

Part C – Decision Under Appeal

The decision under appeal is the Ministry of Social Development and Poverty Reduction (the Ministry) Reconsideration Decision (RD) dated April 7, 2022, which found that the Appellant was not eligible for a Monthly Nutritional Supplement (MNS) for nutritional items.

The Ministry determined that the Appellant did not meet the eligibility criteria set out in the Employment and Assistance for Persons With Disabilities Regulation (EAPWDR) Section 67 and Schedule C, subsection 7(a). Specifically, the Ministry found that the information provided in the Appellant's MNS application and Request for Reconsideration (RFR) does not confirm that the Appellant requires additional nutritional items as part of caloric supplementation to a regular dietary intake and to prevent imminent danger to life.

Part D – Relevant Legislation

EAPWDR Sections 61.01 and 67, and Schedule C, Section 7

The relevant legislation is provided in the Appendix

Part E – Summary of Facts

The Appellant is a Person with Disabilities (PWD) receiving disability assistance and is not residing in a special-care facility.

According to the information provided by the Ministry and included in the RD, on February 17, 2022, the Ministry determined that the Appellant met the eligibility criteria for a \$40 diet supplement for a gluten-free diet, which she received for February, March and April 2022, but did not meet the eligibility criteria for an MNS for vitamin or mineral supplementation and nutritional items. On reconsideration, the Ministry determined that the Appellant was eligible for the vitamin and mineral supplementation but not for nutritional items.

The evidence before the Ministry at reconsideration included:

- A Request for Reconsideration (RFR), signed by the Appellant and dated March 22, 2022, in which the Appellant's family physician (FP) completed the reasons for the request on behalf of the Appellant. The FP wrote:

“(The Appellant) suffers from severe gluten sensitivity and severe lactose intolerance that is significantly affecting her well being and posing a danger to her health. As noted previously she has lost significant amounts of weight involuntarily and is unusual for her. She needs vitamin supplements, dairy alternatives and gluten free food, without which she is deteriorating progressively. (The Appellant) has Vitamin B and D deficiencies (which) manifest as has resulted in paresthesia in the hands and feet, numbness and low immunity. Dry skin causes chaffing on skin leading to pain and disability. Due to low immunity she gets frequent respiratory illnesses which are detrimental to her health. Vitamin supplementation as noted helps alleviate above illness and would be necessary for maintenance of her health. Furthermore, the conditions and deficiencies lead to her feeling angry, depressed, and impact her functioning at home and socially.”; and,
- An MNS application form (the Application Form) signed by the Appellant as applicant and dated January 22, 2022, and completed by the FP as medical practitioner. The Application Form:
 - Identifies the Appellant's severe medical conditions as gluten intolerance and lactose intolerance;
 - Where asked to provide any information on treatments (if the applicant is being treated for a chronic progressive deterioration of health as a direct result of the severe medical conditions), the FP has written *“Weight loss, Vitamin B deficiency, Vitamin D deficiency”*. The FP also indicates that the Appellant displays symptoms of malnutrition (*“dry skin, fatigue, low mood”*) and significant weight loss (*“Lost 10 kg over 2 – 3 years”*), identifying her current weight as 53.0 kg;
 - Where asked to identify what vitamin or mineral supplements are required and for how long, the FP has written multivitamin (*likely long term*), vitamin D (*long term*), omega 3 capsules (*long term*), and ferrous fumarate (*long term*), indicating that these supplements will prevent imminent danger to the Appellant's life by preventing worsening fatigue, low mood, and skin problems and help with her general health;
 - Where asked to specify the additional nutritional items that will be required and expected duration of need, the FP has written *“will need gluten free diet, soy milk and protein rich diet*

long term". In describing how the nutritional items required will alleviate one or more of the symptoms specified and provide caloric supplementation to the regular diet, the FP writes that they will help with malabsorption, prevent vitamin deficiencies, and help with weight gain; and,

- The FP says that the nutritional items will prevent imminent danger to the Appellant's life (identified as malnourishment and "*concerning weight loss*") by helping to prevent complications and adverse events in her life.

Additional Information Submitted after Reconsideration

In the Notice of Appeal (NOA) dated April 14, 2022, the Appellant said that she has difficulty buying the extra foods she needs in her daily life, adding "*As a mother (I) need to be well ... to care better (for) my lovely kids and support them better ... we have a hard (time) buying the extra foods (for example, fish, shrimp, caviar, Persian and Arabic medicinal plants, lamb, sheep liver). When I have these items in my daily life I have a (stronger) body and more happy emotions so (I am able to) care better and better for my lovely kids. Because of our ... hard situation I (often) can't ... buy the foods and (feel) very ... weak and low energy ... I lost weight in this time too and it made me worry. (I) hope (I) can have the support (to) buy the extra foods and be (a) strong mother.*"

The Appellant also provided a written submission on May 24, 2022 (the Submission). The Submission comprised a one-page letter dated May 16, 2022 signed by the FP and addressed "*To whom this may concern*". The letter says "*(The Appellant) can benefit from (a) high protein diet including ... fish, shrimp and lamb. She also has chronic fatigue and can benefit from (an) iron rich diet such as liver and red meat. Unfortunately she is unable to afford these foods and (this) is affecting her medically.*"

Evidence Presented at the Hearing

The Appellant was represented at the hearing by her spouse, who was appointed as her advocate (the Advocate). An interpreter was also present.

At the hearing, the Advocate, speaking on behalf of the Appellant, said that he has been married to the Appellant for 22 years. During the time he has known her, she has always suffered from a particularly difficult menstrual cycle, which lasts ten days every month, and results in low energy, headaches, dizziness and depression.

The Advocate explained that their family unit, which includes young children, were refugees from another Country and spent 6 years in a different Country before obtaining visas to move to Canada. In their original Country, their family doctor said that the Appellant was anemic and needed a high protein diet, which they were able to afford until they fled to the different Country where the husband was unable to work and where there was no social assistance available. The Advocate said that he tried to give the Appellant the right foods, and as a result he often didn't eat properly himself. He would "*walk everywhere*" to save money so he could help the Appellant.

Since arriving in Canada as refugees five years ago the family has had a better life, but neither the Appellant nor her spouse have been able to find work and they have been receiving income assistance. Until recently, they were not aware "*that there were programs that could help (the Appellant) with a proper diet*", which is why they applied for the MNS. The Appellant's family have been trying to get by on the regular shelter and support allowances, which have left them with only \$290 per month for food. As a result, the family has had to save as much as possible on other things; for example, the Advocate

stopped paying for a monthly phone plan so that he had a bit more money to buy better foods for his wife, adding *“As husband and father my responsibility it to (my family). I am last.”*

Regarding the Appellant’s current health, the Advocate said that she continues to get dizzy, has headaches and feels tired and depressed for 10 days every month. The Advocate said that *“he has asked around”* and been told about some herbal treatments that have helped. He also said that some of the medications she requires are covered, but he has to pay for the herbal remedies. He said that the Appellant is also taking 300 mg iron pills (*“the highest dose”*), which are covered, but after the MNS application for nutritional items was rejected they can’t afford the high protein diet that the doctor has prescribed.

In response to a question from the Panel, the Advocate said that the Appellant has not had her weight measured since she was weighed at 53 kg when the MNS application was prepared by her FP in January 2022, largely due to the pandemic, but that she must have lost more weight since then because *“her pants are loose”* and *“she would have lost even more weight if (the Advocate) hadn’t given up the phone”*.

At the hearing, the Ministry relied on its RD.

The Panel referred to a part of the RD that says *“At application in January, you were reported to be 53 kg. A 10 kg drop from 63 kg to 53 kg would therefore indicate you have lost approximately 3% of your pre-weight-loss weight over 2-3 years”*, and asked how the Ministry calculated the weight loss to be 3% as a 10 kg drop from 63 kg actually represents 16% loss in the Appellant’s weight. In response, the Ministry said that the calculation must have been the annual weight loss, not the total weight loss.

In response to another question from the Panel regarding EAPWDR Section 67(2), which says that, in order to determine the need for a nutritional supplement, the Ministry may require an applicant to obtain an opinion from a prescribed professional other than the one who completed the Application Form, the Ministry said that it rarely requires the second opinion set out in Section 67(2).

In response to another question from the Panel, the Ministry said that an applicant is free to submit a new MNS application if the Ministry denies coverage after assessing the original one.

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.

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 notes that both the NOA and the Appellant Submission contained new evidence. The new evidence in both documents is the information regarding details of the specific foods that the Appellant requires for the protein-rich diet that the FP referred to in the Application Form and the Appellant Submission (i.e., fish, shrimp, caviar, lamb, and sheep liver in the NOA; fish, shrimp, lamb, liver and red

meat in the Appellant Submission). The Ministry did not object to the admissibility of the new evidence in the Appellant Submission.

The Panel notes that the evidence in the NOA and the Appellant Submission is generally consistent. The information in the Appellant submission is provided by the FP. The Panel considered the new evidence in the Appellant Submission to be particularly credible because it was provided by a prescribed professional.

The Panel also finds that new verbal information was provided at the hearing by both the Advocate and the Ministry.

The new evidence provided by the Advocate at the hearing was that the Appellant has not had her weight measured since January 2022 and that the Appellant's clothing is currently loose fitting and needs to be tailored to fit her smaller frame. The Panel considered the verbal evidence presented at the hearing by the Advocate to be credible because it was provided by the Appellant's spouse, who has intimate knowledge of her health and living conditions.

The new evidence provided by the Ministry at the hearing was that the Ministry rarely requires that a second opinion be provided pursuant to EAPWDR Section 67(2). Section 67(2) says that an applicant may be required to provide an opinion from a prescribed professional other than, in this case, the Appellant's FP, in order to determine the need for a nutritional supplement. The Panel considers this new evidence to be highly credible because it came directly from the Ministry.

The Panel considered the new written evidence contained in the NOA and the Appellant Submission and the new verbal evidence presented at the hearing by both the Advocate and the Ministry all to be evidence that is reasonably required for a full and fair disclosure of all matters relating to the decision under appeal. In addition, the Panel considers all of the new evidence to be very useful as it directly addresses the criteria set out in the legislation. As a result, the Panel admitted all of the new evidence and gives it full weight.

Part F – Reasons for Panel Decision

The issue under appeal is whether the Ministry's RD, which determined the Appellant was not eligible for an MNS for nutritional items, was reasonably supported by the evidence or was a reasonable application of the legislation in the circumstances of the appellant.

Position of the Parties

The Appellant's position is that she requires a nutritional supplement in the form of a high-protein diet and high iron diet, which she is unable to afford, in order to be healthier and to help address her significant weight loss and other symptoms of wasting, including headaches, dizziness and depression.

The Ministry's position is that it is not satisfied the information provided in the Appellant's MNS application and RFR confirm that she requires additional nutritional items as part of caloric supplementation to a regular dietary intake and to prevent imminent danger to her life.

Panel Decision***As to whether the Appellant displays the symptom of Significant Weight Loss***

In the RD, the Ministry said that it did not consider the Appellant's loss of 10 kg of weight over 2 -3 years to be significant, and that the FP did not provide a new measurement of the Appellant's weight at reconsideration (i.e., three months after the lower weight of 53 kg was reported in the Application Form). "*Significant*" is not defined in the EAPWDR. The Oxford Advanced Learner's Dictionary defines "*significant*" as "*large or important enough to have an effect or to be noticed*". The Panel notes that there is no requirement in the EAPWDR that the rate of weight loss be measured over a specified period of time; so provided the weight loss is large or important enough to be noticed it is significant. The Panel also notes that the Appellant had lost 16% of her body weight in January 2022, and that, while her weight has not been measured since that date, the admissible evidence indicates that it is likely she has lost even more weight since then.

The Panel finds that it was not reasonable for the Ministry to determine that the Appellant's weight loss was not significant. Therefore, the Panel finds that, even though only two need to exist for the legislated requirement to be met, it has reasonably been established that at least three of the symptoms listed in EAPWDR Section 67(1.1)(b) are displayed in the case of the Appellant: malnutrition, significant weight loss, and a moderately to severely depressed immune system.

As to Whether the Nutritional Items are Required for Caloric Supplementation

EAPWR Section 67(1.1)(c) says that, for the purpose of alleviating **one** of the symptom referred to in Section 67(1.1)(b), a person must require one or more of the items listed in EAPWDR Schedule C, Section 7 (which includes "*additional nutritional items that are part of a caloric supplementation to a regular dietary intake*"), and that those additional nutritional items must be specified in the request. The symptoms listed in Section 67(1.1)(b) includes malnutrition. (The Panel notes that the Appellant's significant weight loss is also a listed symptom and that nutritional items would reasonably be required to address that symptom, but that only one symptom has to be addressed to satisfy legislated requirements.)

In the RD, the Ministry says that it is satisfied that the nutritional items listed are required to alleviate the symptom of malnutrition, but that it has not been established that they are required for “*caloric supplementation*”; and, as such, does not meet the requirements of EAPWDR Section 67(1.1)(c).

“*Caloric supplementation*” is not a defined term in the EAPWDR. The Oxford Advanced Learner’s Dictionary defines “*calorie*” as “*a unit for measuring how much energy food will produce*”. (“*Caloric*” is the adjective form of the word “*calorie*”). The Oxford Advanced Learner’s Dictionary defines “*supplementation*” as “*the act of adding something to something else in order to improve or complete it*”. The FP, a prescribed professional, has indicated in the Application Form that the Appellant requires additional protein-rich foods, and, in the Appellant Submission, that those foods include red meat and liver and that she would benefit from a high protein diet and an iron rich diet but is unable to afford these additional foods (so they would be supplemental by definition).

The FP has indicated that the Appellant has lost significant weight, and that she requires supplemental protein-rich foods to address that symptom. The Panel finds that the evidence establishes that nutritional items are required for caloric supplementation, and that the Ministry’s finding that it has not been established that nutritional items are required for caloric supplementation is not reasonable.

As to Whether the evidence demonstrates that the Appellant has a medical condition that results in the inability to absorb sufficient calories to satisfy daily requirements through a regular dietary intake

In the RD, the Ministry says that the FP has not provided enough evidence to demonstrate that the Appellant is displaying a symptom that would indicate a need for caloric supplementation, such as underweight status or significant weight loss. As mentioned above, the Panel has determined that the FP has provided evidence of significant weight loss, and that a protein-rich diet is necessary to alleviate that symptom. Therefore the Panel finds that the Ministry’s determination that the Appellant does not have a medical condition that results in the inability to absorb sufficient calories to satisfy daily requirements through a regular dietary intake is not reasonably supported by the evidence.

As to whether the information provided constitutes confirmation that failure to provide additional nutritional items will result in an imminent danger to the Appellant’s life

In the RD, the Ministry found that failure to obtain vitamin and mineral supplementation would result in imminent danger to the Appellant’s life because the FP indicated that those supplements would prevent worsening fatigue, low mood, skin problems, will help with her general health, and that the conditions and deficiencies lead to feelings of depressed mood and impact her functioning at home and socially. On the other hand, in the RD the Ministry found that the information provided by the FP in describing why the nutritional items were required did not establish that failure to provide additional nutritional items will result in an imminent danger to her life. The Ministry does not explain in the RD how it determined that the symptoms associated with the need for nutritional items are not life threatening, while the symptoms associated with the need for vitamin and mineral supplements are.

The FP is a medical practitioner, and EAPWDR Section 67(1.1)(a) requires that a prescribed professional (either a medical practitioner or a dietitian) confirm that an applicant for an MNS, which includes nutritional items, is being treated for a chronic, progressive deterioration of health on account of

a severe medical condition. The Panel notes that the FP says that he is treating the Appellant for a chronic, progressive deterioration of health on account of a severe medical condition.

EAPWDR Section 67(1.1)(b) requires that, as a direct result of the chronic, progressive deterioration of health, the person displays two or more of a list of symptoms, including malnourishment and significant weight loss. In relation to the need for nutritional items, the FP has said that the Appellant has experienced significant weight loss and is malnourished.

EAPWDR Section 67(1.1)(d) requires that failure to obtain items that are part of a caloric supplementation to a regular dietary intake will result in imminent danger to the applicant's life. In the part of the Application Form that deals with the need for nutritional items, and in direct response to the question "*Describe how the nutritional items requested will prevent imminent danger to the applicant's life*", the FP says that they will help "*prevent complications and adverse effects to her life*". It is not clear to the Panel how the FP's response to this question was not considered evidence from a medical practitioner that the Appellant would face imminent danger to her life without the nutritional items. If the Ministry found that the FP's answer to this question did not provide sufficient evidence of imminent danger to her life, it could have sought another opinion, as provided for in Section 67(2), which it did not do.

The Panel finds that it was not reasonable for the Ministry to determine that failure to provide additional nutritional items will not result in an imminent danger to the Appellant's life.

Conclusion

Having considered all the evidence, the Panel finds that the Ministry's RD is not reasonably supported by the evidence and is not a reasonable application of the applicable legislation in the circumstances of the Appellant. Accordingly, the Panel rescinds the Ministry's decision and the Appellant is successful in her appeal.

APPENDIX – LEGISLATION**EMPLOYMENT AND ASSISTANCE FOR PERSONS WITH DISABILITIES REGULATION****Definitions**

61.01 In this Division:

... "**nutrition-related supplement**" means ...:

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

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 ...

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, ...

(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

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 ...

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)

Section 24(2)(a) or Section 24(2)(b)

Part H – Signatures

Print Name
Simon Clews

Signature of Chair

Date (Year/Month/Day)
2022/05/29

Print Name
Sarah Bijl

Signature of Member

Date (Year/Month/Day)
2022/05/29

Print Name
Sameer Kajani

Signature of Member

Date (Year/Month/Day)
2022/05/29