

Part C - Decision Under Appeal

The decision under appeal is the Ministry of Social Development and Poverty Reduction (the “ministry”) reconsideration decision (the “decision”) dated 28 September 2022, which determined that the appellant does not qualify for Monthly Nutritional Supplements (“MNS”) benefits for either vitamin/mineral supplementation or nutritional items as per the Employment and Assistance for Persons with Disabilities Regulation, subsections 67(1.1) (b) (c) and (d), and Schedule C, subsection 7(a).

Specifically, the ministry determined that the appellant did not meet the criteria outlined in the regulations for MNS. For vitamins and minerals, the ministry determined 67(1.1)(d) was not met. For nutritional items, the ministry states that the requirements in 67(1.1)(c), (d) and Schedule C, section 7(a) were not met.

Part D - Relevant Legislation

Employment and Assistance for Persons with Disabilities Regulation (EAPWDR) sections 67(1.1)

Schedule C section 7

Part E – Summary of Facts**Evidence at the time of reconsideration**

As part of the application for reconsideration, the appellant submitted:

- 1) the MNS application form dated July 12, 2022, which was completed by a physician of a walk-in urgent primary care clinic.
- 2) the ministry's original Decision Summary dated August 4, 2022, which denied the appellant's request because he "did not meet the eligibility criteria".
- 3) A letter dated September 13, 2022, from a neurologist which supported the appellant's application for MNS

The MNS application outlined the appellant's medical condition, noting the neurological and cognitive impacts of his disease. In regard to vitamin/mineral supplementation, the physician states "full vitamin supplementation required". In regard to nutritional items, the physician states that the appellant's "neurological/cognitive decline affects feeding behaviour", and that such MNS would "guarantee intake" in order that the appellant could "maintain health".

In the Notice of Appeal submitted to the Tribunal, the appellant stated that he did "not have a G.P. I have been trying to deal with a walk in clinic doctor who didn't do the paper work correctly"... and "I need these supplements [and] minerals to sustain life, I just believe the issue is the paper work has not been filled out correctly". Also included with the NOA was the results of an Echocardiogram Ultrasound, which included the appellant's weight and height measurements.

Additional information

During the hearing, the appellant's advocate and relative provided additional information about his situation.

The appellant also provided additional documentation as evidence for the panel. This included:

- 1) an updated Application for MNS provided by fax on December 6, 2022 from the physician who had originally completed the application which expanded on some of the physician's original statements about the appellant's need for MNS and the imminent danger to his health.
- 2) a letter from a social worker dated August 9, 2022
- 3) three letters from a neurologist dated August 2, August 9 and September 13, 2022
- 4) a letter from another neurologist dated September 15, 2022

- 5) a letter and prescription note dated March 1, 2022 from a physician at a pain management centre
- 6) a hospital medical report of a visit on December 1, 2021
- 7) a Persons with Disability (PWD) application dated February 16, 2022
- 8) a Disability Tax Credit Application dated June 5, 2022

The ministry representative was present and did not object to the admission of the additional evidence.

The panel determined that the additional information provided by the appellant supported his argument and found that it would be considered admissible evidence.

Testimony at the hearing

The appellant's relative represented the appellant at the hearing. The appellant was also represented at the hearing by an advocate. The appellant was not well on the day of the hearing and was not present.

The appellant's advocate outlined the situation of the appellant, stating that he suffers from a disease with progressive neurological and muscular degeneration, and this affects all areas of his functioning. The advocate noted that the appellant does not have access to a family physician and relies on a walk-in clinic physician.

The advocate outlined several items in the additional evidence provided to the panel, including:

- 1) The prescription dated March 1, 2022, in which a physician states the appellant has "VMO wasting", meaning that the appellant's outside quad muscle was wasting;
- 2) The physician's letter dated August 9, 2022 which states the appellant has "increased tension in his lower limbs ... severe enough to require pain medications";
- 3) The application updated and faxed on December 6, 2022, by the physician who had originally made the assessment with previously incomplete sections now completed. Specifically:
 - a. In regard to vitamin supplementation, the physician had previously described how vitamins would help the appellant to "maintain nutrition". In the updated application, the physician added "prevent muscle wasting" and "weight loss. diet alone insufficient". In the initial application, the physician did not complete the section requesting a description of how the item would prevent imminent danger to the applicant's life. In the updated application, the physician states "will need dysphagia modified supplements as disease progresses".

- b. In regard to nutritional items, the physician had previously stated that nutritional items were required to “guarantee intake”, but he updated the application to state “compensate for difficulties with routine [ro] intake”. Regarding imminent danger to the applicant’s life, the physician had originally stated “maintain health” but the updated application states “maintain health/nutrition [] setting progressive neuromuscular symptoms”.

The advocate noted that the appellant’s symptoms include dysphagia, which means that he has trouble swallowing and can have difficulty feeding himself, as he is at risk of choking or inhaling his food.

The advocate also stated that the appellant has increasing difficulty with social decision making and social control, and his anxiety and compulsive disorders are worsening, and that access to food is an important way to minimize this.

The appellant’s relative stated that she was the caregiver for five relatives who have suffered from the same disease, including the appellant. One of them had recently passed away. She stated that the appellant had difficulty keeping his weight up and was underweight, and that, in her experience, keeping weight on was crucial for the well-being and longevity of sufferers of this disease.

The ministry representative outlined the decision. She noted that in the original MNS application there was no explanation offered by the physician regarding the imminent danger to life. The physician also did not state that the appellant was underweight or suffered from loss of appetite and did not provide any personalized information regarding the appellant’s situation.

In regard to the additional submission of evidence provided to the panel, the ministry representative stated that the updated information provided by the physician in the updated MNS application would mean that this request would now meet the imminent danger criteria for vitamin and mineral MNS application.

In regard to nutritional items, the ministry representative explained that the ministry differentiated between nutritional items required for meal replacement and nutritional items required for calories over and above the usual caloric intake. The appellant’s application was specifically for nutritional items MNS, and not for meal replacement. The ministry noted in an MNS application that it was important to clarify whether the nutritional items are required above the regular caloric intake, and it needs to be clearly explained in the application.

The ministry stated during the hearing that the difficulty swallowing by the appellant “should meet the criteria” relating to imminent danger.

Part F – Reasons for Panel Decision

The issue on appeal is whether the ministry's reconsideration decision that determined the appellant was ineligible for MNS for vitamins/minerals and nutritional items was reasonably supported by the evidence or was a reasonable application of the legislation in the circumstances of the appellant.

Specifically, did the ministry reasonably determine that the appellant did not meet the criteria for MNS benefits for vitamins/minerals and nutritional items.

In the Reconsideration decision, the ministry concluded that the appellant was not eligible for MNS for vitamin/mineral supplements because he did not provide information to support that there was an imminent danger to life as outlined in the regulations.

Regarding MNS for nutritional items, the ministry determined that the appellant's application:

- 1) did not indicate that he was underweight,
- 2) was a request for a meal replacement rather than meal supplementation,
- 3) failed to indicate a need for caloric supplementation in addition to his regular diet to alleviate malnutrition or neurological degeneration.
- 4) failed to indicate that there was an imminent danger to his life.

The ministry determined that the above supported the conclusion that the eligibility criteria in the EAPDWR were not met for nutritional items.

Section 67 (1.1) of the EAPWDR outlines the requirements for MNS. A request must be made by a medical practitioner, nurse practitioner or dietitian, in which they confirm the following:

- 1) The applicant is being treated for a chronic progressive deterioration of health on account of a severe medical condition
- 2) as a result of the chronic progressive deterioration of health the person displays two or more of the following symptoms
 - a. malnutrition
 - b. underweight status
 - c. significant weight loss
 - d. significant muscle mass loss
 - e. significant neurological degeneration
 - f. significant deterioration of a vital organ
 - g. moderate to severe immune suppression

- 3) the applicant requires one or more of the items set out in Schedule C, section 7 and specified in the request
- 4) failure to obtain these items will result in imminent danger to the person's life.

MNS for vitamin/mineral supplementation

Ministry position

In the decision, the ministry found that the appellant met the first three criteria but did not meet the criteria for “imminent danger to life”, stating that neither of the two physicians that provided information in the MNS application “provided information to indicate that failure to obtain vitamin/mineral supplementation will result in imminent danger to life”.

Appellant’s position

The Appellant’s new evidence included an updated MNS application completed by a physician, in which the physician states that the vitamin and mineral supplementation would “prevent muscle wasting, weight loss. Diet alone insufficient”.

In regard to how this would prevent imminent danger to the applicant’s life, the physician wrote “will need dysphagia [illegible] supplements as disease progresses”. In the initial application, this section was left blank.

The appellant’s advocate stated that dysphagia is a condition where swallowing is difficult, and the appellant is at risk of choking or inhaling food, and this is a significant imminent danger to the appellant.

Panel’s reasons

The panel has reviewed the physician’s updated comments on the MNS application, which was provided as new evidence to the panel, and also notes that the ministry had no objections to the admission of this evidence.

The panel finds that the updated information by the physician regarding the appellant’s dysphagia supports the finding that vitamin and mineral supplementation will help to prevent imminent danger to the appellant’s life. The ministry confirmed to the panel at the hearing that this new evidence would meet the criteria in establishing an imminent danger. Based on the new evidence, and in particular the updated MNS application provided by the physician, the panel finds that it would be reasonable to conclude that the criteria for imminent danger to the applicant’s life has been met.

MNS for nutritional items

Ministry position

In addition to the MNS criteria outlined above, Schedule C section 7(a) states that nutritional items are “part of a caloric supplementation to a regular dietary intake”.

In the decision, the ministry states that neither of the physicians that provided input for the MNS application confirmed that the need for nutritional items were for “caloric supplementation to a regular dietary intake”.

The ministry also states that the physicians do not confirm underweight status, significant weight loss or significant weight mass loss, which would support the need for caloric supplementation. The ministry also notes that medical records also supported that the applicant had a BMI above the normal range.

The ministry states that the physicians specify that nutritional items are required as a “meal replacement”, “rather than due to an inability to absorb sufficient calorie[s] to satisfy daily requirements through a regular dietary intake.”

The ministry states that the physicians did not confirm that the applicant consumes a regular caloric intake and “requires supplementation to alleviate malnutrition or neurological degeneration”.

The ministry states that the physician states on the MNS application that the nutritional items are required to “maintain health”, and determined that this was not sufficient information to confirm that “failure to obtain the items requested will result in imminent danger to your health”.

In the decision, the ministry concluded that the application did not establish that the nutritional items were for caloric supplementation to a regular dietary intake to alleviate one of two symptoms that are the direct result of a chronic, progressive deterioration of health due to a severe medical condition and that the failure to obtain the items will result in an imminent danger to the applicant’s life.

Appellant’s position

The appellant’s relative has been a caregiver for five people at different stages of the same disease. She observed that the “continuous movement” and high metabolism caused by the disease means that additional calories above and beyond a normal dietary intake is required. She noted that intake of 5,000 calories daily was necessary in order to stem weight loss. She had worked hard to give those under her care the best possible quality of life and maintaining weight meant they could stay healthier longer and limit the

symptoms of disease. The difficulty swallowing meant that eating was a constant challenge, and that caloric supplementation, particularly in liquid form, was crucial. She also noted that such supplements were “in the fridge all the time”.

The appellant’s advocate outlined the updated MNS application provided on December 6, 2022, which states that the nutritional items would “compensate for difficulties with routine [illegible] intake”. She also noted the letter from the neurologist which supported the need for nutritional supplements to address weight loss as well as swallowing and nutritional challenges which are attributes of the disease.

The advocate addressed the ministry’s statement that appellant’s weight appeared to be above average, which they indicated did not support the need for additional caloric supplementation. The ministry made this conclusion based on the MNS application of May 25, 2022, which stated that the appellant weighed 230 pounds. As part of the additional evidence, the appellant submitted a medical report dated December 1, 2021, which reported his weight as 180 pounds. The appellant’s relative noted she had “started him on” nutritional items in February 2022 and worked with him to get his weight up using caloric supplements.

Panel’s reasons

The panel has previously concluded that the imminent danger criteria had been met based primarily on the updated application completed by the physician on December 6, 2022. At the hearing, the ministry agreed with the conclusion that, based on this new evidence, the imminent danger criteria had been met.

The panel considered the testimony put forward by the appellant’s relative as a caregiver for five people with the same disease. Her experience and history with those who are, or were, suffering at various stages of this disease is insightful. Her direct experience with not only the needs of the appellant, but others under her care who had previously gone through various stages of the disease, is helpful in understanding the appellant’s current requirements. The panel notes in particular her testimony relating to the appellant’s constant movement and the high caloric intake needed which cannot be addressed through a regular diet, particularly with the challenges presented by swallowing and the risk of choking, which are undisputed attributes of the disease.

Schedule C, Section 7 states “nutritional items ... are part of a caloric supplementation to a regular dietary intake”. In their decision, the ministry concluded that they could not determine, based on the evidence provided at the time, whether the nutritional items were to be provided as caloric supplementation to a regular diet, or whether they would

be a meal replacement, which is not permitted, so the benefit was disallowed. This conclusion was based on the fact that neither physician confirmed that there was evidence of “underweight status, significant weight loss, or significant muscle mass loss”, which would indicate caloric supplementation was necessary.

In the new evidence, the physician has updated the MNS application to state that the appellant needed the MNS to “prevent muscle wasting, weight loss. Diet alone insufficient”. A neurologist provided a letter which supports the application for nutritional supplements, noting that weight loss was a common feature of the disease, and supplements were recommended to address swallowing and nutritional challenges.

The panel gave weight to the evidence provided by the appellant's relative about the stages of the disease and the appellant's current requirements. The appellant's relative at the hearing stated that she had worked hard with the appellant to increase his weight as she was aware of how important weight gain and weight retention was. This is supported by medical records supporting the appellant's significant weight changes over a short period of time. The ministry used a weight reading from the MNS application to observe that the appellant's BMI was above average and concluded that nutritional supplements were not required. As part of the new evidence, a hospital medical report dated six months previous indicates the appellant had weighed significantly less at that time. The appellant's relative stated that she “had got [the appellant's] weight up and was managing it”.

The panel finds that the new evidence, including the updated MNS application, the neurologist's letter, the medical records, and testimony heard at the hearing, supports the conclusion that the supplements are necessary for the caloric supplementation in addition to the regular dietary intake of the appellant.

The panel finds that, in this case, based on the new written evidence and verbal testimony provided at the hearing, the ministry's decision is no longer reasonably supported by the evidence. The panel rescinds the ministry's decision. The appellant is successful in the appeal.

Schedule of Legislation**EMPLOYMENT AND ASSISTANCE FOR PERSONS WITH DISABILITIES REGULATION****Nutritional supplement**

67 (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.

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;
- (b) Repealed
- (c) for vitamins and minerals, up to \$40 each month.

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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)

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

Part H – Signatures

Print Name

Robert McDowell

Signature of Chair

Date (Year/Month/Day)

2022/12/19

Print Name

Julie Iuvancigh

Signature of Member

Date (Year/Month/Day)

2022/12/19

Print Name

Susanne Dahlin

Signature of Member

Date (Year/Month/Day)

2022/12/20