

**Part C – Decision Under Appeal**

The Appellant is appealing a decision of the Ministry of Social Development and Poverty Reduction (the “Ministry”) dated July 21, 2023 (the “Reconsideration Decision”) on a reassessment requested by the Appellant, a disability assistance recipient.

The Reconsideration Decision denied the Appellant’s request for funding for nutritional counselling with a registered dietitian because the regulatory criteria for coverage was not met because those services were not eligible for coverage, “are not included under the MSP supplementary benefits”, and “acute need” was not confirmed.

**Part D - Relevant Legislation**

*Employment and Assistance for Persons with Disabilities Regulation (the "Regulation")*

Section 62

Schedule C

Section 1 (definitions)

Section 2(1) (c)(i), (ii), and (iii)

*Employment and Assistance Act*

Section 24

*Medical and Health Care Services Regulation*

Section 7.6

Section 25.1

(See attached Appendix for text of the above)

**Part E – Summary of Facts**

The Appellant is a recipient of disability assistance as a Person with Disabilities (PWD). That assistance includes a monthly dietary supplement for a ketogenic diet. The Appellant's neurologist has recommended that the Appellant have a therapeutic ketogenic diet for medication resistant epilepsy, which requires specialized consultations.

On May 18, 2023, the Ministry received the Appellant's request for funding for nutritional counselling with a registered dietitian experienced in ketogenic diet for epilepsy for a comprehensive nutrition assessment, education regarding the ketogenic diet, vitamin and mineral supplementation recommendations, and management of side effects.

On June 5, 2023, the Ministry denied the request (on the same grounds as in the Reconsideration Decision).

On July 5, 2023, the Ministry received the Appellant's Request for Reconsideration with:

- A letter from the Appellant's parent about the importance of support for a ketogenic diet to manage the Appellant's medical conditions (the "Parent Letter").
- An email from a dietitian at the local regional hospital, referring the Appellant to services to "put you in contact with [Community Living BC's] own dietician ... I am sorry that I am not able to assist you long term."
- A consent to disclosure.
- A March 31, 2023, note from the Appellant's neurologist, stating that the Appellant requires:
  - A modified ketogenic diet for her specific type of disorder.
  - A "specific dietician with expertise for this and none is available in [the health authority]".
  - The dietician's services indefinitely or until available in the health authority.

On July 21, 2023, the Reconsideration Decision denied the request on the basis that: ... the Regulation does not provide coverage of dietitian counselling and the ministry is not authorized to provide funding for this service. While the ministry provides some additional coverage of extended health treatments for acute needs, this extends the MSP coverage for supplementary benefits, which does not include dietitians.

It stated, as follows, that the information provided does not establish that all the regulatory criteria had been met:

Basic Eligibility – The only criteria met was that the Appellant was a disability assistance recipient.

Eligibility for Extended Therapy Treatments – The request did not meet the eligibility requirements set out for health supplements that may be paid as set out in Regulation Schedule C at subsection 2(1)(c), 2(1)(c)(i) and 2(1)(c)(ii) as follows:

1)

...You are not requesting treatments covered in this legislation, which includes:

- a. **Acupuncture treatment** delivered by an acupuncturist registered with the College of transitional Chinese Medicine under the Health Professions Act.
- b. **Chiropractic treatment** delivered by a chiropractor registered with the College of Chiropractors of BC under the Health Professions Act.
- c. **Massage therapy** delivered by a massage therapist, registered with the College of Massage Therapists of BC under the Health Professions Act.
- d. **Naturopathy treatment**, delivered by a naturopath, registered under the College of Naturopathic Physicians of BC under the Health Professions Act.
- e. **Non-Surgical podiatry**, delivered by a podiatrist, registered with the College of Physician and Surgeons of BC under the Health Professions Act.
- f. **Physical therapy**, delivered by a physical therapist, registered with the College of Physical Therapists of BC, under the Health Professions Act.

2)

...A medical practitioner has not confirmed you have an *acute* need for the therapy requested. As confirmed by [your neurologist], you will require indefinite dietician support. This is a chronic condition and need for treatment, rather than an acute need.

3)

...Dietitian services are not included under the MSP supplementary benefits, and therefore, you are unable to utilize the 10 treatments provided for some services under MSP.

### **Appellant Submissions**

The Appellant has a complex metabolic disorder and a seizure disorder. The seizure disorder is "almost impossible to control with medication" but responds "dramatically" to the specialized diet that needs monitoring and adjustment to maintain efficacy. The metabolic disorder was also described as being treated by the diet.

The Appellant's "Reasons for Appeal" state that [The Appellant] needs this diet otherwise [the Appellant] will not stay alive."

The Appellant, through her parent, reiterated the contents of the Parent Letter.

The Appellant is on a ketogenic diet formerly managed by a dietician within the health authority, but that person retired over a year ago. The parent stated that they have been unable to find someone to take over that care because there is no longer anyone in any health authority with the expertise and ability to take on the Appellant as a patient. The only people with the expertise are available for private consultation only. Together with the Appellant's neurologist they found one of those private people. The Appellant requested a general health supplement to pay for that service.

Since losing access within the health care system the Appellant has been functionally and physically degrading and subject to more seizures. Before being put on the diet the Appellant was having seizures in the thousands. The diet brought those down to single digits. Without the monitoring and adjustment this number has climbed.

The parent also reports that the risk increases for biventricular hypertrophy and kidney failure as well as from dyslipidemia, liver dysfunction, and bone demineralization as confirmed in the dietician's letter.

The Appellant's parent states that:

... We are not seeking funding for dietitian services for a traditional reason. We are not looking for a dietitian who focuses on weight loss. We need a specialized dietitian, trained in this type of specialized diet, to work with along with her neurologist to keep [her] alive. This is medically necessary treatment as there is no medication available to treat her symptoms. [sic]

### **Ministry Submissions**

The Ministry representative reiterated the Reconsideration Decision reasons as summarized above.

### **Admissibility of New Evidence**

The Appellant's parent made statements as part of the Appellant's submissions. Under section 22(4) of the *Employment and Assistance Act* the panel admits those statements as evidence that is reasonably required for a full and fair disclosure of all matters related to the decision under appeal.

**Part F – Reasons for Panel Decision**

The purpose of the panel in appeals, such as this, is not to make a decision as if it was the Ministry, but to decide whether the decision made by the Ministry is a reasonable application of the laws and reasonably supported by the evidence previously available together with any new evidence admitted by the panel.

This is a case where the Ministry decided that the Regulation does not allow the Ministry to provide funding for specialized nutritional counselling service from a dietician. The application for funding (the “Application”) is not in the record to disclose the precise request but appears to be more aptly described as a request for funding of services from a specific person identified as a “dietitian” for dietary assessment, recommendations, monitoring and adjustment as treatment for a complex metabolic disorder and symptoms not controlled by medication.

The Reconsideration Decision reviewed the request according to the criteria set out in the Regulation Schedule C at subsection 2(1)(c). The panel considers this matter as applied to those provisions and expresses no opinion as to whether funding may be available from other sources or under other provisions in keeping with the more apt description.

Under Regulation Schedule C at subsection 2(1) the Appellant is eligible for general health supplements as a person designated as a PWD (see also s.62 of the Regulation), however in order to receive funds other criteria must be met under the provisions that follow in that subsection. These are set out in the Regulation Schedule C at subsection 2(1)(c), 2(1)(c)(i) and 2(1)(c)(ii). (Subsection 2(1)(c)(iii) also applies but was not addressed in the Reconsideration Decision. In the circumstances the panel considers that this was an implicit acceptance that it was satisfied but also unnecessary to address given the decision.)

Regulation Schedule C at subsection 2(1)(c) refers to a table that sets out the health supplements that may be paid if the other criteria are satisfied. Before getting to those other criteria the request must be for one of those services. In the current case the services sought are not found on that table. The panel asked and it was confirmed that the service was not any of them and the person intended to provide them was not a registrant of any of the listed colleges, including specifically not a naturopath.

Because of that failure to meet that first criteria, and because subsection 2(1)(c) requires that all of the criteria must be met, the application inevitably fails. The Ministry was obligated to deny the application on that ground alone. In short that failure to meet the first criteria is determinative that the Reconsideration Decision must be confirmed.

The Ministry also considered the other criteria in subsection 2(1)(c)(i) and (ii) and found those also not satisfied. Whether or not the Ministry was reasonable in those findings is irrelevant because denial of the application was inevitable based on the failure discussed

above. With that caution the panel finds the next finding of the Ministry is unreasonable, while stressing, again, that it has no effect on the ultimate decision here.

Regarding Regulation Schedule C at subsection 2(1)(c)(i) the Ministry reasoned that the Appellant had a chronic condition needing treatment and that this was not “confirmed an acute need” by the medical practitioner. That interpretation considers that time or duration bears on the meaning of “acute need”. That term is undefined but is used elsewhere in the Regulation but with a time specified, which suggests that “acute need” alone does not have that limit. This is seen at section 67.001 where it refers to a person who has “an acute short-term need”.

The term “acute” means something of a severe or intense degree. Elsewhere the panel notes that governmental publications refer to “acute need” in relation to housing and for skilled professionals in BC, for “real cost” reviews of projects, for methods to assess water flow manipulation on fish, etc. all of which might be described as ongoing needs akin to being chronic. This is all consistent with a description of severity of need as distinct from “acute care” which is short-term treatment for severe or urgent medical condition.

The March 31, 2023, note from the neurologist states that the Appellant “requires [a] modified ketogenic diet” stating why as well as that this “requires a specific dietician with expertise for this and none is available in [the health authority].” The panel considers that it is unreasonable for the Ministry to find that a medical practitioner had not “confirmed an acute need” in the circumstances of the Appellant’s disorder.

Regarding Regulation Schedule C at subsection 2(1)(c)(ii), the Ministry reasoned that:

... Dietitian services are not included under the MSP supplementary benefits, and therefore, you are unable to utilize the 10 treatments provided for some services under MSP.

The cited subsection states:

2(1)(c)... (ii) if the visits available under the Medical and Health Care Services Regulation, B.C. Reg. 426/97, for that calendar year have been provided and for which payment is not available under the *Medicare Protection Act*, ...

The wording of that subsection is complex and appears to have been interpreted by the Ministry as requiring the requested service to be one listed under the Health Care Services Regulation, B.C. Reg. 426/97 (the “HCSR”) for supplemental services. Dietitian is not one of those services described in the HCSR as a supplemental health service (see HCSR s.7.6 and s.25.1) and which replicates the list in the table in the Regulation Schedule C at subsection 2(1)(c) and sets the 10 visit limit cited by the Ministry.

That may not be the only interpretation, but the panel finds that the interpretation applied by the Ministry is reasonable in the circumstances. (Note, however, that the panel distinguishes this consideration from one about a service that could be provided under the MSP – as was the case here - but not provided or currently staffed and available.)

The finding regarding “acute need” does not change the ultimate outcome here. In all the circumstances, the Ministry’s denial of the Appellant’s Application was reasonably based upon the fact that the service sought was not one that was listed on the table specified by Regulation, Schedule C, subsections 2(1)(c) and thus the Appellant had not met all the criteria required.

The panel has sympathy for the Appellant and the apparent gap in services that would allow her to have acupuncture or the like but not a service critical to her health and survival. The panel recognizes the gap while lacking the power to fix it.

### **Conclusion**

The panel finds that the Ministry’s Reconsideration Decision was:

1. reasonably supported by the evidence, and
2. a reasonable application of the applicable enactment in the circumstances of the person appealing the decision.

Accordingly, the Panel confirms the Reconsideration Decision.



**Appendix – Relevant Legislation**

***EMPLOYMENT AND ASSISTANCE FOR PERSONS WITH DISABILITIES REGULATION***

[Last amended March 8, 2023 by B.C. Reg. 66/2023]

**General health supplements**

**62** The minister may provide any health supplement set out in section 2 [*general health supplements*] or 3 [*medical equipment and devices*] of Schedule C to or for

- (a) a family unit in receipt of disability assistance,
- (b) a family unit in receipt of hardship assistance, if the health supplement is provided to or for a person in the family unit who is under 19 years of age, or
- (c) a family unit, if the health supplement is provided to or for a person in the family unit who is a continued person.

**Schedule C**

Health Supplements

**General health supplements**

**2** (1) The following are the health supplements that may be paid for by the minister if provided to a family unit that is eligible under section 62 [*general health supplements*] of this regulation:

...

- (c) subject to subsection (2), a service provided by a person described opposite that service in the following table, delivered in not more than 12 visits per calendar year,
  - (i) for which a medical practitioner or nurse practitioner has confirmed an acute need,
  - (ii) if the visits available under the Medical and Health Care Services Regulation, B.C. Reg. 426/97, for that calendar year have been provided and for which payment is not available under the *Medicare Protection Act*, and
  - (iii) for which there are no resources available to the family unit to cover the cost:

Item	Service	Provided by	Registered with
1	acupuncture	acupuncturist	College of Traditional Chinese Medicine under the <i>Health Professions Act</i>
2	chiropractic	chiropractor	College of Chiropractors of British Columbia under the <i>Health Professions Act</i>

3	massage therapy	massage therapist	College of Massage Therapists of British Columbia under the <i>Health Professions Act</i>
4	naturopathy	naturopath	College of Naturopathic Physicians of British Columbia under the <i>Health Professions Act</i>
5	non-surgical podiatry	podiatrist	College of Physicians and Surgeons of British Columbia under the <i>Health Professions Act</i>
6	physical therapy	physical therapist	College of Physical Therapists of British Columbia under the <i>Health Professions Act</i>

***Medical and Health Care Services Regulation***

BC Reg 426/97

**Part 3 — Eligibility for Supplemental Services**

**Definitions**

**7.6** In this Part:

**"supplemental services"** means the services referred to under [section 25.1](#).

...

**25.1** (1) Subject to [section 27](#), an acupuncture, chiropractic, massage, naturopathic, physical therapy or non-surgical podiatric service is a benefit if the service is

- (a) listed in a payment schedule for supplemental services,
- (b) rendered in British Columbia to a beneficiary who
  - (i) is eligible for supplemental services under [section 10](#), or
  - (ii) has been determined under [section 11](#) to be eligible for supplemental services,
- (c) rendered by an enrolled health care practitioner, and
- (d) described in an adequate clinical record.

(2) Subject to subsection (1), acupuncture, chiropractic, massage, naturopathic, physical therapy and non-surgical podiatric services are benefits up to a combined maximum of 10 visits during each calendar year.

***Employment and Assistance Act***

SBC 2002, c 40

**Decision of panel**

- 24** (1) After holding the hearing required under section 22 (3) [*panels of the tribunal to conduct appeals*], the panel must determine whether the decision being appealed is, as applicable,
- (a) reasonably supported by the evidence, or
  - (b) a reasonable application of the applicable enactment in the circumstances of the person appealing the decision.
- (2) For a decision referred to in subsection (1), the panel must
- (a) confirm the decision if the panel finds that the decision being appealed is reasonably supported by the evidence or is a reasonable application of the applicable enactment in the circumstances of the person appealing the decision, and
  - (b) otherwise, rescind the decision, and if the decision of the tribunal cannot be implemented without a further decision as to amount, refer the further decision back to the minister.

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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  
Kent Ashby

Signature of Chair

Date (Year/Month/Day)  
2023/08/21

Print Name  
Bob Fenske

Signature of Member

Date (Year/Month/Day)  
2023/08/24

Print Name  
Richard Franklin

Signature of Member

Date (Year  
2023/08/24