schedule C and 67(1) of the Employment and Assistance for Persons with Disabilities Regulation (EAPWDR).

The ministry determined that the appellant met the following criteria:

- A medical practitioner confirmed that the appellant is being treated for a chronic, progressive deterioration of health and therefore meets the requirements of section 67 (1.1) (a) of the EAPWDR.
- A medical practitioner confirmed that the appellant displays at least two symptoms set out in section 67 (1.1) (b) of the EAPWDR as a result of a chronic progressive deterioration of health; specifically, significant muscle loss and significant neurological degeneration.
- The requirements set out in section 67 (1.1) (b), (c) and (d) of the EAPWDR have been met to be eligible for MNS for vitamins/mineral supplementation. That is, the ministry determined that the evidence from a medical practitioner confirmed that vitamins/minerals supplements were needed to alleviate symptoms set out in section 67 (1.1) (b) of the EAPWDR and that failure to obtain the vitamin/mineral supplementation will result in imminent danger to the appellant's life.

The ministry determined that the appellant did not meet the following criteria:

- The requirements set out in section 67 (1.1) (b), (c) and (d) of the EAPWDR have not been met to be eligible for MNS for nutritional items. That is, the ministry determined that the evidence from a medical practitioner did not confirm that nutritional items are necessary as a part of caloric supplementation to a regular dietary intake to alleviate a symptom set out in section 67 (1.1) (b) of the EAPWDR and that failure to obtain the nutritional items will result in imminent danger to the appellant's life pursuant to section 67 (1.1) (c) and (d) of the EAPWDR.

APPEAL NUMBER  
2021-00040

**PART D – RELEVANT LEGISLATION**

Employment and Assistance for Persons with Disabilities Regulation - section 67(1), (1.1) and Schedule C, section 7

## PART E – SUMMARY OF FACTS

### Evidence at Reconsideration

1. Application for MNS which was signed and dated November 10, 2020 and indicated the following:
  - The appellant's severe medical conditions as diagnosed by the medical practitioner (the physician) were Diabetes with the comment "severe diabetes, uncontrolled with diet interventions" and Neuropathy with the comment "chronic nerve damage due to nutritional cause".
  - To the question '*is the appellant being treated for a chronic progressive deterioration of health?*' the physician stated "Yes, being treated for diabetes, which is uncontrolled. He has chronic neuropathy that is due to a nutritional cause".
  - The physician indicated that the chronic progressive deterioration of health is causing 'significant weight loss, significant loss of muscle mass and significant neurological degeneration' and commented "recent significant weight loss due to diabetes; recent significant muscle mass loss due to diabetes; working neuropathy in feet due to low nutrition".
  - The appellant's height is 182 cm and weight are 227lbs.
  - In response to '*specify the vitamins or minerals required and expected duration of need*' the physician wrote "B-12 required to reduce progression of neuropathy – lifelong".
  - In response to 'describe how this item will alleviate the specific symptoms identified', the physician commented "decreased progression of neuropathy".
  - In response to 'describe how this item or items will prevent imminent danger to the applicant's life', the physician indicated "if neuropathy progresses, at risk for amputation".
  - In response to '*specify the additional nutritional items required and expected duration of need*', the physician indicated "B-12 supplement – Extra funds for purchase diabetic diet".
  - In response to 'does this applicant have a medical condition resulting in the inability to absorb sufficient calories to satisfy daily requirements through a regular dietary intake?' the physician indicated "0".
  - In response to 'describe how the nutritional items required will alleviate one or more of the symptoms specified and provide caloric supplementation to the regular diet', the physician commented "Control diabetes – slow progress of neuropathy".
  - In response to 'describe how the nutritional items requested will prevent imminent danger to life' the physician commented "Without control of diabetes or neuropathy will lead to amputation & death".
  - Under "additional comments, the physician did not provide any information.
2. Two undated notes from the appellant which indicated he had lost weight and he is "well below functional weight," his unwillingness to switch to lower coverage, his diet, and his frustration about dealing with the ministry.
3. Letter signed and dated February 8, 2021, from the appellant's physician who completed the MNS application.
  - The letter indicated that the physician omitted vital information in the application.
  - The appellant suffered significant muscle mass loss as a result of the diabetes and medication adverse effects.
  - The appellant continues to have significant muscle mass loss despite the intake of a regular diabetic diet which will have serious consequences on his health status going forward.
  - The appellant requires a high protein intake, along with B vitamin supplementation and a

diabetic diet.

4. Notes dated January 14, 2021 and January 19, 2021, from the appellant in which he expressed his frustrations about delays caused by the ministry and the processes used by the ministry and wrote that his weight is down 22 lbs. in less than 5 months.
5. Request for Reconsideration (RFR), signed and dated January 20, 2021, which in part indicated the following:
  - His weight has dropped 23.5 lbs in the past 5 months, approx. 2 lbs/week.
  - The weight drop of 2lbs per week is a clear indication that he is not absorbing nutrients.
  - Given his body structure, he is below his functional weight, causing constant fatigue, loss of energy, decreased vision, depression, and immune system issues with fighting infection.
  - The diabetic issue was found 3 years past with the threat of amputation 5 years ago, and with the known result of being unable to do more than delay the inevitable present situation.
  - He is unable to maintain his blood sugar as strips are \$90 per 100 units so he puts his limited resources into getting the B12 and psyllium fiber which cannot be obtained from any source but direct purchase.

### **Evidence at Appeal**

Notice of Appeal (NOA), signed and dated February 27, 2021 in which the appellant stated that he meets the legislative requirements and the BMI indicated is incorrect.

### **Evidence Prior to the Hearing**

- Letter signed and dated March 1, 2021, from the physician which indicated that vital information was omitted from the MNS application and between December 2020 and March 2021 the appellant has lost 10% of his body mass and muscle loss. It was also indicated that if the appellant “is not on a high protein diet with supplementation he likely will face significant morbidity and death”.
- A series of emails between the appellant and the Employment and Assistance Appeals Tribunal (EAAT) staff. In these emails the appellant expressed his frustration about dealing with the ministry and its processes, his disagreement with the ministry’s decision and why he thinks that he meets the legislative requirements.

### **Evidence at the Hearing**

At the hearing, the appellant stated, in part, the following:

- The BMI is not an accurate tool because there are different body types. He is a ‘mesomorph,’ which means he is “a big-boned fellow” who easily increases in muscle mass. His BMI can indicate he is overweight and is not an accurate measure.
- Weight and muscle mass are different from one another but without specialized tests the two cannot be defined separately. Only overall weight loss can be used to determine muscle mass loss.
- The MNS application categorizes loss of weight and muscle mass separately but they are one and the same, a combination of a loss of fat and a loss of muscle.
- His weight started dropping “like bricks off the back of an open truck”.
- Amputation and death will occur if the diabetes is not controlled, and this has been confirmed by the physician in his two letters.
- In his letter, the physician stated that diabetes and the medications are leading to the

inability to absorb [calories].

- He is only able to take one of three medications available and it contributes to weight loss.
- A high protein diet is necessary.

At the hearing, the ministry relied on its reconsideration decision and added the following:

- The appellant is in receipt of a dietary allowance for a diabetic/ketogenic diet.
- Based on the physician's evidence, the appellant needs a specialized high protein diet not more nutrition on top of a regular diet.
- BMI is a legitimate tool to use as it is consistent.

### ***Admissibility of Additional Information***

The ministry did not object to the admission of the information submitted prior to the hearing.

A panel may consider evidence that is not part of the record as the panel considers is reasonably required for a full and fair disclosure of all matters related to the decision under appeal.

In this case, the panel determined that the March 1, 2021 letter from the physician and emails between the appellant and EAAT are admissible because the information in both documents allow for full and fair disclosure of all matters related to the issue on appeal. However, the panel notes that emails do not provide additional evidence to the matters at issue at this appeal and considers them as a part of the appellant's argument, which will be addressed in Part F- Reasons for Panel Decision, below.

## PART F – REASONS FOR PANEL DECISION

The issue under appeal is whether the ministry's decision that the appellant was not eligible for the MNS for nutritional items under section 67(1.1) of the EAPWDR because it was not established that the physician confirmed the requested nutritional items are required as part of a caloric supplementation to a regular dietary intake to alleviate a symptom of a chronic, progressive deterioration of health and prevent imminent danger to life under section 67(1.1) (b), (c) and (d) of the EAPWDR, was a reasonable application of the legislation or reasonably supported by the evidence.

Section 67(1) and (1.1) of the EAPWDR sets out the eligibility requirements which are at issue on this appeal for providing the additional nutritional supplement, as follows:

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

- (a) the person with disabilities to whom the request relates is being treated by the 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.

**Section 7 of Schedule C of the EAPWDR provides as follows:**

**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 Appellant's Position***

The appellant argued that additional nutritional items are necessary as he is losing weight rapidly and without his diabetes under control, his condition will continue to deteriorate to the point of death as indicated by his physician more than once. The appellant argued that the symptom of significant weight loss is important because it is also a measure of significant muscle mass loss and points to an inability to absorb sufficient calories from a diabetic diet.

***The Ministry's Position***

The ministry argued that it is not satisfied that the evidence established that the physician confirmed the appellant requires nutritional items as part of a caloric supplementation to a regular dietary intake to alleviate a symptom as set out in section 67(1.1) (b) of the EAPWDR and to prevent imminent danger to life, as set out in the legislation pursuant to section 67 (1.1) (b), (c) and (d) of the EAPWDR. The ministry wrote in the reconsideration decision that the appellant's BMI is currently in the overweight range and the physician reported in the MNS application that the appellant does not have a medical condition that results in the inability to absorb sufficient calories through a regular dietary intake. At the hearing, the ministry stated that, based on the physician's evidence, the appellant needs a specialized high protein diet not more nutrition on top of a regular diet. The ministry acknowledged the physician reported that without control of the appellant's diabetes, his neuropathy will lead to amputation and death, but wrote that the evidence does not suggest that failure to provide *caloric supplementation* will result in imminent danger to the appellant's life.

***The Panel's Decision***

Section 67(1.1) of the EAPWDR states that in order to receive a nutritional supplement the ministry must receive a request completed by the medical practitioner or nurse practitioner and the request must

confirm that the recipient is being treated by the practitioner for a chronic, progressive deterioration of health resulting from a severe medical condition, displays two or more of the symptoms of chronic progressive deterioration of health, requires the requested items to alleviate a symptom of chronic progressive deterioration, and failure to obtain the items requested will result in imminent danger to the recipient's life. In this case, the appellant must meet these criteria.

*Section 67 (1.1) (b)*

Section 67 (1.1) (b) of the EAPWDR states that the practitioner must confirm that as a direct result of the chronic, progressive deterioration of health, the person displays two or more of the listed symptoms. The evidence provided by the appellant's physician indicated that the appellant displays the symptoms of significant neurological degeneration and significant muscle mass loss, which the ministry accepted based on the letter from the physician dated February 8, 2021 provided at reconsideration. The ministry did not accept that the appellant displays the symptom of significant weight loss and the appellant argued that this symptom is important since it points to an inability to absorb sufficient calories from a regular diabetic diet.

The ministry argued that though the appellant has lost weight (approximately 23 over 5 months) it does not consider this to be a significant weight loss because the appellant's BMI is 29.7 and this is in the overweight range. The panel notes that the BMI provides a snapshot or a status at one point in time and may be relevant to a consideration of the symptom of underweight status, but it is not useful for establishing a change in status such as a "loss" of either weight or muscle mass as there are no points of comparison. For example, a person might have a base line weight in the "obese" range given their weight and height and may end up in the "overweight" range after losing a large amount of weight over a short period of time. In this example, being in the "overweight" range from a static BMI calculation does not preclude a finding of the symptom of significant weight loss.

The panel notes that in the MNS application the physician indicated significant weight loss as a symptom of a chronic, progressive deterioration of health. The ministry acknowledged that the appellant has lost 23 lbs. of weight over the past 5 months. In addition, in the March 1, 2021 letter, the physician stated that the appellant has lost 10% of his body mass and muscle mass between December 2020 and March 2021. The panel notes that there are 3 separate categories regarding mass; namely, underweight status, significant weight loss and significant muscle mass loss. The physician and the appellant are not claiming underweight status, rather, the claim is that the appellant is rapidly losing weight and muscle mass. The panel finds the ministry's conclusion that the appellant is in the overweight range and that, therefore, he did not meet the criteria of significant weight loss was unreasonable given the evidence presented by the physician in the March 1, 2021 letter. The panel finds that a loss of 10% of one's body mass between December and March constitutes a significant loss of weight and simplifying this determination to the BMI, given the new information, is unreasonable.

As a result, the panel finds that the ministry unreasonably determined that the evidence does not demonstrate that the physician confirmed the appellant displays the symptom of significant weight loss as set out in section 67 (1.1) (b) of the EAPWDR.

*Nutritional Items*

Section 67 (1.1) (c) of the EAPWDR states that for the purpose of alleviating a symptom referred to in section 67 (1.1) (b) of the EAPWDR, the appellant may be eligible for one or more of the items set out in section 7 of Schedule C, being additional nutritional items that are part of a caloric supplementation to a regular dietary intake. First, the ministry argued that the evidence provided by the physician established that the appellant is in the overweight range and, therefore, does not display the symptom of significant weight loss. The panel has previously addressed this issue.



Second, the ministry stated that the physician did not indicate that the appellant's medical condition results in the inability to absorb sufficient calories to satisfy daily requirements through a regular dietary intake. The panel notes that in the February 8, 2021 letter, the physician stated that the appellant "suffered significant muscle mass as a result of the diabetes and medication adverse effects". The panel finds that the physician has indicated that the appellant is losing weight because of his medical condition of diabetes and the side effects of his medication. The panel notes that the physician also stated that "despite the intake of a regular diabetic diet, [the appellant] continues to lose significant muscle mass". In the March 1, 2021 letter, the physician wrote that as a result of uncontrolled diabetes the appellant has had more than 10% body mass and muscle loss since December 2020. The panel finds that the physician confirmed that the appellant is not able to satisfy his daily caloric requirements through a regular dietary intake.

The ministry stated that special diet is not considered indicative of a need for caloric supplementation and that the muscle mass loss supports the need for a higher % of protein in the appellant's diabetic diet to help maintain and rebuild the muscles; however, this does not confirm the need for caloric supplementation over and above a regular dietary intake at this time. The panel notes that in the February 8, 2021 letter, the physician indicated that a high protein *intake* is required "along with B vitamin supplementation and a diabetic diet". That is, high protein foods/nutrition are required in addition to B vitamin supplementation and a diabetic diet. The physician then specifies that "despite the intake of a regular diabetic diet, [the appellant] continues to lose significant muscle mass". In the March 1, 2021 letter, the physician also wrote that if the appellant is not on a high protein diet *with supplementation*, he will likely face significant morbidity and death. The panel finds that the physician has indicated that a regular diabetic diet alone is not enough to prevent the significant muscle mass loss and that appellant must add on a high protein intake too. The panel finds that, given the additional evidence, the ministry was unreasonable to determine that the physician did not confirm that there is a need for caloric supplementation over and above a regular dietary intake to alleviate the symptoms of significant weight and muscle mass loss.

Third, the ministry acknowledged that the physician reported that without control of the diabetes, the appellant's neuropathy will lead to amputation and death and argued that this evidence does not suggest that failure to provide caloric supplementation will result in imminent danger to the appellant's life. The panel notes that in the March 1, 2021 letter, the physician indicated that "if [the appellant] is not on a high protein diet with supplementation he likely will face significant morbidity and death". The panel notes that in the MNS application the physician stated that "without control of diabetes or neuropathy will lead to amputation and death". The panel finds that physician has clearly indicated that both issues are related to dietary intake. The panel finds that the ministry was unreasonable to conclude that the evidence does not establish that the physician confirmed that failure to provide additional nutritional items that are part of a caloric supplementation to a regular dietary intake will result in imminent danger

For reasons cited by the panel, the panel finds that the ministry unreasonably determined that the evidence provided by the appellant's physician does not confirm that nutritional items that are part of a caloric supplementation to a regular dietary intake are required to alleviate symptoms caused by a chronic, progressive deterioration of health, and that failure to obtain additional nutritional items will result in imminent danger to the appellant's life pursuant to section 7 of Schedule C and section 67 (1.1) (c) and (d) of the EAPWDR.

**Conclusion:**

The panel finds that the ministry unreasonably concluded that the evidence establishes that the appellant's request for MNS of nutritional items did not meet the legislative criteria set out in section 67 (1.1) (b), (c) and (d) of the EAPWDR. The panel rescinds the ministry's decision and therefore the appellant is successful at appeal.

APPEAL NUMBER  
2021-00040

**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

Neena Keram

SIGNATURE OF CHAIR

DATE (YEAR/MONTH/DAY)

2021/03/08

PRINT NAME

Jennifer Armstrong

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2021/03/08

PRINT NAME

Sandra Walters

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2021/03/08