

STATE OF VERMONT
HUMAN SERVICES BOARD

In re) Fair Hearing No. 11,958
)
Appeal of)

INTRODUCTION

The petitioner appeals the decision by the Department of Social Welfare denying the issuance of a replacement check for supplemental fuel assistance. The issue is whether the Department's regulation that fuel assistance checks must be cashed within 60 days or forfeited violates the petitioner's rights under the Americans with Disabilities Act (ADA) or as a matter of constitutional due process.

FINDINGS OF FACT

The facts are not in dispute, and are taken from the parties' memoranda. The petitioner is a disabled man who shares a house with his sister-in-law. During the period in question the petitioner was responsible for his own business and personal affairs.

In fall, 1992, the petitioner began to become forgetful and confused. In January, 1993, he was hospitalized for an extended period. In March, 1993, his sister-in-law, in the process of making arrangements to bring the petitioner home from the hospital, came across a supplemental fuel check for \$48.00 issued to the petitioner on November 11, 1992. The

check contained the notation, "VOID AFTER 60 DAYS".¹ The petitioner's fuel dealer would not honor the check when it was subsequently presented to them, and the Department refused the sister-in-law's request on behalf of the petitioner to issue a new one as a replacement.

Following the Board's remand, the petitioner submitted the following letter (dated April 24, 1994) from his treating physician:

In response to your letter of 5 April 94, please know that I have provided medical care for [petitioner] for the past then years.

[Petitioner] has suffered from heart disease for the past five years, his condition considerably worsening between 1991 and 1993.

He did require cardiac catheterization and angioplasty for his coronary heart disease, performed at the Medical Center Hospital of Vermont during 1993.

I am able to confirm that his medical condition did prove to be exceedingly difficult for him and was responsible for problems with cognition that included behavioral abnormalities, confusion at times as well as memory impairment.

He has since improved considerably since that time and will, hopefully, remain so.

The above letter establishes that the petitioner's disability (heart disease) explains why he forgot to cash the fuel check in question. The evidence does not establish, however, that the petitioner's disability prevented him from

¹According to the petitioner the notation was "in small brown letters on a brown background", but he does not argue that this was insufficient notice. Neither party submitted a copy of the check or a sample of a similar one.

being able to cash the check on time. This is a crucial distinction under the applicable statutes and regulations (see infra).

ORDER

The Department's decision is affirmed.

REASONS

Welfare Assistance Manual (WAM) § 2906 includes the following provision:

Any check which is not cashed or presented to an energy provider within 60 days from the date of issue will be forfeited. Lost checks will be replaced only if the loss is reported within the 60-day period and shall be subject to recoupment in the event the lost check is subsequently found to have been properly endorsed and cashed.

The petitioner maintains that this provision violates the ADA and due process because it contains no exception or accommodation for individuals who because of a disability fail to cash their checks within 60 days.

The ADA at 42 U.S.C. § 12132 provides that:

Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

In this case there is no dispute that the Department is a "public entity" within the meaning of the Act. See 42 U.S.C. § 12131(1). There is also no dispute that the Department, as a recipient of federal funding, is also subject to the similar

anti-discrimination provisions of section 504. See 29 U.S.C. § 794.

28 C.F.R. § 35.130(b)(7) provides:

A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.

In promulgating federal regulations to implement the ADA the U.S. Attorney General commented that the following practices were prohibited:

. . . blatantly exclusionary policies and practices that are neutral on their face, but deny individuals with disabilities an effective opportunity to participate.

56 F.R. 35694, 35704 (1991).

Those comments make specific reference to Alexander v. Choate, 469 U.S. 287 (1985), a United States Supreme Court case decided prior to the enactment of the ADA that considered whether certain time limitations on inpatient hospital coverage under Medicaid discriminated against the handicapped in violation of section 504. The comments specify that the anti-discrimination provisions of the ADA are consistent with those in section 504 as interpreted in Choate. Id.

In Choate, the Supreme Court adopted a "meaningful access" test to determine that a "facially neutral" provision in the Tennessee Medicaid regulations that limited inpatient hospital coverage to fourteen days did not discriminate

against handicapped individuals. Id. at 301. In that case the basis of the plaintiffs' argument was that as a general matter handicapped individuals required longer hospital stays.

However, in rejecting this argument the Court concluded that . . . nothing in the record suggests that the handicapped . . . will be unable to benefit meaningfully from the coverage they will receive under the 14-day rule." Id. at 302.

However, the Court also made clear that there may well be circumstances in which ". . . reasonable adjustments in the nature of the benefit offered must at times be made to assure meaningful access." Id. at 301, footnote 21.

This case is indistinguishable from Choate. Allowing that the petitioner's disability falls under the protections of the ADA (see Id. ¶ 12131[2]), the 60-day limit on cashing checks did not prevent him from "meaningful access" to the supplemental fuel program. Like the plaintiffs in Choate who argued that people with disabilities usually require hospital stays longer than the 14-day limit that was at issue in that case, it might be found that people with certain disabilities are more likely than others to fail to comply with the 60-day limit to cashing fuel checks. This does not mean, however, that the rule violates the ADA. The petitioner's "memory impairment" may explain why he did not, in this one instance, cash this particular check in a timely manner, but there has been no showing this his disability prevented him from being

able to comply with the 60-day limit. Therefore, it cannot be concluded that the rule, per se, denied him "an effective opportunity to participate" in the program. See Fair Hearings Nos. 11,260 and 11,648.

Similarly, the 60-day provision does not violate the constitutional due process rights of disabled individuals. In Canales v. Sullivan, 936 F 2d 755 (2d Cir. 1991), cited by the petitioner, the court held that SSI applicants constitute an "unusually protect(ed)" class of individuals who must be allowed to argue that their disability prevents them from complying with the statutory time limitations regarding SSI appeals. As noted above, it cannot be found in this case that the petitioner's disability prevented him from cashing the check on time.

Moreover, unlike SSI, no such "unusual protect(ion)" is either implicit in the fuel assistance statutes or required as a matter of fundamental fairness. The purpose of the fuel assistance program is "to help eligible households with home heating expenses". W.A.M. § 2900. There is no allegation that the petitioner has gone without heat (or any other necessity) by virtue of the Department not replacing this particular fuel check. Nor has the petitioner's ongoing eligibility for fuel assistance been affected. Except for the single check in question, he has had full access to and the full benefit of the program--including the "emergency"

provisions (at W.A.M. §§ 2950 et seq.) if his failure to cash the check in question caused him to have an "emergency need" for fuel.

For the above reasons the Department's decision in this matter is affirmed.

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