

### **Part C – Decision Under Appeal**

The decision under appeal is the Ministry of Social Development and Poverty Reduction (the Ministry) Decision dated December 20, 2022, which found that the Appellant is not eligible for a monthly nutritional supplement for nutritional items.

The Ministry found that the Appellant met some of the eligibility requirements. However, the Ministry found there was insufficient evidence to confirm:

- The Appellant displays symptoms of underweight status, significant weight loss, or significant muscle mass loss; and
- The Appellant requires additional caloric supplementation in addition to a regular dietary intake.

### **Part D – Relevant Legislation**

Employment and Assistance for Persons with Disabilities Regulation, Section 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 receiving disability assistance.

The evidence the Ministry had when it made the Decision included:

- The Appellant’s request for reconsideration, in which the Appellant said:
  - His first application was incomplete, as it *“did not fully reflect my need and eligibility for the nutritional portion of the supplement”*;
  - His Doctor provided a new application that *“better reflects (the Appellant’s) health status and subsequently meets the legislative eligibility requirements for the nutritional supplement”*, and *“specifically addresses (his) need for the monthly nutritional supplement to meet the costs associated with a high protein diet”*;
  - His gastroenterologist, (the Specialist) has written a letter supporting his application (the Letter);
  - His Doctor and the Specialist confirm his physical impairments, and because of these impairments he is not able to absorb sufficient nutrients with a regular dietary intake. As a result, the Appellant needs additional nutritional supplementation *“to meet metabolic demands and prevent imminent danger to his life by maintaining cardiac function and avert wasting”*; and,
  - The Doctor says the Appellant needs nutritional supplements to *“alleviate muscle wasting ... and improve absorption of nutrients.”*
- The Letter, which says *“(The Appellant) suffers from chronic diarrhea related to abnormality of his colon associated with his diagnosis of myotonic dystrophy. This results in daily substantial impact on his ability to carry out activities due to the unpredictable nature of his symptoms”*;
- An Application for Monthly Nutritional Supplement form signed by the Doctor on October 4, 2022 (the First Application). The First Application says, in part:
  - The Appellant’s medical condition that results in an inability to absorb sufficient calories to satisfy daily requirements through a regular dietary intake is gastrointestinal (GI) motility; and,
  - The nutritional items requested will prevent imminent danger to the Appellant’s life by maintaining cardiac function.

The Doctor has not completed the part of the Application that asks to *“describe how the nutritional items required will alleviate one or more of the symptoms (previously described) and provide caloric supplementation to the regular diet”*;

- An Application for Monthly Nutritional Supplement form signed by the Doctor on November 24, 2022 (the Second Application). In the Second Application, the Doctor has completed the part of the Application that asks for a description of how the nutritional items required will alleviate one or more of the symptoms and provide caloric supplementation to the regular diet. The Doctor writes “*Avert muscle wasting, reduce GI transit, lower blood pressure and improve heart function, improve absorption of nutrients*”;
- Eleven additional letters and medical reports providing details about the Appellant’s medical impairments; and
- Twenty-two prescriptions and prescription receipts for medications prescribed by the Doctor and other medical practitioners.

### **Additional Evidence Presented at the Hearing**

At the hearing, the Appellant said that he was going to summarize the criteria that the Ministry had said were not met in its original decision, addressing each issue separately, and highlighting “*inconsistencies and contradictions*”.

As the Ministry had acknowledged in the Decision that the evidence showed that some of the legislative criteria had been met (specifically: that he is being treated for a chronic, progressive deterioration of health due to a severe medical condition and a medical practitioner has confirmed his symptoms of significant neurological degeneration and significant deterioration of a vital organ), the Panel asked the Appellant to address the criteria the Ministry said were still not met.

The Appellant said that the Ministry had determined that the evidence showed that only two of the symptoms listed in the Employment and Assistance for Persons with Disabilities Regulation (the Regulation) subsection 67(1.1)(b) had been met (specifically, significant deterioration of a vital organ and significant neurological degeneration). However, the Ministry did not agree that the Doctor had identified any additional symptoms. The Appellant argued that the Doctor and other medical professionals had also identified malnutrition, significant weight loss and significant muscle mass loss symptoms in the First Application, the Second Application, and some of the additional letters and medical reports. The Appellant said that the Ministry had “*not accurately considered all the information*” included in his application.

The Appellant also argued that the Ministry’s conclusion in the Decision that the need for supplemental caloric intake has not been addressed was unreasonable. The Decision says that this is because no medical practitioners have indicated that he is currently consuming a regular dietary intake, and that in addition to this, he requires nutritional supplements.

The Appellant said that it was clearly evident that he needs nutritional supplements based on the information provided by medical practitioners.

In response to a question from the Panel, the Appellant said he is being seen by a dietitian, who has explained an optimal diet to him, and he maintains a food intake journal because he *"must keep tabs on everything he eats"*. He said the dietitian had recommended a high protein diet and had probably informed the Doctor of this. The Appellant explained that he suffers from a muscular wasting disease which *"affects every cell in his body and toxicity builds up over time"*.

In response to another question from the Panel, the Appellant said that he has experienced weight loss. He said that a few months ago his weight was down to 74 kilos, a reduction of 9 kilos from his current weight. He said that he has been taking a protein supplement for over a year, and he takes medications to keep his weight stable.

At the hearing, the Ministry relied on its decision and read some sections from the Ministry's policy and procedures manual, including a section that explains that the Ministry is not expected to seek out *"additional answers not provided by a medical practitioner"* when it assesses an application for nutritional supplementation. The Ministry said that the Doctor identified two symptoms but has not provided *"any information pertaining to weight status or malnutrition as symptoms"*.

The Ministry also referred to the requirement in section 7 of Schedule C of the regulation that any additional nutritional items had to be part of *"a caloric supplementation to a regular dietary intake"*. The Ministry said that this criterion had not been met because the Ministry had no idea what the Appellant's regular diet was. The Ministry also said that the Appellant's application was missing information about why a special diet was required and what symptoms are being alleviated by it. The Ministry said that if an applicant has to absorb nutrients to avoid muscle wasting, a medical practitioner has to identify muscle wasting as one of the symptoms in the application form.

In response to a question from the Panel, the Ministry said that the legislation requires that a medical practitioner identify a severe medical condition, at least two symptoms, and an explanation of how nutritional items can address identified symptoms. In this case there was not enough information in the Appellant's application to allow the Ministry to assess the need for nutritional items. The Ministry said that this application looks more like a specific recommended diet than a situation where a medical practitioner has clearly stated that the Appellant needs caloric supplementation.

When asked by the Panel why it was not enough for a medical practitioner to say that the nutritional item will *"avert muscle wasting"*, where asked to describe how a nutritional item will avert a symptom, the Ministry said that the Doctor had not listed muscle wasting as

one of the symptoms in Part C, 3 of the application, or explained how it will alleviate that symptom.

When asked by the Panel if, when a medical practitioner prescribes a treatment, it is necessary for the medical practitioner to say that there was an assessment of the applicant's regular dietary intake, the Ministry said the medical practitioner has to provide justification to show that all the legislative requirements have been met, that an applicant's diet has been assessed, and to explain how caloric supplementation alleviates a symptom. The Ministry said the medical practitioner "*has to link all the pieces together*".

**Admissibility of Additional Evidence**

No new written evidence was provided after the Decision. New evidence presented at the hearing was information about the Appellant's recent weight loss and that he has a dietitian who has given him an optimal diet and suggested he maintain a food intake journal because he must keep track of everything he eats.

The Ministry did not object to the Panel considering any of the new evidence presented at the hearing.

The Panel decided that all the new information should be considered because it all has an impact on the Decision. The Panel assigns all the new information significant weight.

**Part F – Reasons for Panel Decision**

The issue under appeal is whether the Decision, which found there was insufficient evidence to confirm:

- The Appellant displays symptoms of underweight status, significant weight loss, or significant muscle mass loss; and,
- The Appellant requires additional caloric supplementation in addition to a regular dietary intake;

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

**Appellant's Position**

The Appellant's position is that the Doctor's evidence and additional evidence provided by other medical practitioners provide sufficient evidence that his medical condition displays symptoms of significant weight and muscle mass loss, and that he requires additional caloric supplementation in addition to a regular dietary intake.

**Ministry's Position**

The Ministry's position is the information provided does not establish that a medical practitioner has confirmed that the Appellant is currently consuming a regular dietary intake that requires nutritional supplements. In addition, the Doctor has not confirmed that the Appellant is displaying the symptoms of underweight status, significant weight loss, or significant muscle mass loss, which would indicate a need for caloric supplementation.

**Majority Panel Decision**

For a panel to determine whether a Ministry decision was reasonable, it must consider all the admissible evidence. To that end, it does not matter where on an application form or other admissible evidence necessary information is provided by a listed professional (in this case a medical practitioner).

The Ministry found that the Appellant met the requirement that at least two of the symptoms listed in the Regulation Section 67(1.1)(b) be present because the Doctor had provided narrative confirming significant neurological degeneration and significant deterioration of a vital organ (his heart) in the space provided for this purpose on the First Application or the Second Application (Part C, 3). However, the Ministry determined that the Appellant was not displaying symptoms of underweight status, significant weight loss, or significant muscle mass loss because the medical practitioner did not provide any narrative in the appropriate space in the same section of the application form.

The Majority Panel notes that in Section 6 of the Second Application, the Doctor is asked to *“Describe how the nutritional items required **will alleviate one or more of the symptoms specified in (Part C 3 of the application) and provide caloric supplementation to a regular diet**”* (emphasis added). In this section, the Doctor writes *“avert muscle wasting, reduce GI transit, lower blood pressure and improve heart function, improve absorption of nutrients”*. And in the First Application, where the Doctor is asked in Section 6 to describe how the requested nutritional items will prevent imminent danger to the applicant’s life, the Doctor has written *“maintain cardiac function”*.

According to the Columbia University Department of Surgery, the heart is both a vital organ and a muscle. In the Decision, the Ministry said that it accepts the symptom of *“significant deterioration of a vital organ due to (the Appellant’s) poor cardiac function”*. Based on the information provided by the Doctor, the required nutritional items will improve the Appellant’s heart function. Therefore, the Majority Panel finds that the Doctor has provided clear evidence that the nutritional items are necessary to avert the symptom of significant deterioration of a vital organ.

Section 6 also asks the medical practitioner if the applicant has *“a medical condition that results in **the inability to absorb sufficient calories to satisfy daily requirements through a regular dietary intake**. If yes, please describe”* (emphasis added). Here the Doctor has written *“increased GI motility”*.

In summary, according to the information provided by the Doctor in Section 6 of the application forms:

- The additional nutritional items requested by the Appellant, in addition to multivitamins, are a high protein diet, a high fibre diet, and a low sodium diet;
- The Appellant has a medical condition (GI motility) that results in his inability to absorb sufficient calories to satisfy daily requirements through a regular dietary intake;
- The additional nutritional items will alleviate the symptom of significant deterioration of a vital organ (his heart) and provide caloric supplementation to a regular diet; and,
- Failure to obtain the necessary nutritional items will result in imminent danger his life (an inability to maintain his cardiac function).

The Majority Panel finds that the Doctor’s response clearly demonstrates that the Appellant is unable to absorb sufficient calories to satisfy daily requirements without the nutritional items. In addition, the Doctor has described the medical condition that causes this inability.

In the Decision, the Ministry based its denial on the Doctor not providing:

- Further detail on how GI motility may result in caloric malabsorption; and
- The Appellant's current dietary intake, which the Ministry determined makes it difficult to confirm if caloric supplementation over and above a regular dietary intake is required.

At the hearing, the Ministry also said that the medical practitioner has to explain how caloric supplementation alleviates a symptom.

The Majority Panel notes that there is nothing in the legislation that requires that these opinions be described or explained by a medical practitioner. The phrase "*in which the practitioner has confirmed*" clearly suggests that the Ministry is required to accept a medical or nurse practitioner's opinion if it is reasonable and not contradicted by other reliable evidence. As the Doctor's view is reasonable and not inconsistent with other evidence, it should be accepted.

The Majority Panel finds that all the requirements set out in section 67(1.1) of the Regulation have been met. Specifically:

- The request is in a form specified by the Minister;
- The Appellant is being treated by the Doctor for a chronic, progressive deterioration of health on account of a severe medical condition as a direct result of which he displays two or more of the listed symptoms (one of which is "*a significant deterioration of a vital organ*");
- For the purpose of alleviating the significant deterioration of his heart, the Appellant requires additional nutritional items that are part of a caloric supplementation to a regular dietary intake; and,
- Failure to obtain the necessary nutritional items will result in imminent danger his life.

Because the Doctor has confirmed that the legislative requirements have been met, and because the Ministry determined that it needs explanations beyond what the legislation requires, the Panel finds that the Decision was not reasonable.

### **Dissenting Member Opinion**

The Regulation provides for several types of nutrition-related supplements which are defined in section 61.01. For this appeal, apart from the MNS the appellant applied for,



only the diet supplements listed in section 66 and outlined in section 6 of Schedule C are relevant.

The EAPWDR differentiates between various nutrition-related supplements as follows:

## Definitions

### 61.01

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

- (a) a supplement under section 66 [*diet supplement*];
- (b) a supplement under section 67 [*nutritional supplement — monthly*], other than a supplement for vitamins and minerals;
- (c) a supplement under section 67.001 [*nutritional supplement — short-term*];
- (d) a supplement under section 67.01 [*tube feed nutritional supplement*];
- (e) a supplement under section 2 (3) of Schedule C that is related to **nutrition**;

Section 6 of Schedule C lists 9 different diet supplements that the ministry may fund. Among others, it lists a high protein diet, a gluten-free diet, and restricted sodium diet.

It follows that a high protein diet as well as a monthly nutritional supplement (other than vitamins and minerals) are both nutrition-related supplements; however, they are not interchangeable, and not every nutrition-related or nutritional supplement is a caloric supplement. In fact, only section 67 and Schedule C section 7(a) (MNS) and section 67.001 (Short-Term Nutritional Supplement) refer to a caloric supplement.

In this appeal, the Doctor has specifically requested a high protein diet, high fiber diet and low sodium diet (two of these diets are listed in section 6 of Schedule C). In relation to these items the doctor has remarked that they will "avert muscle wasting, reduce GI transit, lower blood pressure and improve heart function and improve absorption". While in the form the prompt reads: "Describe how the nutritional items required will alleviate one or more symptoms ... and provide caloric supplementation to a regular diet", the Doctor simply used the form to write what the required diets would achieve. The Doctor has not requested a caloric supplement as required by section 7(a).

The Dissenting Member would have confirmed the ministry's decision.

**Conclusion**

The Majority Panel finds that the Ministry's Decision which found that the Appellant was not eligible for additional nutritional items was not reasonably supported by the evidence or a reasonable interpretation of the legislation in the Appellant's circumstances.

The Decision is rescinded and the Appellant's appeal is successful.

## Appendix – Relevant Legislation

The relevant legislation is as follows:

### Employment and Assistance for Persons with Disabilities Regulation

#### Definitions

**61.01** In this Division:

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

- (a) a supplement under section 66 [*diet supplement*];
- (b) a supplement under section 67 [*nutritional supplement — monthly*], other than a supplement for vitamins and minerals;
- (c) a supplement under section 67.001 [*nutritional supplement — short-term*];
- (d) a supplement under section 67.01 [*tube feed nutritional supplement*];
- (e) a supplement under section 2 (3) of Schedule C that is related to nutrition;

#### Diet supplement

**66** (1) Subject to subsection (2), the minister may pay for a diet supplement in accordance with section 6 [*diet supplements*] of Schedule C that is provided to or for a family unit in receipt of disability assistance or hardship assistance, if the supplement is provided to or for a person in the family unit who

- (a) is described in section 6 (1) of Schedule C, and
- (b) is not described in section 8 (2) (b) [*people in special care*] of Schedule A.

(2) A person is not eligible to receive a supplement under subsection (1) unless

- (a) the person is not receiving another nutrition-related supplement, and
- (b) a medical practitioner, nurse practitioner or dietitian confirms in writing the need for the special diet.

#### 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 person with disabilities in a family unit who receives disability assistance under

(a) section 2 [*monthly support allowance*], 4 [*monthly shelter allowance*], 6 [*people receiving room and board*] or 9 [*people in emergency shelters and transition houses*] 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 a supplement under section 2 (3) [*general health supplement*] of Schedule C,

(e) the person is not receiving a supplement under subsection (3) or section 66 [*diet supplements*],

(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.

(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 or nurse practitioner other than the practitioner referred to in subsection (1) (c).

### **Schedule C**

#### **Diet supplements**

**6** (1) The amount of a diet supplement that may be provided under section 66 [*diet supplements*] of this regulation is as follows:

- (a) \$10 for each calendar month for a person who requires a restricted sodium diet;
- (b) \$35 for each calendar month for a person who has diabetes;
- (c) \$30 for each calendar month for a person who requires kidney dialysis if the person is not eligible under the kidney dialysis service provided by the Ministry of Health;
- (d) \$40 for each calendar month for a person who requires a high protein diet;
- (e) \$40 for each calendar month for a person who requires a gluten-free diet;
- (f) \$40 for each calendar month for a person who has dysphagia;
- (g) \$50 for each calendar month for a person who has cystic fibrosis;
- (h) \$40 for each calendar month for which a person requires a ketogenic diet;
- (i) \$40 for each calendar month for which a person requires a low phenylalanine diet.

(2)A diet supplement under subsection (1) (d) may only be provided if the diet is confirmed by a medical practitioner, nurse practitioner or dietitian as being necessary for one of the following medical conditions:

- (a)cancer that requires nutritional support during
  - (i)radiation therapy,
  - (ii)chemotherapy,
  - (iii)surgical therapy, or
  - (iv)ongoing medical treatment;
- (b)chronic inflammatory bowel disease;
- (c)Crohn's disease;
- (d)ulcerative colitis;
- (e)HIV positive diagnosis;
- (f)AIDS;
- (g)chronic bacterial infection;
- (h)tuberculosis;
- (i)hyperthyroidism;
- (j)osteoporosis;
- (k)hepatitis B;
- (l)hepatitis 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; ...

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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

**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)

2023/05/23

Print Name

Rubina Sidhu

Signature of Member

Date (Year/Month/Day)

2023/05/23

Print Name

Inge Morrissey - Dissenting Opinion

Signature of Member

Date (Year/Month/Day)

2023/05/23