

Part C – Decision Under Appeal

The decision under appeal is the Ministry of Social Development and Poverty Reduction's (the "Ministry") decision of March 7, 2022 in which the Ministry determined that the Appellant was not eligible for a monthly nutritional supplement (MNS), pursuant to section 67 and Schedule C, section 7 of the *Employment and Assistance for Persons with Disabilities Regulation*.

Part D – Relevant Legislation

EAPWDR – *Employment Assistance for Persons with Disabilities Regulation*, Section 67 and s. 7 of Schedule C

Part E – Summary of Facts

The information before the Ministry at the time of reconsideration included the following:

- 1) The Appellant is a sole recipient of disability assistance.
- 2) **December 23, 2021** – The Appellant submitted an application for Monthly Nutritional Supplements (MNS). The MNS application was completed by the Appellant’s medical practitioner and contained the following:
 - The Appellant is diagnosed with arthritis, severe lumbar disc disease, and Post Traumatic Stress Disorder (PTSD).
 - In the original decision, the Ministry determined that the information provided established that the Appellant was being treated for a chronic, progressive deterioration of health. In the Reconsideration decision, the Ministry confirmed the Appellant meets the eligibility requirements set out in the EAPWD Regulation, section 67(1.1)(a).
 - Under “Symptoms”, or section 67(1), the Ministry notes that in accordance with Section 7 of Schedule C the minister may provide a nutritional supplement if the minister is satisfied that based on the information contained in the application, the requirements are met, as set out in subsection (1.1)(a) to (d).
 - In the MNS application, the physician reports that as a direct result of the chronic, progressive deterioration of health, the Appellant displays the symptoms of malnutrition (“food insecurity”) and significant deterioration of a vital organ (“severe lumbar spine disease”).
- 3) **January 20, 2022** – The Ministry denied the request.
- 4) **February 17, 2022** – The Appellant sent a signed Request for Reconsideration to the Tribunal, who then forwarded the Request to the Reconsideration team (Ministry) on February 18, 2022.
- 5) **March 7, 2022** – The Ministry completed its Reconsideration and denied the Appellant the MNS.

Additional Information

The Appellant did not attend the hearing, and after confirming the Notice of Hearing was delivered on April 1, 2022, at 6:34 pm, the panel waited a full 15 minutes after the intended start time of the hearing (9:00 am). At 9:15 am, the panel dismissed the interpreter, and, after confirming that the Appellant was notified of the time and place of the hearing at least 2 business days in advance, proceeded in the absence of the Appellant, pursuant to sections 85(2) and 86 of the Employment and Assistance Regulation.

The Appellant did join the teleconference hearing at the time that the hearing had ended (at 9:37 am). The panel Chair informed the Appellant that the hearing had ended and indicated that the panel would confirm whether any adjournment requests had been made. The Appellant accepted

this and left the hearing. The panel confirmed that no adjournment requests had been filed leading up to the date of the hearing.

Evidence Presented at the Hearing

At the hearing, the Ministry representative relied on the Ministry's reconsideration decision and confirmed that it was common practice for the Ministry to contact the physician of an MNS applicant if it appeared the information provided in the application was unclear. In response to a question from the panel, the Ministry representative said that they did not know why the Ministry had not contacted the physician for more information in this case.

Admissibility of New Evidence

Section 22(4) of the Employment and Assistance Act (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 the requirements set out in the legislation and on all admissible evidence.

The panel considered the new information about the Ministry's practice of contacting the prescribed professional if the information in an MNS application is unclear to be new evidence and admitted the information pursuant to section 22(4) of the *Employment and Assistance Act*, where the 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.

General principles of weighing evidence require that the evidence be considered based on its credibility and its probative value. The probative value of evidence is the degree to which the information is useful in answering the question which must be addressed. The Panel considers the new evidence to be credible because the information is from a highly credible witness (Ministry representative). The Panel considers the new evidence to be of high probative value as it establishes the practice that the Ministry usually follows when it finds the information in the MNS application does not clearly establish whether the criteria set out in section 67(1.1)(a) of the EAPWDR have been met. As a result, the Panel assigns full weight to the new evidence.

Part F – Reasons for Panel Decision

The decision under appeal is the reasonableness of the Ministry of Social Development and Poverty Reduction's (the "Ministry") decision of March 7, 2022, in which the Ministry determined that the Appellant was not eligible for a monthly nutritional supplement, pursuant to section 67 and Schedule C, section 7 of the *Employment and Assistance for Persons with Disabilities Regulation*.

Full text of the relevant sections of the EAPWDR is provided in the Appendix.

Panel Decision

To be eligible for a nutritional supplement, an applicant must satisfy the following eligibility requirements:

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; or (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; and (d) failure to obtain the items referred to in paragraph (c) will result in imminent danger to the person's life.

The Ministry's position is that the Appellant does in fact meet eligibility requirements for the MNS under section 67(1.1) (a) of the EAPWDR, where the Appellant displays a chronic, progressive deterioration of health on account of a severe medical condition, however, they submit that the symptoms the Appellant displays (as described by the physician) are unclear under section 67(1.1) (b)(c) and (d). Specifically, the Ministry submits that it is not obliged to accept a medical practitioner's confirmation that an applicant is displaying a symptom without supporting information.

The Ministry asserts that the Appellant did not meet the two-symptom requirement set out in section 67(1.1)(b), as a result of a chronic, progressive deterioration of health. Specifically, the two symptoms the Ministry submits were not established (are) (i) malnutrition and (vi) significant deterioration of a vital organ. The Ministry argues that the first, malnutrition has not been established because the Appellant's Body Mass Index (BMI) is in the 32.1 range (in the initial application, dated December 23, 2021), which falls into the obese category. The second symptom indicated, the significant deterioration of a vital organ, the Ministry asserts has not been established because the Appellant's "spine" is not considered a vital organ. The Ministry submits

that no additional information was provided by the Appellant's physician that would clarify the symptoms as they relate to the Appellant's condition.

The panel notes that the legislation does not require that supporting information be provided by the medical practitioner; nor does the MNS application form ask that it be included with the application. The Ministry's ability to confirm that at least two symptoms are present in the face of incomplete or ambiguous information in the MNS application form are either through its standard practice of asking the medical professional to clarify uncertainties in the MNS application, or to require that the applicant obtain a second medical opinion, as provided for in Section 67(2) if the EAPWDR.

The panel considered that the Ministry's reliance on the first symptom not being met, where malnutrition could not be established because the Appellant had a BMI of 32.1 in December 2021, which put the Appellant in an obese range was an unreasonable application of the legislation. Malnutrition is defined by Johns Hopkins Medicine to be "*the condition that develops when the body is deprived of vitamins, minerals and other nutrients it needs to maintain healthy tissues and organ function. Malnutrition occurs in people who are either undernourished or over nourished*", confirming that malnutrition relates to insufficient vitamins, minerals or other nutrients and can be present when a person is underweight or overweight. As such, the Ministry cannot know or determine malnutrition from the BMI provided.

The panel also considered that the Ministry's reliance on the second symptom not being met, where the Ministry had determined that the "spinal cord" is/was not a vital organ was an unreasonable application of the legislation. The panel considered that the physician, as a prescribed professional, would have or ought to have considered whether the spine was a vital organ when the MNS application was filled out, and given the adjudicator is not a prescribed medical professional, the overriding of this determination, whether it be speculation that an error had been made, or whether the physician was incorrect in this determination, is outside of the adjudicator's purview. In addition, the panel considered the oral testimony (new evidence) of the Ministry representative, where they provided that it is a common practice with the MNS applications for the Ministry to call the physician for clarification, if the information appears unclear or lacking, or the alternative provided in EAPWDR section 67(2), which allows the Ministry to require a second medical opinion.

In all cases, the panel considered that the Ministry's reliance on the two symptoms not being met to deny the MNS was unreasonable, given the opportunity afforded to them through their (confirmed) regular practice of seeking additional information from the prescribed professional if or when unclear, or under the provisions of EAPWDR 67(2). In this case, the ministry denied the appellant's MNS application based on unclear or inconclusive information provided by the physician.

Further, the panel also considered that under section, 67(2), where 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), and in this case, the panel finds the evidence establishes the Ministry did not request a second opinion be obtained from a different physician.

As such, the panel finds that the decision of the Ministry was not a reasonable application of the applicable enactment in the circumstances of the person appealing the decision, under section (67) (1.1) & (2) of the *Employment and Assistance for Persons with Disabilities Regulation*.

Accordingly, the panel rescinds the Ministry's decision, and the Appellant is successful in this appeal, pursuant to Section 24(1)(b) and (2)(b) of the *Employment and Assistance Act*.

APPENDIX - LEGISLATION

EMPLOYMENT AND ASSISTANCE REGULATION

Time period for scheduling and conducting hearing

85 (2) The chair of the tribunal must notify the parties of the date, time and place of a hearing ... at least 2 business days before the hearing is to commence.

Procedures

86 The practices and procedures of a panel include the following:

(b)the panel may hear an appeal in the absence of a party if the party was notified of the hearing.

EMPLOYMENT AND ASSISTANCE FOR PERSONS WITH DISABILITIES REGULATION

Nutritional supplement

67 (1) The minister may provide a nutritional supplement in accordance with section 7 [*monthly nutritional supplement*] of Schedule C to or for a family unit in receipt of disability assistance, if the supplement is provided to or for a person in the family unit who

(a)is a person with disabilities, and

(b)is not described in section 8 (1) [*people receiving special care*] of Schedule A, unless the person is in an alcohol or drug treatment centre as described in section 8 (2) of Schedule A,

if the minister is satisfied that

(c)based on the information contained in the form required under subsection (1.1), the requirements set out in subsection (1.1) (a) to (d) are met in respect of the person with disabilities,

(d)the person is not receiving another nutrition-related supplement,

(e)Repealed. [B.C. Reg. 145/2015, Sch. 2, s. 7 (c).]

(f)the person complies with any requirement of the minister under subsection (2), and

(g)the person's family unit does not have any resources available to pay the cost of or to obtain the items for which the supplement may be provided.

(1.1)In order for a person with disabilities to receive a nutritional supplement under this section, the minister must receive a request, in the form specified by the minister, completed by a medical

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

(a) the person with disabilities to whom the request relates is being treated by a medical practitioner or nurse practitioner for a chronic, progressive deterioration of health on account of a severe medical condition;

(b) as a direct result of the chronic, progressive deterioration of health, the person displays two or more of the following symptoms:

(i) malnutrition;

(ii) underweight status;

(iii) significant weight loss;

(iv) significant muscle mass loss;

(v) significant neurological degeneration;

(vi) significant deterioration of a vital organ;

(vii) moderate to severe immune suppression;

(c) for the purpose of alleviating a symptom referred to in paragraph (b), the person requires one or more of the items set out in section 7 of Schedule C and specified in the request;

(d) failure to obtain the items referred to in paragraph (c) will result in imminent danger to the person's life.

(2) In order to determine or confirm the need or continuing need of a person for whom a supplement is provided under subsection (1), the minister may at any time require that the person obtain an opinion from a medical practitioner, nurse practitioner or dietitian other than the medical practitioner, nurse practitioner or dietitian who completed the form referred to in subsection (1.1).

(3) Repealed. [B.C. Reg. 145/2015, Sch. 2, s. 8.]

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.

