

PART C – Decision under Appeal

The decision under appeal is the ministry's reconsideration decision dated October 28, 2011 which held that the appellant did not meet the legislative requirements to receive the nutritional supplement of Pediasure as set out in the Employment and Assistance Regulation, (EAR) sections 67, 74, 74.1 and 76 and Schedule C, sections 8 and 10. Specifically the ministry determined that it does not have the legislative authority to continue to supply the appellant with Pediasure as a short-term nutritional supplement, infant formula, a medical supply, or for a life threatening health need. However the ministry did find that the appellant may be eligible to receive a diet supplement in the amount of \$40.00 per month towards the purchase of Pediasure under section 73 EAR.

PART D – Relevant Legislation

Employment and Assistance Regulation, (EAR) sections 67, 73, 74, 74.1 and 76.
Schedule C, sections 8 and 10.

PART E – Summary of Facts

The ministry did not attend the hearing, and as the appellant is a minor, he was represented by his legal guardian, who was in attendance. After confirming that the ministry was duly notified, the hearing proceeded under section 86(b) of the Employment and Assistance Regulation.

Information before the ministry at the time of reconsideration

- Physician's note confirming appellant's diagnosis dated May 20, 2009.
- Ministry approval letter for 2 cans of Pediasure daily for one year dated July 31, 2009.
- Physician's prescription for 2 cans of Pediasure daily for one year dated July 5, 2010.
- Ministry approval letter for 2 cans of Pediasure daily for one year dated July 30, 2010.
- Physician's prescription for 2 cans of Pediasure daily for one year dated July 18, 2011.
- Ministry Short Term Nutritional Supplement Decision Summary dated September 26, 2011.
- Ministry Nutritional Supplement denial letter to the appellant dated September 26, 2011.
- Physician's letter dated October 4, 2011.
- Employment and Assistance Request for Reconsideration dated October 5, 2011.
- Letter from appellant's guardian part C of Request for Reconsideration Dated October 5, 2011.
- Undated document titled "PediaSure Complete", apparently retrieved from the World Wide Web on 2011-10-28.
- Undated document which defines Infant Formula.

In a Ministry letter to the appellant dated July 31, 2009 the appellant was approved to receive 2 container cans of Pediasure daily with an expiry date of July 31, 2010. On July 5, 2010 the physician prescribed continuation of 2 container cans of Pediasure daily which was approved by the ministry in a letter to the appellant dated July 30, 2010 with an expiry date of July 31, 2011.

The appellant's guardian states in her attached letter Part C of Request for Reconsideration dated October 5, 2011 that she contacted the ministry in the summer of 2011 and requested a continuation of the appellant's supply of Pediasure. She states that she did not hear back from the ministry for some time and when she contacted them she was told that it had already gone through for consideration and that the worker would forward the doctors prescription of July 18, 2011 marking it urgent.

On September 26, 2011 the Ministry denied the appellant's request for a continuation of his Nutritional Supplement. The ministry stated that the information provided did not establish that the appellant has an acute short-term need for caloric supplementation to a regular dietary intake to prevent weight loss while recovering from surgery, a severe injury, a serious disease, or side effects of medical treatment.

On October 5, 2011 the appellant's guardian completed a Request for Reconsideration on his behalf. In her attached letter of the same date, the guardian states that she is requesting a renewal for the appellant's Nutritional Supplement. "This is not a new request". She states that in July 2009 there was a detailed letter of the challenges that the appellant has and there was an approval for Pediasure for 2009. She states that as this is an ongoing issue she was told that she only needed the doctor's confirmation that the issues were ongoing and that the appellant needed 2 cans per day and was told she did not need a full letter restating his condition. The guardian also states that she has now received a full letter from the appellant's physician, stating his conditions and needs, for the ministry.

In the physician's letter of October 5, 2011 the physician states that the appellant was born with FAS, has a hyper-gag reflex, Encopresis, Attention Deficit Hyperactive Disorder (ADHD) and has suppressed appetite (due to side effects for medical treatment for ADHD that is necessary for him to function at school and at home.) The physician states that it is essential for the appellant to "continue" to receive the two cans of Pediasure per day as he is both under weight and overactive. On many days it is the only nutrition he is receiving. Without the Pediasure, it would place his health in jeopardy.

The ministry acknowledges that the appellant is a child in the home of a relative, receives income assistance (support) and is eligible to be considered for a nutritional supplement under EAR. The appellant's legal guardian made the request for reconsideration on his behalf.

The ministry also acknowledges that the appellant was approved for a supply of Pediasure July 2009 and July 2010, for a period of one year however, they also state that their approval letters do not reference the legislative authority under which the supplement was provided.

The appellant's guardian submitted a letter with her Notice of Appeal which provided new evidence which the ministry. The appellant writes in this letter that the ministry has referenced incorrect information. The evidence contained in this letter references information which the ministry relied upon when it determined that Pediasure was not an "Infant Formula". The ministry has directly quoted information it copied from the internet which describes a product called PediaSure Complete and has incorrectly stated that this is a description of Pediasure. The ministry stated that Pediasure, is a complete, balanced nutritional supplement formulated for picky eating children 1 to 10 years of age that contains 26 vitamins and minerals. While the appellant's guardian agrees with this statement she says in her letter submitted with the Notice of Appeal that the website also states "Pediasure is a formulated liquid diet to be used upon Health Care Professional recommendations for children who require specific nutrition for medical needs". She testified that the label on Pediasure cans indicates that it is a medical nutritional supplement for infants.

The guardian testified that the appellant has been getting Pediasure since the ministry stopped providing it at the end of July and said that she had ordered several cases of Pediasure in July which is enough to last for approximately 5 months. She said that Pediasure costs about \$70.00 per month and that given her limited income she is not in a position to cover it

The panel admitted both the appellant's guardian's oral and written testimony as new evidence under section 22(4) of the Employment and Assistance Act as it was found to be in support of the information and records before the ministry at the time of reconsideration.

The panel made the following findings of fact.

- The appellant is a child in the home of a relative, receives income assistance (support) and is eligible to be considered for a nutritional supplement under EAR.
- The appellant's guardian is acting on his behalf.
- The appellant is diagnosed as being born with FAS, has a hyper-gag reflex, Encopresis, Attention Deficit Hyperactive Disorder (ADHD) and has suppressed appetite (due to side effects from medical treatment for ADHD.)

- The appellant was approved for a supply of Pediasure by the ministry in July 2009 and July 2010, for a period of one year.
- The ministry's two Pediasure approval letters to the appellant do not reference the legislative authority under which the supplement was provided.

PART F – Reasons for Panel Decision

The issue in this appeal is whether the ministry reasonably determined that the appellant did not meet the legislative requirements to receive the nutritional supplement of Pediasure as set out in the Employment and Assistance Regulation, (EAR) sections 67, 74, 74.1 and 76 and Schedule C, sections 8 and 10. Specifically the ministry determined that it does not have the legislative authority to continue to supply the appellant with Pediasure as a short-term nutritional supplement, infant formula, a medical supply, or for a life threatening health need. However the ministry did find that the appellant may be eligible to receive a diet supplement in the amount of \$40.00 per month towards the purchase of Pediasure under section 73 of EAR.

In arriving at its decision the ministry relied upon the following legislation.

67 (1) Subject to subsection (1.1), 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 family unit if the health supplement is provided to or for a person in the family unit who (B.C. Reg. 89/2005) (B.C. Reg. 67/2010)

(a) is a recipient of income assistance under 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

(i) any person in the family unit is a person who has persistent multiple barriers to employment, and

(ii) the recipient does not receive a federal spouse's allowance or guaranteed income supplement benefits,

The ministry determined that the appellant is a child in the home of a relative, receives income assistance (support) and is eligible to be considered for a nutritional supplement under section 67 of EAR. Due to the nature of the appellant's request, the ministry decided to consider whether Pediasure could be authorized for the appellant as a short-term nutritional supplement, infant formula, a medical supply, dietary supplement or for a life threatening health need.

Eligibility for Pediasure as a Short-Term Nutritional Supplement
EAR section 74 sets out the legislative requirements as follows:

74 The minister may provide a nutritional supplement for a period of 3 calendar months for a recipient of income assistance or a dependent child of a recipient of income assistance if

(a) the recipient or dependent child is not receiving a supplement under section 2 (3) of Schedule C, and

(b) a medical practitioner or nurse practitioner confirms in writing that the recipient or dependent child has an acute short term need for caloric supplementation to a regular dietary intake to prevent critical weight loss while recovering from

(B.C. Reg. 317/2008)

(i) surgery,

(ii) a severe injury,

(iii) a serious disease, or

(iv) side effects of medical treatment.

The ministry's position is that the appellant is not eligible to receive Pediasure under EAR section 74 as his physician has not indicated that he has an acute short-term, need for caloric supplementation to a regular dietary intake

The appellant's guardian was in agreement with the ministry's finding stating that nobody had ever suggested that the appellant's need for Pediasure was short-term and she did not understand why the ministry had even considered this legislation.

The panel finds the ministry reasonably determined that the appellant did not meet the eligibility

requirements set out in EAR section 74.

Next the ministry considered the appellant's eligibility to receive Pediasure as a Medical Supply. EAR, Schedule C, section 2(1)(a) which states:

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 67 [*general health supplements*] of this regulation:

(a) medical or surgical supplies that are, at the minister's discretion, either disposable or reusable, if the minister is satisfied that all of the following requirements are met:

(i) the supplies are required for one of the following purposes:

- (A) wound care;
- (B) ongoing bowel care required due to loss of muscle function;
- (C) catheterization;
- (D) incontinence;
- (E) skin parasite care;
- (F) limb circulation care;

(ii) the supplies are

- (A) prescribed by a medical practitioner or nurse practitioner,
- (B) the least expensive supplies appropriate for the purpose, and
- (C) necessary to avoid an imminent and substantial danger to health;

(iii) there are no resources available to the family unit to pay the cost of or obtain the supplies.

(1.1) For the purposes of subsection (1) (a), medical and surgical supplies do not include nutritional supplements, food, vitamins, minerals or prescription medications.

The ministry's position is that EAR Schedule C section 2(1.1) states that medical and surgical supplies do not include nutritional supplements and that information has not been provided indicating that the item requested is a disposable or reusable medical or surgical supply required for one of the purposes set out in EAR Schedule C section 2(1)(a)(i). As a result the ministry determined that the appellant's request does not meet the eligibility requirements set out in EAR, Schedule C, subsections 2(1)(a)(i) and 2(1.1).

The appellant's guardian was in agreement with the ministry's finding once again stating that she had never suggested that Pediasure was a medical supply.

The panel finds the ministry reasonably determined that the appellant did not meet the eligibility requirements set out in EAR, Schedule C, subsections 2(1)(a)(i) and 2(1.1).

The ministry next considered the appellant's eligibility to receive Pediasure as a Life-Threatening Health Need. EAR, Schedule C, section 76 states:

76 The minister may provide to a family unit any health supplement set out in sections 2 (1) (a) and (f) [*general health supplements*] and 3 [*medical equipment and devices*] of Schedule C, if the health supplement is provided to or for a person in the family unit who is otherwise not eligible for the health supplement under this regulation, and if the minister is satisfied that

(a) the person faces a direct and imminent life threatening need and there are no resources available to the person's family unit with which to meet that need,

(b) the health supplement is necessary to meet that need,

(c) the person's family unit is receiving premium assistance under the *Medicare Protection Act*, and

(d) the requirements specified in the following provisions of Schedule C, as applicable, are met:

(i) paragraph (a) or (f) of section (2) (1);

(ii) sections 3 to 3.11, other than paragraph (a) of section 3 (1).

The ministry's position is that in the appellant's physician's letter of October 4, 2011 he states that without Pediasure the appellant's health would be placed in jeopardy. However, short-term nutritional supplements, infant formula, and diet supplements are not set out in Schedule C, section 2(1)(a){medical supplies} and (f){medical transportation} and 3{medical equipment and devices}. In addition, it has been established that nutritional supplements such as Pediasure can not be provided as a medical supply under EAR, Schedule C, subsection 2(1)(a). For these reasons the ministry argued that the appellant did not meet the eligibility requirements to receive an ongoing supply of Pediasure to meet a life-threatening health need.

The appellant's position as stated in the letter attached to the Notice of Appeal is that the ministry has stated that the short-term medical supplements are not set out in Schedule C and states once again that the appellant was not requesting a short-term supplement. Secondly the guardian states she fails to understand how a life-threatening need would be ignored or refused even with the doctor's letter stating the jeopardy because the ministry does not know how it would fit. Finally the guardian argued this entire issue has been created because the ministry does not know what legislative authority the appellant's supply of Pediasure was covered under for the past two years.

The panel finds the ministry reasonably determined that the appellant does not meet the legislative requirements set out in EAR, section 76 as Pediasure is not a health supplement or medical equipment or device set out in section 2 or 3 of Schedule C.

Next the ministry considered the appellants eligibility for Pediasure as a Dietary Supplement. The EAR section 73 states that:

73 (1) The minister may pay for a diet supplement in accordance with section 8 of Schedule C for a recipient of income assistance under 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

(B.C. Reg. 48/2010)

(a) a special diet for a specific medical condition described in section 8 of Schedule C, or

(b) a special diet described in section 8 of Schedule C.

(B.C. Reg. 64/2010)

(2) A person is not eligible for a supplement under subsection (1) unless the need for the special diet is confirmed in writing by

(a) a medical practitioner,

(a.1) a nurse practitioner, or (B.C. Reg. 317/2008)

(b) A registrant of the College of Dietitians of British Columbia established under the *Health Professions Act*. (B.C. Reg. 202/2006)

Schedule C, section 8 (1) of EAR sets out the amount of a dietary supplement that may be provided under section 73

8 (1) The amount of a diet supplement that may be provided under section 73 [diet supplement] of this regulation is as follows:

(f) \$40 for each calendar month for a person who has dysphagia;

The ministry's position is that as the appellant's physician has stated in his letter of October 4, 2011 that the appellant has hyper-gag reflex which is a form of dysphagia the appellant may be eligible to receive a monthly dietary supplement of \$40.00 to assist with the purchase of Pediasure.

The appellant's guardian is aware of this however she argues that the cost of Pediasure is around

\$70.00 per month leaving her with a \$30.00 shortfall and that, in any event, constitutes an infant formula under s. 10, Schedule C of the EAR.

The panel finds that as no application for a dietary supplement has been made by the appellant, the ministry has simply offered an opinion as to the appellant's potential eligibility for a dietary supplement as set out in EAR section 73 and Schedule C, section 8 (1)(f), and therefore makes no finding.

The ministry then considered the appellant's eligibility for Pediasure as Infant Formula. EAR, Schedule C, section 10 states:

10 The minister may provide infant formula under section 74.1 of this regulation if

(a) a medical practitioner or nurse practitioner confirms in writing that (B.C. Reg. 317/2008)

(i) the dependent child for whom a specialized infant formula is to be provided has a medical condition and the specialized infant formula is necessary to treat the medical condition, or

(ii) the dependent child for whom the infant formula is to be provided is at risk of contracting a disease that is transmissible through the mother's breast milk,

(b) in the case of a child described by paragraph (a) (ii), the child is under 12 months of age, and

(c) the minister is satisfied that the infant formula is medically required to treat the medical condition or respond to the risk referred to in paragraph (a). (B.C.

74.1 (1) Subject to subsection (2), the minister may provide the type of health supplement referred to in section 10 of Schedule C, in accordance with that section, to or for

(a) a dependent child of a recipient of income assistance under section 4 of the Act,

(b) a dependent child of a recipient of hardship assistance under section 5 of the Act, or

(c) a dependent child of a person referred to in section 67 (1) (f) of this regulation,

(c.1) a dependent child of a person referred to in section 67 (1) (g) of this regulation,

(c.2) a dependent child of a person referred to in section 67 (1) (h) of this regulation,

(i) the person referred to in section 67 (1) (h), or his or her spouse, is under age 65 and the family unit is receiving premium assistance under the *Medicare Protection Act*, or

(ii) the person referred to in section 67 (1) (h), or his or her spouse, is aged 65 or more and any person in the family unit is receiving the federal spouse's allowance or guaranteed income supplement...

The ministry's position is that Pediasure is described as a complete, balanced and nutritional supplement formulated for picky eating children 1 -10 years of age that contains 26 Vitamins and Minerals. The ministry finds that Pediasure is not a specialized infant formula. The ministry states that infant formula is considered to be a substitute for breast milk for feeding infants. Examples of specialized infant formula include special formulas for low birth weight infants, low sodium formulas for infants that need to restrict salt intake, "predigested" formulas for infants that cannot tolerate or

are allergic to the whole proteins in cow milk or milk-based formulas and special formulas for PKU (phenylketonuria). Therefore because the ministry does not consider Pediasure to be an infant formula they found that the appellant does not meet the eligibility requirements set out in EAR, Schedule C, subsection 10(a).

The appellant's position is that a medical practitioner has confirmed in writing that the appellant has a medical condition and that the specialized infant formula Pediasure is necessary to treat the medical condition.

She argues that, "Pediasure is sent out (By the ministries) and used by children, on a constant and ongoing basis. The Product distribution Center for the Ministries, sends it out all the time. If Pediasure was not an accepted supplement, it wouldn't have been sent out in the first place, and the Pediatricians and doctors would not have prescribed it".

Furthermore, it is the appellant's guardian's position that the ministry relied on incorrect information when it determined that Pediasure was not an "Infant Formula". The ministry has directly quoted information it copied from the internet which describes a product called "PediaSure Complete", and has incorrectly stated that this is a description of Pediasure. She argues "Pediasure is a formulated liquid diet to be used upon Health Care Professional recommendations for children who require specific nutrition for medical needs and that meets the criteria for "Infant Formula". The appellant's guardian therefore disputes the ministry's position and contends that the appellant does meet the eligibility requirements set out in ERA Schedule C, subsection 10(a).

The panel finds that the appellant's physician, a medical practitioner, states that the appellant has a medical condition and that it is essential for the appellant to "continue" to receive the two cans of Pediasure per day as he is both under weight and overactive. On many days it is the only nutrition he is receiving. Without the Pediasure, it would place his health in jeopardy.

The panel further finds that the appellant's guardian raised her concerns in her letter attached to her Notice of Appeal regarding the ministry's incorrect use of the promotional material they copied from the internet, a copy of which they included in the appeal file, describing PediaSure Complete, which they then ascribed to Pediasure. The panel also finds that Pediasure is a different product than PediaSure Complete and Pediasure is considered to be an infant formula, as shown in the guardian's evidence. Thus, the panel finds the ministry's determination that Pediasure was not an infant formula and that this infant formula was not medically required to treat the appellant's medical condition is unreasonable in the circumstances of the appellant. In the absence of any information to the contrary the panel finds the information provided by the ministry used to determine that the appellant did not meet the requirements set out in EAR, Schedule C, subsection 10(a) was not reasonably supported by the evidence.

Finally, the panel finds the ministry's decision was not reasonably supported by the evidence and rescinds the decision. Therefore, the ministry's decision is overturned in favour of the appellant.