

STATE OF NEW YORK
OFFICE OF TEMPORARY AND DISABILITY ASSISTANCE

REQUEST: November 3, 2011

████████████████████
AGENCY: New York City
FH #: 5940601Y

In the Matter of the Appeal of
████████████████████ :
: **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 February 1, 2012, in New York City, before an Administrative Law Judge. The following persons appeared at the hearing:

For the Appellant

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For the Social Services Agency

Carol Barrios, Fair Hearing Representative (January 12, 2012)
Stephen Asante, Fair Hearing Representative (February 1, 2012)

ISSUE

Was the Agency's determination that the Appellant was not disabled and was required to engage in work activities 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:

1. The Appellant advised the Agency that she suffers from seizure disorder, which prevented her from engaging in work activities as a condition of receiving Public Assistance benefits.

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2. The Agency thereafter found that the Appellant was not totally disabled and was therefore required to engage in work activities on a limited basis in order to receive Public Assistance.

3. On November 3, 2011, 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. Should the individual declare that he has a mental or physical impairment, the social services official:

- 1) shall 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; or
- 2) may refer the individual to a health care practitioner (district's practitioner) certified by the New York State Office of Disability Determinations of the Office of Temporary and Disability Assistance, or if applicable, to the contracted agency or institution by or with which such health care practitioner is employed or affiliated 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.

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

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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.

The social services official shall have sole discretion in determining whether any documentation provided by the individual or the individual's practitioner is sufficient evidence of the claimed or declared impairment.

Pursuant to paragraph (5) of Section 385.2(d), 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 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;

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- (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.

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.

DISCUSSION

The Appellant failed to request this hearing within the ten days authorized by the Regulations. The Appellant's representative, argued, however, that the 10-day Statute of Limitations should be tolled because on the day that the NOWR was given to the Appellant, she was mentally impaired because she was unable to take her seizure medications because they make her too sleepy to travel. The Appellant testified that not taking her medications limited her ability to focus on the notice when it was given to her. And when she received it she put it away. When she got home, she forgot about the notice for many days. The Appellant is taking multiple medications, at least two of whose labels warn of side effects including memory impairment and mental and mood changes. Appellant also attended the fair hearing with letters from a neurologist stating that the Appellant's three medications "are causing marked drowsiness and has been hampering her daily activities." Because of the Appellant's significantly altered mental state on the date of her receipt of the NOWR and in the days that followed, there is a sufficient basis to toll the State of Limitations and the Appellant's fair hearing may be deemed to have been timely made.

The Agency failed to present evidence at the hearing to support its determination that the Appellant is work-limited. However, Appellant had requested a copy of the evidence packet and it included the biopsychosocial summary. The Appellant's representative argued that while the Appellant's major medical complaint is that she is unable to travel alone because of her seizure disorder, this situation is not addressed in the Agency's physician's review and recommendation. According to the Appellant she is unable to travel unaccompanied; that her mother always accompanies her outside of the home. As proof, the Appellant's representative pointed out that the Appellant's mother accompanied the Appellant to the medical evaluation as well as to both fair hearing sessions. Yet the only noted work limitation that the Appellant has, according to the Agency biosychosocial summary, is that "she should be limited bending and not engage in heights, driving, heavy machinery. In order to properly evaluate the Agency's determination, a medical opinion is needed as to the Appellant's claim of not being able to independently travel. The record does not include such an opinion. Therefore, the Agency's determination cannot be deemed proper.

DECISION AND ORDER

The determination of the Agency that the Appellant is work-limited and must therefore engage in work activities to be eligible for Public assistance is 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.
2. The Agency is directed to render a professional medical opinion about the Appellant's claimed inability to travel without a second party.
3. After such evaluation, the Agency is directed to provide the Appellant and her representative with written notification of its determination.

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4. The Agency is directed to exempt the Appellant from work activities until such time as the Agency determines that the Appellant is not work-exempt.

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
02/08/2012

NEW YORK STATE OFFICE OF
TEMPORARY AND DISABILITY ASSISTANCE

By

A handwritten signature in black ink, appearing to read 'M. P. ...', is written over a faint horizontal line.

Commissioner's Designee