

PART C – DECISION UNDER APPEAL

(State the reconsideration decision)

The decision under appeal is the Ministry's reconsideration decision dated January 28, 2010 denying the Appellant's request for the following monthly nutritional supplements:

1. additional nutritional items that are part of a caloric supplementation to a regular dietary intake;
and
2. bottled water.

The Ministry determined the Appellant did not meet the regulatory eligibility requirements for these supplements. The Ministry did approve her application for vitamin/mineral supplementation. The Appellant is a Person With Disabilities receiving assistance from the Ministry.

PART D – RELEVANT LEGISLATION

(State the relevant Legislation considered)

Employment and Assistance for Persons with Disabilities Regulation (EAPWDR) section 67 and Schedule C, Section 7.

PART E – SUMMARY OF FACTS

Please set out the facts as determined by the panel, based on the evidence at the hearing. Please note that subsection 22(4) of the Employment and Assistance Act states that, in a hearing referred to in subsection (3), a panel may admit as evidence only:

- (a) the information and records that were before the minister when the decision was being made, and
- (b) oral or written testimony in support of the information and records referred to in paragraph (a).

For its reconsideration decision the Ministry considered the following evidence:

1. The Appellant's application for Monthly Nutritional Supplement, dated October 27, 2009 includes a section completed by her physician. The physician indicated the Appellant has a chronic, progressive deterioration of health due to a severe medical condition; specifically, depression, poor eating habit, muscle weight loss, hypothyroidism. The physician further noted the appellant has the following symptoms that are a direct result of chronic progressive deterioration of health: malnutrition – hard time swallowing/choking – poor nutrition; muscle mass loss. The physician indicated the Appellant requires nutritional items to alleviate these symptoms to prevent imminent danger to life and specified Boost, multivitamins and high protein diet of meat and eggs to alleviate the specific symptoms. With respect to bottled water, the physician indicated the Appellant's risks associated with immune suppression would be mitigated by bottled water and would prevent imminent danger to life, adding the note "well water with significant contamination". Regarding vitamin or mineral supplementation the physician noted the Appellant requires these to alleviate the symptoms and prevent imminent danger to life, specifically poor nutrition, anemia, better absorption of iron with vitamin C.
2. A prescription form, dated December 1, 2009, was completed by the same physician who completed the application above. The physician wrote that the Appellant has dysphagia, difficulty swallowing.
3. The Appellant's January 6, 2010 request for reconsideration of the Ministry's denial was supported by a written submission which had a summary of the evidence before the Ministry and arguments articulating why the Appellant qualifies for the requested monthly nutritional supplements.

At the hearing the Appellant provided a number of documents as well as oral testimony. The first document is a written submission reviewing the evidence before the Ministry, responding to each of the Ministry's determinations, and referring to portions of the Hudson case and applicable regulations. The Panel finds that this document is in the form of a submission rather than evidence and admits it as written argument.

The Appellant also submitted parts of her March 21, 2007 application for designation as a Person With Disabilities: parts of her self-report, the physician's report and the assessor's report outlining her impairments and treatments. These reports indicate she has severe depression, severe migraines, panic and anxiety attack and hypothyroidism. She is on methadone for pain relief from the migraines. The Ministry acknowledged these documents are part of its records and accepted the information in them. The Panel finds that these are related to information about the Appellant's health conditions and treatments already in the record and admits these as being in support of evidence that was before the Ministry, pursuant to section 22(4) of the Employment and Assistance Act.

The Appellant also submitted a copy of an article about thyroid and weight from the American Thyroid Association, and a typed list of methadone reactions. The Panel finds that the contents of these are related to the Appellant's medical condition information that was before the Ministry. Therefore the Panel admits these documents as being in support of evidence that was before the Ministry pursuant

to Section 22(4) of the Employment and Assistance Act. However, the Panel finds that these are copies of secondary sources, with neither the authorship nor the validity of the information established. Therefore the Panel gives these documents little weight.

The Appellant told the Panel she has difficulty swallowing pills, and she wants to get better, to go back to work and be part of society. The Panel finds that this testimony is related to the Appellant's medical condition and therefore admits it as in support of evidence that was before the Ministry pursuant to Section 22(4) of the Employment and Assistance Act.

At the hearing the Ministry stood by its reconsideration decision.

PART F – REASONS FOR PANEL DECISION

(State the reasons for the panel decision)

The issue in this appeal is whether the Ministry reasonably concluded that the Appellant is ineligible for monthly supplements: for additional nutritional items that are part of a caloric supplementation to a regular dietary intake, and for bottled water. The criteria for eligibility for these types of monthly nutritional supplements are set out in the EAPWDR. A number of provisions in that regulation were amended effective April 1, 2010 and are not applied retroactively. The reconsideration decision that the Panel is reviewing was made on January 28, 2010. Therefore, the Panel finds that the regulation in effect before April 1, 2010 applies to the Appellant's case and the applicable provisions are as follows:

Section 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., if the minister is satisfied that all of the following conditions are met:
(c) the minister receives a completed request in the form specified by the minister in which a medical practitioner or nurse practitioner has confirmed that

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

(ii) as a direct result of the chronic, progressive deterioration of health, the person displays one or more of the following symptoms: (A) malnutrition; (B) underweight status; (C) significant weight change; (D) muscle mass loss; (E) bone density loss; (F) neurological degeneration; (G) significant deterioration of an organ; (H) moderate to severe immune suppression,

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

(iv) failure to obtain the items referred to in subparagraph (iii) will result in imminent danger to the person's life.

Section 7 in Schedule C of the EAPWDR: Monthly Nutritional Supplement states:

The amount of a nutritional supplement that may be provided under section 67 [*nutritional supplement*] 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, \$165 each month;

(b) for bottled water for a person suffering moderate to severe immune suppression, \$20 each month;

(c) for vitamins and minerals, \$40 each month.

The Ministry has put the criteria in Section 67(1) (c) in its application form for monthly nutritional supplements. That part of the form is to be completed by a medical practitioner or nurse practitioner. This same application form requires the practitioner to complete sections titled: nutritional items, bottled water, and vitamin or mineral supplementation - the 3 different types of nutritional supplements in Section 7 of Schedule C.

The Appellant's position is she is eligible for monthly nutritional supplements for additional nutritional

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items and for bottled water. She submitted that her physician confirmed that as a result of her chronic, progressive deterioration of health she displays two of the required symptoms, specifically malnutrition and muscle mass loss. Further the physician specified which nutritional supplements are required and the reasons those are required.

The Ministry's position is as set out in its reconsideration decision. In that decision the Ministry acknowledges that the Appellant is a Person with Disabilities in receipt of disability assistance; that the physician confirmed she is being treated for a chronic, progressive deterioration of health on account of severe medical condition. However, the Ministry was not satisfied that she requires nutritional items that are part of a caloric supplementation to a regular dietary intake to alleviate the symptoms of her chronic progressive deterioration of health and to prevent an imminent danger to her life. The Ministry determined that because the physician did not specify that the Appellant was underweight, the need for a caloric supplementation was not established. With respect to the request for bottled water the Ministry determined that the physician did not indicate that the Appellant is suffering from the symptom of moderate to severe immune suppression.

The Panel finds, after considering all the evidence and the applicable regulation, that the Ministry's denial for additional nutritional items, specifically Boost and multivitamins, was not reasonable. In the Ministry's designated form, which repeats the eligibility criteria in the regulation, the physician specifically noted the Appellant had two of the required symptoms that are a direct result of her chronic progressive deterioration of health: malnutrition and muscle mass loss. The physician further indicated the Appellant requires nutritional items to alleviate these symptoms and to prevent imminent danger to life – specifically Boost and multivitamin. The Panel finds that these specific nutritional items, identified by the physician to alleviate malnutrition and muscle mass, are part of a caloric supplementation to a regular dietary intake as required by the regulation. The Panel finds that the Ministry's interpretation of this part of Section 7 as being applicable only to persons who are underweight is not supported by the regulation. The Panel finds no such restriction in the regulation.

The Panel also finds that the Ministry's denial of a monthly supplement for bottled water was not reasonable. In the regulations in effect before April 1, 2010, bottled water was an eligible monthly nutritional supplement if the treating physician specifically indicated the Appellant's risks associated with immune suppression will be mitigated by bottled water and also specifically indicated that bottled water will prevent imminent danger to life. The physician checked "yes" for both of requirements on the designated form. Therefore, the Panel finds the physician's evidence clearly establishes the Appellant's eligibility for the bottled water supplement under the regulations in effect before April 1, 2010.

After considering all the evidence as a whole, all the submissions and the applicable regulation, the Panel finds that the Ministry's reconsideration decision was not a reasonable application of the legislation in these circumstances and was not reasonable based on the evidence before it. Therefore the Panel rescinds the decision.