

STATE OF VERMONT
HUMAN SERVICES BOARD

In re) Fair Hearing No. 11,281
)
Appeal of)

INTRODUCTION

The petitioner moves to reopen an appeal dismissed by the Board when she failed to attend her hearing without known good cause. The petitioner asserts that she had good cause for not attending and seeks a determination on the underlying ANFC termination for failure to provide evidence of her husband's disability.

FINDINGS OF FACT

1. Late in 1991, the petitioner received ANFC on behalf of herself and her four children. The petitioner's eligibility was based on her lack of income and the absence of her husband who was incarcerated. Her husband was released from prison in December and the petitioner asked that her ANFC continue under the unemployed parent program. On January 24, 1992, she was notified that her grant would be determined for failure to show eligibility under this program. She appealed that decision but decided on the day of hearing, April 1, 1992, to apply for consideration under the incapacitated parent program because she believed that her husband is mentally incapacitated. She received continuing benefits and was told to get a doctor's statement regarding her husband's condition.

2. The petitioner, thereafter, called a couple of psychiatrists but was unable to get an appointment in the short time frame she was allowed. Her husband had no regular treating physician and apparently no therapeutic relationships with mental health providers. After notifying her worker of her difficulty, she was granted an extra ten days to provide medical evidence. The petitioner alleges that she asked for help in finding a doctor and getting an appointment but was allegedly told that it was up to her to do that. She thereafter called over twelve psychiatrists but was unable to get anyone to see her husband.

3. When the Department failed to receive the medical confirmation of disability by May 18, 1992, the petitioner was sent a notice that her benefits would be terminated. She appealed that notice on May 28, 1992, and received continuing benefits.

4. The petitioner's appeal was received by the Board on June 3, 1992, and set for hearing on July 8, 1992. Although she was notified of the hearing, she did not attend because her daughter had an asthma attack on that day and needed the petitioner to help her use a home nebulizer. She called the Department's central office in Waterbury to report her inability to attend the hearing and was told by an operations specialist that she would receive a letter from the Board giving her another chance to reschedule to which she should respond.

5. Such a letter was sent by the Board on July 10, 1992 and the petitioner called the Board office to report the reason for her non-attendance. The petitioner's hearing was reset for August 5, 1992.

6. The petitioner in the meantime had found a doctor who agreed to see her husband on the 30th of August. She attended the hearing set for August 5, 1992, to announce that her husband would see a doctor on August 30th and would get him to fill out the necessary forms that day. Based on this information, the hearing officer continued her hearing until September 2, 1992. The Department asked for no further delay because the petitioner was receiving continuing benefits. The petitioner was instructed to return that day with the forms. She was also notified of that date in a subsequent notice from the Board.

7. The petitioner failed to attend the hearing scheduled on September 2, 1992, and was sent another notice on September 8, 1992, by the Board requesting that she offer some good cause for her failure to attend within 10 days or face dismissal of her appeal. When no response was received to this letter, dismissal of the appeal was recommended to the Board which acted on September 23, 1992 to dismiss the appeal. A copy of that order was mailed to the petitioner.

8. The petitioner was in fact sick with a fever herself on September 2, 1992, and had to ask her neighbor to watch her children. That petitioner asked that same neighbor to call

the Board for her. (The petitioner does not have a phone.) Phone bills produced by the petitioner showed that her neighbor called both the Board office number and the DSW central office number on September 2, 1992, although it cannot be established what information she left at either number.

9. The petitioner's husband did not attend his psychiatric appointment on August 30, 1992 because he was unable to find the doctor's office. The petitioner was able to get him another appointment with a general practitioner in September. She brought the doctor's report in to the DSW office on September 28, 1992. Based on that medical evidence which stated that the petitioner's husband was unable to work due to severe alcoholism and emotional problems, the petitioner's family was granted ANFC prospectively from September 28. The Department, however, refused to make the petitioner's eligibility retroactive to February of 1992 when she was first found ineligible because of her failure to provide information. Although she was paid through this period, the petitioner fears that she will be found to be overpaid and will have the money recouped from her future ANFC payments.

10. The petitioner alleges she did not receive the September 8, 1992, inquiry from the Board regarding her second failure to show. She does, however, admit that she received the Board's order of dismissal. At that time she obtained the assistance of legal aid and requested that the matter be

reopened on October 15, 1992. Although there is a presumption that letters mailed are duly received, the petitioner's assertions of non-receipt are found to be credible based upon her admission of receiving all other letters and the strong evidence that she had always acted upon or responded to all other documents she has received in a timely manner in the course of this appeal.

11. The hearing officer finds that the petitioner's illness would have been sufficient to find good cause for resetting the hearing which she failed to attend on September 2, 1992.

ORDER

The Board's prior Order dismissing this matter is be vacated and the matter is reset for a hearing on the merits.

REASONS

The Board held in Fair Hearing No. 9403 that it, as any administrative body, has the inherent power to take steps necessary to carry out its functions, including vacating its own orders when justice requires. In vacating orders, the Board looked to Rule 60 of the Vermont Rules of Civil Procedure for guidance:

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under

Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken.

In this case, the petitioner's appeal was dismissed because she failed to respond to a request for a showing of good cause for failure to attend a scheduled hearing. The facts show that the petitioner did, in fact, contact the Board and the Department on the day of the hearing through a neighbor to report her illness. The facts further show that she failed to receive a notice asking her to offer good cause within ten days or face dismissal. Without that notice, she could not have known that she had such an opportunity. Furthermore, the petitioner took action almost immediately after receiving the Board's order to ask that it be vacated.

Because the petitioner had good cause to have her hearing reset and through no fault of her own was unable to assert that good cause prior to the Board's ruling, a mistake exists which justifies vacating the order of dismissal. Furthermore, subsequent evidence introduced by the petitioner showing that her husband is disabled coupled with her allegations of lack of assistance from the Department in obtaining information in

a timely manner earlier in these proceedings, indicate that the petitioner's appeal may have merit, further justifying a reopening of this matter.

#