

STATE OF VERMONT  
HUMAN SERVICES BOARD

In re ) Fair Hearing No. 9116  
 )  
Appeal of )

INTRODUCTION

The petitioner appeals the determination of the Department of Social Welfare reducing her ANFC benefits. The issue is whether the Department's "sibling-deeming" regulations (also referred to as the "DEFRA regulations", see infra) violate the nondiscrimination provisions of the Federal Rehabilitation Act of 1973.

FINDINGS OF FACT

The facts are not in dispute.<sup>1</sup> The petitioner is a thirty-one-year-old mother of three children. She receives SSI benefits due to disability--multiple sclerosis. Prior to December, 1988, the petitioner and her children lived alone. The children received ANFC benefits as an "assistance group" of three--the petitioner was not included in the assistance group due to her receipt of SSI (see infra).

In December, 1988, the father of the petitioner's youngest child came to live with the petitioner and her children. At the time he was unemployed. He was added to the petitioner's (actually her children's) ANFC group as an "unemployed parent".

In January, 1989, the father started working. On

March 9, 1989, the Department notified the petitioner that her (i.e. her children's) ANFC grant would be reduced due to the income received by the assistance group due to the father's employment. The petitioner appealed this decision.

The parties have orally informed the hearing officer that shortly after March, 1989, the father left the petitioner's home and has not returned. As of his leaving, the petitioner's grant reverted to that of an assistance group of three--her three children. Because the case concerned only a brief "closed period" of benefits, and because the issues raised were novel and complex (and, in the hearing officer's view, very close) much time elapsed before the parties fully defined and completed their legal arguments.

ORDER

The Department's decision is affirmed.

REASONS

This is a so-called "DEFRA" case<sup>2</sup>--an area which for years has occupied much of the board's attention.<sup>3</sup> The petitioner herein, however, raises an issue that has not been considered by the board and, apparently, has not been addressed by any litigation anywhere else. That issue is whether the DEFRA-imposed sibling-deeming provisions of the federal and state statutes and regulations, when applied to a handicapped individual like the petitioner, conflict with the nondiscrimination provisions of the Federal Rehabilitation Act of 1973.

Under DEFRA, all siblings and half-siblings of an eligible child, on whose behalf ANFC assistance is sought, and all parents of any of those children living in the household, are required to be included in one ANFC "assistance group" if any of those siblings are, or would be, "categorically" eligible for ANFC in their own right. V.S.C. § 602(a)(38),<sup>4</sup> W.A.M. §2242.<sup>5</sup> See also 45 C.F.R. § 206.10(a)(1)(vii). Furthermore, all the income received by any parent or child in the assistance group is "deemed" to be available to the group as a whole, and is, therefore, counted for purposes of establishing the groups' financial eligibility for ANFC.

In Bowen v. Gilliard, 107 Sup Ct. 3008 (1987), the United States Supreme Court rejected challenges to DEFRA specifically related to families in which one or more half-siblings received separate child support or Social Security payments that was deemed "available" under DEFRA to the entire ANFC assistance group. This ruling effectively reversed several previously-issued Human Services Board Orders regarding these types of cases.<sup>6</sup> Vermont Supreme Court appeals of those cases, which were pending at the time of Gilliard, were stipulated for dismissal.<sup>7</sup> Since Gilliard, the Board has routinely affirmed the Department's decision in all DEFRA cases.<sup>8</sup>

As the petitioner points out, however, Gilliard on its facts was limited to cases involving only two types of

categorical ANFC (AFDC) eligibility--"death" and "absent parent", and to only two types of "deemed" sibling income-- child support and Social Security benefits. However, some of the cases that were pending before the Vermont Supreme Court at that time, (as well as some cases that the Board has decided post-Gilliard) involved the deeming of income of siblings who were categorically eligible for ANFC on the basis of their parent's "unemployment"<sup>9</sup> or "incapacity"<sup>10</sup>-- the other two categorical bases of ANFC eligibility not specifically dealt with in Gilliard. Nonetheless, the Board and its hearing officers have consistently applied the ruling in Gilliard to these types of DEFRA cases as well.<sup>11</sup>

At this point, some digression is necessary in order to understand the basis of the petitioner's claim. First of all it must be noted that the petitioner, by virtue of her receipt of SSI, cannot under the regulations be considered a member of any ANFC "assistance group". W.A.M. § 2242.<sup>12</sup> Thus, the case involves only the ANFC benefits payable on behalf of her children. For purposes of analysis, however, the hearing officer will assume that the Department's decision is directly adverse to the petitioner, herself. See 3 V.S.A. § 3091(a).

It is also necessary, as background, to understand one of the inexplicable (at least in terms of policy) features of the DEFRA sibling-deeming rule. This is that when both

parents of a half-sibling live in the home, the mandatory inclusion of the half-sibling and his parent in the ANFC household and the deeming of their income occurs only if the "primary wage earner" parent of that sibling is "unemployed" or if either of the sibling's parents is "incapacitated". There can be no mandatory inclusion and no deeming of income if the primary-wage-earning parent is employed and neither parent is incapacitated. This is because the half-sibling would not be "deprived of parental support" within any of the four categories of ANFC eligibility--i.e. death, absence, incapacity, or unemployment of a parent. (See 42 U.S.C. §§ 606 and 607, and W.A.M. § 2330.) In the latter cases (those with no unemployment or incapacitated parent) neither the needs nor the income of the half-sibling and his parent is considered by the Department in determining the ANFC eligibility of the remaining household members.

This vagary of DEFRA is central to the petitioner's claim. Were the petitioner herein not "incapacitated", her youngest child would not have been subject to DEFRA when his primary-wage-earning parent (his father) became employed. Thus, the employment income of the half-sibling's father would not have been deemed available to the petitioner's two older children. Although the household would have been reduced from four members to two (the needs of the half-sibling and his father would no longer be taken into consideration), the net loss of income to the household would have been significantly less than that which occurred.

However, given the petitioner's disability, her youngest child, regardless of his father's employment status, will always have at least one "incapacitated" parent. Thus, under DEFRA, he and his father (as long as the father lives in the home) can never escape inclusion in the petitioner's ANFC household.

The petitioner maintains that the above result constitutes discrimination against her and her family based on her handicap in violation of the nondiscrimination provisions of the Rehabilitation Act of 1973.

The relevant portion of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (a), provides as follows:

No otherwise qualified individual with handicaps in the United States, as defined in section 706(8) of this title, shall, solely by reason of her or his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

Generally, courts have held that in order to find a violation of this section an individual must establish that she is: 1, handicapped within the meaning of the Act; 2, otherwise qualified for the service or benefit sought; 3, excluded solely on the basis of her handicap; and 4, that the program receives federal financial assistance.

Giesecking v. Schafer, 672 F. Supp. 1249, 1262 (W.D. Mo., 1987); Doe v. New York University, 666 F 2d 761, 775 (2d Cir., 1981).

In this case there appears no dispute that conditions 1

and 4 (above) are met. The petitioner is certainly "handicapped" within the meaning of the Act, and the Department clearly receives and disburses federal funds.<sup>13</sup> The dispute in this case centers around conditions 2 and 3-- i.e., whether the petitioner would be "otherwise qualified" for a higher benefit level of ANFC and whether she has been denied this level of ANFC "solely on the basis of her handicap".

One snag in the symmetry of the petitioner's legal argument is that a change in her handicapped status would affect more than just the DEFRA status of her youngest child. If the petitioner were not handicapped, she also would not receive SSI--and, unlike now, her needs and income would then be considered in determining the ANFC benefits of any of her ANFC-eligible children.<sup>14</sup> Regardless of the household's income this, in and of itself, would result in a significant change in the level of ANFC benefits to the family. Thus, the petitioner's situation cannot be compared simply and neatly to that of a non-handicapped individual. Therefore, determining whether the petitioner is "otherwise qualified" within the meaning of § 794 (supra) to a certain level of benefits is highly problematic.

The petitioner has a similar problem in establishing that she has been adversely affected "solely by reason of her handicap". W.A.M. § 2332 defines "incapacity" as being ". . . unable, due to (a) physical or mental condition, to

maintain (one's) earning capacity for a period of not less than 30 days. . ." Clearly, not all "handicapped" individuals<sup>15</sup> meet this definition--many are fully employed despite their handicaps; and not all "incapacitated" individuals are "handicapped"--an individual can have a temporary physical or mental condition that is not handicapping but that interrupts (for 30 days or more) her ability to work.<sup>16</sup>

The sibling-deeming provisions of DEFRA are triggered by a sibling's parent meeting the ANFC definition of "incapacity" (or any of the other "categories" of ANFC eligibility), not by whether or not that parent is "handicapped" within the meaning of 29 U.S.C. § 794. In the petitioner's case, even if she were not handicapped, it is conceivable that she could nonetheless meet the definition of an "incapacitated" parent under W.A.M. § 2332--and, thus, still be subject to DEFRA.

Therefore, it must be concluded that the petitioner is not necessarily "otherwise qualified" for the benefits she seeks and that she has not been treated adversely based "solely" on her handicap. For the above reasons, it cannot be concluded that the Department's decision is barred by 29 U.S.C. § 794(a). The Department's decision is affirmed.

FOOTNOTES

<sup>1</sup>The hearing officer's findings are gleaned from the memoranda submitted by the parties, copies of which have been furnished to members of the board.

<sup>2</sup>DEFRA is an acronym for the Deficit Reduction Act of 1984, Pub. Law No. 98-369. Only a small portion of this voluminous Act applies to the AFDC program.

<sup>3</sup>Since May, 1985, the board has considered more than fifty cases involving DEFRA issues.

<sup>4</sup>42 U.S.C. § 602(a)(38) provides, in pertinent part:

(38) provide that in making the determination under paragraph (7) with respect to a dependent child and applying paragraph (8), the State agency shall (except as otherwise provided in this part) include--

(A) any parent of such child, and

(B) any brother or sister of such child, if such brother or sister meets the conditions described in clauses (1) and (2) of section 606(a) of this title or in section 607(a) of this title (if such section is applicable to the State),

if such parent, brother, or sister is living in the same home as the dependent child, and any income of or available for such parent, brother, or sister shall be included in making such determination and applying such paragraph with respect to the family. . .

<sup>5</sup>W.A.M. § 2242 provides, in pertinent part:

An ANFC assistance group must include one or more eligible dependent children. In addition, the assistance group must include all siblings (including half-siblings) who live with the dependent child or children, who are also deprived of parental support and who qualify under the ANFC age criteria, as defined in policy. The parent(s) of each and every child included in the ANFC assistance group must also be included in the ANFC assistance group if he or she lives in the home with the children.

<sup>6</sup>See Fair Hearing Nos. #6466, #6565, #6648, #6664, #6672, #6691, #6732, #6771, #6894, #6947, #6968, #7026, #6969, #7073, #7117, #7178, #7194, #7200, #7235, #7250, #7278, #7283, #7305, #7348, #7435, #7543, #7643, #7646, #7697, #7702, #7731, #7738, #7746, #7754, #7755, #7769, #7815, #7853, #7881, #7882, #7920, #7942, #7996

<sup>7</sup>Virtually every case listed in FootNote 6, supra, had been appealed to the Supreme Court.

<sup>8</sup>See Fair Hearing Nos. 8190 and 9020.

<sup>9</sup>See 42 U.S.C. § 607 and W.A.M. § 2333.

<sup>10</sup>See 42 U.S.C. § 606(a) and W.A.M. § 2332.

<sup>11</sup>See Fair Hearing No. 8190.

<sup>12</sup>The petitioner, in her memorandum, argues that W.A.M. §2242 conflicts with its federal statutory counterpart, 42 U.S.C. § 602(24). However, given the basis of recommended ruling, the hearing officer and the board deem it unnecessary to specifically address this issue.

<sup>13</sup>U.S.C. § 706(8)(B) provides, in pertinent part:

(B) Subject to the second sentence of this subparagraph, the term "individual with handicaps" means, for purposes of subchapters IV and V of this chapter, any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment. . .

29 U.S.C. § 794(b) includes the following provisions:

For purposes of this section, the term "program or activity" means all of the operations of--(1)(A) a department, agency. . . or other instrumentality of a State or local government; or (B) the entity of such State. . . that distributes such assistance. . .

<sup>14</sup>W.A.M. § 2242 excludes only SSI recipients from an ANFC household. Handicapped or disabled status, in and of itself, does not exclude an individual from the ANFC household.

<sup>15</sup>See 29 U.S.C. § 706(8)(B), (footnote 13, supra).

<sup>16</sup>29 U.S.C. § 706(8)(C) provides:

(C) For the purpose of sections 793 and 794 of this title, as such sections relate to employment, such term does not include an individual who has a currently contagious disease or infection and who, by reason of such disease or infection, would constitute a direct threat to the health or safety of other individuals or who, by reason of the currently contagious disease or infection, is unable to perform the duties of the job.

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