

STATE OF NEW YORK  
OFFICE OF TEMPORARY AND DISABILITY ASSISTANCE

REQUEST: September 27, 2010

AGENCY: New York City  
FH #: 5620231Z

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In the Matter of the Appeal of  
[REDACTED]

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

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**DECISION  
AFTER  
FAIR  
HEARING**

**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 November 5, 2010, in New York City, before an Administrative Law Judge. The following persons appeared at the hearing:

For the Appellant

[REDACTED]

For the Social Services Agency

B. Nibot, Fair Hearing Representative; Antoinette Jennings, Vocational Counselor

**ISSUE**

Was the Appellant's request for a hearing concerning the Agency's determination that the Appellant was not disabled and was able to comply with employment requirements on a limited basis timely?

Assuming the request was timely, was the Agency's determination that the Appellant was not disabled and was able to comply with employment requirements on a limited basis correct?

**FINDINGS OF FACT**

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:

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1. The Appellant is in receipt of Family Assistance for herself and one child.
2. The Appellant advised the Agency of health-related conditions which the Appellant claimed limited the Appellant's ability to participate in the employment-related activities required by the Agency in order to receive assistance.
3. The Appellant claimed that she suffers for hypertension and depression which would prevent her from fully engaging in work activities.
4. By notice dated July 7, 2010, the health care practitioner found that the Appellant was not disabled but only work limited and able to participate in work activities with limitations on climbing, lifting, pulling, pushing and contact with other people.
5. The Agency's notice of July 7, 2010 was given to the Appellant, who acknowledged receipt thereof by her signature. This notice advised the Appellant that a request for a fair hearing concerning this determination must be made within ten days of the Agency's determination.
6. The Appellant was unable to request the hearing within the statutory period because she was ill, and was admitted to the hospital on two occasions for treatment and observation.
7. The Appellant had good cause for failing to timely request the fair hearing.
8. The Appellant's current medical condition and treatment are substantially different from the time of the Agency's determination.
9. On September 27, 2010, the Appellant requested this fair hearing.

### **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 18 NYCRR 385.2(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

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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 18 NYCRR 385.2(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.

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 18 NYCRR 385.2(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:

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.

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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:

- (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:

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- (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, 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.

Pursuant to the provisions of Administrative Directive 06 ADM-06, dated May 16, 2006, if a district finds that a TA applicant or recipient reasonably appears to be eligible for SSI, the district must require the applicant or recipient to apply for SSI benefits, follow through on the application for such benefits and accept such benefits, if eligible. Individuals whose application for SSI benefits are denied, but are still unable to participate in work activities including employment because of a medical condition that reasonably appears to qualify the individual for SSI must be required to file an appeal to maintain his/her eligibility for public assistance benefits. Individuals who are required by the district to pursue SSI benefits as a condition of

eligibility are exempt from participation in work requirements and cannot be assigned to work activities until the district determines, based on the documentation available, that the individual is no longer exempt from work requirements and is not required to pursue SSI benefits as a condition of eligibility for public assistance. Individuals who are required by the district to appeal a denial of SSI benefits continue to be exempt from participation in work requirements while the appeal is pending a decision unless additional medical information is received which indicates that the individual is no longer exempt from work requirements and the district determines that the individual is no longer required to pursue SSI benefits as a condition of eligibility for public assistance.

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 18 NYCRR 385.2(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.

Regulations at 18 NYCRR 385.2(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:

- 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.
- accept medical care to assist in recovery from the mental or physical impairment and in restoring self-sufficiency;
- accept referral to and enrollment in a program of vocational rehabilitation, training and other essential rehabilitation designed to restore an individual to self-sufficiency.

**DISCUSSION**

By notice dated July 7, 2010, the Agency informed the Appellant that the Appellant had been found to be non-exempt from employment requirements and able to participate with limitations and was therefore required to participate in the Agency's employment-related programs in order to receive assistance.

The Agency's notice of July 7, 2010 was given to the Appellant, who acknowledged receipt thereof by her signature. This notice advised the Appellant that a request for a fair hearing concerning this determination must be made within ten days of the Agency's determination.

This notice advised the Appellant that a request for a fair hearing concerning this determination must be made within ten days of the Agency's determination. However, the Appellant requested the present hearing to review such determination on September 27, 2010, which was more than ten days after the Agency's determination.

The Appellant testified that she was ill at the time she received the notice, and was admitted to the hospital on three separate occasions for hypertension, with attendant cardiac problems. She presented documentation of admissions to Bronx Lebanon Hospital on July 16, 2010, August 24, 2010 and October 6, 2010. The Appellant also stated that she has been suffering from depression and suicidal ideation, and is currently in treatment for them.

On the basis of her credible testimony and documentation, the Appellant has established a sufficient basis for tolling the statute of limitations. Accordingly, the Commissioner retains jurisdiction to review the Agency's determination that the Appellant is employable, with limitations.

The Agency presented documentation of the medical evaluation of the treatment team. Although the record contained the results of the Agency's medical examinations, there was no record of her treatment by her regular physicians.

The Appellant presented documentation of her current treatment by physicians at Bronx Lebanon Hospital. She presented a letter from a physician, dated October 6, 2010, which stated that a cardiac catheterization would be performed on October 15<sup>th</sup>. The Appellant testified that the procedure was performed, and that she is receiving follow-up treatment on an out-patient basis.

On the basis of the Appellant's testimony and documentation of her three subsequent hospitalizations, the Agency's most recent determination of her capacity for employment is seriously inadequate. It is clear that her condition has changed since the time of the Agency's determination on July 7, 2010. Accordingly, the Agency's determination that the Appellant is employable with limitations is not correct.

**DECISION AND ORDER**

The Agency's determination that the Appellant was not disabled but only work limited and able to participate in work activities with limitations was not correct and is reversed.

1. The Agency is directed to immediately reevaluate the Appellant's work-exempt status in accordance with the provisions of 18 NYCRR 385.2, taking into account her current treatment by her regular physicians for hypertension and heart problems and depression.
2. In making its determination, the Agency shall obtain the most recent and complete record of her medical treatment and medication.
3. A notice of the Agency's determination shall be issued.
4. The Appellant shall remain exempt from all employment requirements until the new determination is made.

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 requested, 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  
02/15/2011

NEW YORK STATE OFFICE OF  
TEMPORARY AND DISABILITY ASSISTANCE

By



Commissioner's Designee