

STATE OF NEW YORK
DEPARTMENT OF LABOR

REQUEST November 25, 2003
CASE #
CENTER # 39
FH # 4019991P

In the Matter of the Appeal of

A F

:
DECISION
: AFTER
FAIR
HEARING

from a determination by the New York City
Department of Social Services

JURISDICTION

Pursuant to Section 22 of the New York State Social Services Law (hereinafter Social Services Law) and Part 358 of Title 18 NYCRR, (hereinafter Regulations), a fair hearing was held on September 21, 2004, in New York City, before Glenn E. Harris, Administrative Law Judge. The following persons appeared at the hearing:

For the Appellant

Barbara Small, Appellant's Representative

For the Social Services Agency

Margaret Persans, Fair Hearing Representative

ISSUE

Was the Agency's determination that the Appellant was able to participate in work activities on a limited basis correct?

Has the Agency acted correctly with respect to its determination to reduce the Appellant's Public Assistance and Food Stamp benefits?

FACT FINDING

An opportunity to be heard having been afforded to all interested parties and evidence having been taken and due deliberation having been had, it is hereby found that:

1. The Appellant has been in receipt of Public Assistance and Food Stamp benefits.

FR# 4019991P

2. The Appellant requested an exemption from employment program activities on the grounds that she suffered from a combination of medical impairments which would prevent her from engaging in employment program activities.

3. The Agency referred the Appellant for a medical examination to determine whether a physical or mental impairment would prevent the Appellant from fully engaging in work activities.

4. On May 22, 2004, the Agency notified the Appellant of its determination that the Appellant was not disabled but only work limited and able to participate in work activities with limitations.

5. On July 30, 2004, the Agency sent a Notice of Intent to the Appellant setting forth its intention to reduce Appellant's Public Assistance and Food Stamp benefits because Appellant failed to report to an employment program assessment appointment.

6. On November 25, 2003, the Appellant requested a hearing to review the Agency's determination.

7. On May 5, 2004, which was more than five business days before the hearing, the Appellant requested that the Agency provide copies of documents which it intended to present at the fair hearing in support of its determination but the Agency did not provide such documents to the Appellant.

8. The Appellant also requested this hearing to contest the Agency's determination to reduce her benefits to recove an overpayment of assistance, as stated in the July 30, 2003 notice. However, the Appellant withdrew her request for a hearing on this issue.

APPLICABLE LAW

Section 131.5 of the Social Services Law provides that no Public Assistance shall be given to an applicant for or recipient of Public Assistance who has failed to comply with the requirements of the Social Services Law, or has refused to accept employment in which he or she is able to engage.

Section 332-b of the Social Services Law and 12 NYCRR 1300.2(d) provide that upon application and recertification for Public Assistance benefits, or whenever a district has reason to believe that a physical or mental impairment may prevent the individual from fully engaging in work activities, the district must determine whether the individual has any medical condition which would limit the individual's ability to participate in work activities. Should the individual declare that he has a mental or physical impairment, the social services official shall:

FHS 4019991P

- 1) notify the individual verbally or in writing that the individual within 10 days may provide any relevant medical documentation, including but not limited to drug prescriptions and reports of the individual's treating health care practitioner (individual's practitioner). Such documentation must contain a specific diagnosis as evidenced by medically appropriate tests or evaluations and must specify any work related limitations; and/or
- 2) refer the individual to a health care practitioner (district's practitioner) certified by the New York State Office of Disability Determinations for a determination of the individual's medical condition. If the social services official refers an individual to the district's practitioner prior to the individual submitting documentation from the individual's practitioner, the individual should make best efforts to bring the documentation to the examination by the district's practitioner. Any documentation available from the individual's practitioner must be submitted to the district's practitioner no later than four days after the examination, provided that in no instance shall such time period exceed ten calendar days from the notification set forth in (1) above, or the district's practitioner will not be required to consider it as a part of the evidence used to determine the individual's medical condition.

The social services official shall have sole discretion in determining whether any documentation provided by the individual or the individual's practitioner is sufficient to make such a determination on an individual's claim of a physical or mental impairment.

In evaluating the initial claim of a mental or physical impairment made by an applicant, or the continuing claim of a medical impairment made by a recipient who has been previously determined exempt from participation in work activities, the social services official may require the individual to cooperate with measures to verify such claim and/or submit documentation as a condition of eligibility for public assistance and food stamps. Failure of such documentation to substantiate the claimed impairment shall not itself cause the individual to be ineligible for Public Assistance.

In evaluating the ongoing claim of a mental or physical impairment made by an individual who has been determined by the social services official not to be exempt, the social services official may require the individual to provide additional documentation from the individual's practitioner. Such individual remains non-exempt until and unless a different determination is made by the social services official.

In the absence of any claim of mental or physical impairment on the part of the individual, if the social services official suspects that such individual has a mental or physical impairment, the social services official shall:

FB# 4019991P

- (i) refer the individual to the district's health care practitioner for an examination and determination of his or her medical condition.
- (ii) notify the individual of an opportunity to present any medical documentation available from the individual's practitioner at the time of the examination, or in any event no later than four days from the date of that examination if the individual wishes such documentation to be considered by the district's practitioner in the determination of the individual's medical condition.

At the time that the social services official or the district's practitioner makes a determination of an individual's medical condition, the social services official shall notify the applicant or recipient in writing of such determination and of the right to request a fair hearing to contest such determinations within ten days of such notification.

If the individual requests a fair hearing within the ten day period, the social services official shall not assign the individual to work activities pending the fair hearing determination, except that the social services official may, during the pendency of a determination assign an individual, with the agreement of such individual, to a limited work assignment which would be consistent with any limitations associated with the mental or physical impairments alleged by the individual.

An individual shall not have the right to a fair hearing to contest such determination if he or she requests a fair hearing after the ten day period.

If the social services official refers an applicant or recipient to the district's practitioner for an examination as a result of a mental or physical impairment claim by the applicant or recipient the examiner shall:

- (i) review and consider all records or information timely provided by the individual or his or her treating health care practitioner that are pertinent to the claimed medical condition;
- (ii) provide to the social services official in writing a specific diagnosis as evidenced by medically appropriate tests or evaluations in determination of the individual's claimed condition;
- (iii) indicate to the social services official and the individual in writing, a medical opinion which specifies whether the medical condition alleged by the individual is present or absent; the social services official shall be responsible for ensuring that the applicant or recipient does receive such written medical opinion;
- (iv) report to the social services official the presence of any condition other than that which was alleged by the individual,

FH# 4019991P

but which was discovered in the course of the examination, which may interfere with the individual's ability to fully engage in work activities;

- (v) determine whether the individual is:
 - (a) disabled and exempt from participation from work activities. Such determination shall specify the duration of time for which the disability shall prevent the social services official from making an assignment to work activities;
 - (b) work limited, having specific identified limitations affecting the type of work activity to which the individual may be assigned; provided, however, that such determination shall specify the duration of time for which such work limitations shall apply to such individual;
 - (c) neither disabled nor work limited.

The social services official shall not assign to work activities any individual for whom a medical determination is pending, either as the result of a request by an applicant or recipient or direction of the social services official, until such a determination is rendered unless the individual agrees to a limited work assignment consistent with the individual's alleged medical condition.

An individual who is eligible to receive comprehensive health services through a special needs plan set forth in paragraph 364-j(1)(m) or (n) of the Social Services Law regardless of whether such a plan is operating in the social services district in which the individual resides, shall be considered to be either disabled or work limited, as determined by the social services official.

Section 335-b of the Social Services Law and 12 NYCRR 1300.2(d) provide that individuals in receipt of Public Assistance and who are work limited shall be assigned to work activities only if such assignment:

- (a) is consistent with the individual's treatment plan when such plan is prescribed by the individual and/or district's practitioner;
- (b) Where no treatment plan exists, is consistent with the individual's mental and physical limitations; and
- (c) is determined to be appropriate by the social services official who is satisfied that such individual is able to perform the work assigned and that such assignment will assist the individual's transition to self-sufficiency.

PH# 4019991P

Regulations at 12 NYCRR 1300.2(e) provide that an individual exempted from participation in work activities due to disability who the social services official determines has the potential to be restored to self-sufficiency through rehabilitation, may be required to:

- o provide information from the individual's practitioner or submit to an examination by the district's practitioner to determine whether the individual can recover from the mental or physical impairment.
- o accept medical care to assist in recovery from the mental or physical impairment and in restoring self-sufficiency;
- o accept referral to and enrollment in a program of vocational rehabilitation, training and other essential rehabilitation designed to restore an individual to self-sufficiency.

Section 131.5 of the Social Services Law provides that no Public Assistance shall be given to an applicant for or recipient of Public Assistance who has failed to comply with the requirements of the Social Services Law, or has refused to accept employment in which he or she is able to engage.

Section 332-b of the Social Services Law and 12 NYCRR 1300.2(d) provide that upon application and recertification for Public Assistance benefits, or whenever a district has reason to believe that a physical or mental impairment may prevent the individual from fully engaging in work activities, the district must determine whether the individual has any medical condition which would limit the individual's ability to participate in work activities. If an applicant or recipient declares that he or she has a mental or physical impairment, the individual must be given the opportunity to present medical documentation of any work limitation, or the district may refer the individual to the district's medical practitioner for a determination of the individual's medical condition. In evaluating an individual's claim of a physical or mental impairment, the district shall have sole discretion in determining whether documentation provided by the individual or by the individual's practitioner is sufficient evidence of the claimed impairment.

Section 332-b of the Social Services Law and 12 NYCRR 1300.2(d) further provide that, after the determination of an individual's medical condition has been made, the Agency must notify the applicant or recipient in writing of such determination and of the right to request a fair hearing to contest such determination within ten days of such notification. An individual shall not have the right to a fair hearing to contest such determination if he or she requests a fair hearing after the ten day period.

Regulations at 18 NYCRR 358-3.7(b), which summarize an Appellant's rights regarding examination of a case record before the hearing, provide as follows:

PH# 4019991P

- (1) Upon request, you have a right to be provided at a reasonable time before the date of the hearing, at no charge, with copies of all documents which the social services agency will present at the fair hearing in support of its determination. If the request for copies of documents which the social services agency will present at the hearing is made less than five business days before the hearing, the social services agency must provide you with such copies no later than at the time of the hearing. If you or your representative request that such documents be mailed, such documents must be mailed within a reasonable time from the date of the request; provided however, if there is insufficient time for such documents to be mailed and received before the scheduled date of the hearing such documents may be presented at the hearing instead of being mailed;
- (2) Upon request, you have the right to be provided at a reasonable time before the date of the hearing, at no charge, with copies of any additional documents which you identify and request for purposes of preparing for your fair hearing. If the request for copies of documents is made less than five business days before the hearing, the social services agency must provide you with such copies no later than at the time of the hearing. If you or your representative request that such documents be mailed, such documents must be mailed within a reasonable time from the date of the request; provided however, if there is insufficient time for such documents to be mailed and received before the scheduled date of the hearing such documents may be presented at the hearing instead of being mailed;
- (3) Your request for copies of documents pursuant to paragraphs (1) and (2) of this subdivision may at your option be made in writing, or orally, including by telephone;
- (4) If the social services agency fails to comply with the requirements of this subdivision the hearing officer may adjourn the case, allow a brief recess for the appellant to review the documents, preclude the introduction of the documents where a delay would be prejudicial to the appellant, or take other appropriate action to ensure that the appellant is not harmed by the agency's failure to comply with these requirements.

Pursuant to the judgment entered in the case of Riviera v. Bane on December 22, 1995, the New York City Human Resources Administration (HRA) is required to "provide within three business days, at no charge and by first class mail, to all public assistance fair hearing appellants or their authorized representatives, upon request, either by telephone or in writing, a copy of the evidence package and copies of any other specifically identified documents from the appellant's case record that are requested to prepare for the fair hearing. If any such request for evidence packages or specifically identified documents is made less than five business days before the scheduled State administrative fair hearing, [HRA must] provide

FR# 4019991P

fair hearing appellants or their authorized representatives with such documents within three business days of the request or at the time of the scheduled hearing." The judgment requires that HRA withdraw its notice "whenever it fails to provide any individual or his or her representative, upon request and at no charge, with copies of documents that the HRA will present into evidence at the fair hearing, and any other specifically identified documents from an individual's case record within three business days of the request when the request is made more than five days before the fair hearing."

Section 22 of the Social Services Law provides that applicants for and recipients of Public Assistance, Emergency Assistance to Needy Families with Children, Emergency Assistance for Aged, Blind and Disabled Persons, Veteran Assistance, Medical Assistance and for any services authorized or required to be made available in the geographic area where the person resides must request a fair hearing within sixty days after the date of the action or failure to act complained of. In addition, any person aggrieved by the decision of a social services official to remove a child from an institution or family home may request a hearing within sixty days. Persons may request a fair hearing on any action of the social services district relating to food stamp benefits or the loss of food stamp benefits which occurred in the ninety days preceding the request for a hearing. Such action may include a denial of a request for restoration of any benefits lost more than ninety days but less than one year prior to the request. In addition, at any time within the period for which a person is certified to receive food stamp benefits, such person may request a fair hearing to dispute the current level of benefits.

DISCUSSION

The evidence of record establishes that the Appellant has been in receipt of Public Assistance and Food Stamp benefits. The Appellant requested an exemption from employment program activities on the grounds that she suffered from a combination of medical impairments which would prevent her from engaging in employment program activities. These illnesses included high blood pressure, a heart condition, asthma and arthritis in her lower spine.

The Agency referred the Appellant to HS Systems for a medical evaluation. The Agency determined, based upon the HS Systems evaluation, that the Appellant was able to work on a limited basis, and notified the Appellant of this determination on May 22, 2003.

The Agency contended that the Commissioner was without jurisdiction to review the May 22, 2003 determination because the Appellant failed to request a hearing within ten days of its determination. The Agency failed to present its May 22, 2003 notice, and was unable to establish that the Appellant had been properly notified of the statute of limitations. Therefore, the statute of limitations is deemed tolled, and the hearing request on this issue is found to be timely.

FH# 4019991P

In support of her position, the Appellant submitted a medical report form from her treating physician, which stated the physical limitations that the Appellant was found to have.

The Agency presented records from the HS Systems evaluation performed in May 2003. The report contains a medical report signed by Viviane Etienne, M.D. Dr. Etienne found that the Appellant had only mild limitations and was capable of "sedentary to light" work. The report does not state the specific limitations that the Appellant was found to have. The HS Systems report contains a "review team recommendation" which specifies limits the Appellant was found to have. However, this list was vague.

There is also evidence in the record that Dr. Etienne did not properly evaluate the Appellant's medical condition.

The lab report concerning the Appellant's blood chemistry indicates that the Appellant suffers from high cholesterol. The lab report is dated May 19, 2003. Dr. Etienne's report makes no mention of the Appellant's high cholesterol. In fact, Dr. Etienne's report is dated May 18, 2003, and therefore, she could not have possibly considered the results of the blood tests.

An electrocardiogram(EKG) report in the file indicates that the Appellant suffers from "irregular ectopic atrial tachycardia" as well as other irregularities, and is "abnormal." Dr. Etienne opined that the Appellant's heartbeat was normal. There is nothing in the record to establish that the EKG findings were considered and not simply ignored.

Accordingly, the Agency's determination that the Appellant was employable on a limited basis cannot be sustained. The Agency must reevaluate the Appellant's condition and make a proper analysis of her condition, including a review of all tests performed by HS Systems.

The evidence establishes that the Agency sent a Notice of Intent to the Appellant dated July 30, 2004, advising the Appellant that it had determined to reduce the Appellant's Public Assistance and Food Stamp benefits because Appellant failed to report to an employment program assessment appointment. The Appellant requested a hearing to review the Agency's determination on November 25, 2003.

The Agency contended that the Commissioner was without jurisdiction to review the July 30, 2003 determination because the Appellant failed to request a hearing within ninety days of its determination. The Agency submitted affidavits of mailing in support of its position. One affidavit, signed by Meyer Elbaz, does not concern mailing of Notices of Intent. The other affidavit, signed by Monica Johnson, is dated June 3, 2003, prior to the date of the notice at issue in this hearing. These do not establish that the notice was mailed in the ordinary course of business. The Appellant contended she did not receive the notice of intent. Therefore, the statute of limitations is tolled.

FR# 4019991P

On May 5, 2004, which was more than five days prior to the scheduled date of this fair hearing, the Appellant requested, in accordance with the above provisions of Section 358-3.7(b), that the Agency provide copies of documents which it intended to present at the fair hearing in support of its determination. The Agency did not provide such documents to the Appellant.

At the hearing, the Agency did not withdraw its July 30, 2004 Notice of Intent to reduce Appellant's Public Assistance and Food Stamp benefits as required by the judgment in the case of Rivera v. Bane. Accordingly, the question of the correctness of the Agency determination to reduce Appellant's Public Assistance and Food Stamp benefits cannot be reached in this case.

DECISION AND ORDER

The Agency's determination that the Appellant was able to participate in work activities on a limited basis was not correct and is reversed.

1. The Agency is directed to reevaluate the Appellant's request for a medical exemption.

2. The Agency is directed to give the Appellant an opportunity to present additional medical documentation to verify his disabling condition(s), and, if necessary, to refer her to their health care practitioner for an examination.

3. The Agency is directed to exempt the Appellant from work activities until the evaluation of her request for a medical exemption is completed.

4. The Agency is directed to issue its determination in writing to the Appellant.

The question of the correctness of the Agency's determination to reduce Appellant's Public Assistance and Food Stamp benefits, by notice dated July 30, 2004 cannot be reached in this case.

1. The Agency is directed to withdraw its Notice of Intent dated July 30, 2004 with respect to Appellant's Public Assistance and Food Stamp benefits.

2. The Agency is directed to continue to provide Public Assistance and Food Stamp benefits to the Appellant.

3. The Agency is directed to restore Appellant's Public Assistance and Food Stamp benefits retroactive to the date of the Agency action.

Should the Agency in the future determine to implement its previous action, it is directed to issue a new Notice of Intent and, in the event that the Appellant requests a fair hearing to review such determination, to comply with the requirements contained in 18 NYCRR 358-3.7(b) concerning the timely provision of documents.

FR# 4019991P

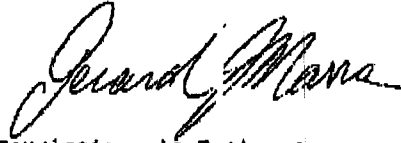
Should the Agency need additional information from the Appellant in order to comply with the above directives, it is directed to notify the Appellant promptly in writing as to what documentation is needed. If such information is required, the Appellant must provide it to the Agency promptly to facilitate such compliance.

As required by 18 NYCRR 358-6.4, the Agency must comply immediately with the directives set forth above.

DATED: Albany, New York
October 1, 2004

NEW YORK STATE DEPARTMENT
OF LABOR

By



Commissioner's Designee