

## STATE OF VERMONT

## HUMAN SERVICES BOARD

In re ) Fair Hearing No. 12,030

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Appeal of )

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INTRODUCTION

The petitioner appeals a determination by the Department of Social Welfare that her family is no longer eligible for ANFC because of a DSW finding that her husband is no longer incapacitated.

FINDINGS OF FACT

1. The petitioner, her husband and their two children have been ANFC recipients since May of 1989, based on a finding by the Department that the petitioner's husband was incapacitated due to a heart condition.
2. The petitioner's husband has undergone treatment for the past four years for his heart condition. He suffered a heart attack in 1990, and afterward was fitted with an aortic valve prosthesis and, first a temporary, then a permanent pacemaker. Thereafter, his condition was expected to improve. The Department has regularly reviewed his condition by seeking medical reports from his doctors at six month intervals.
3. On March 8, 1993, the Department notified the petitioner's husband that a review of his condition was scheduled in April and that he should prepare for that review by making an appointment to see his treating doctor. The petitioner was asked to have an attached medical form filled out by his physician and returned to the office.
4. Pursuant to this request, the petitioner's husband made an appointment with his family doctor for late April. On May 4, 1993, the family doctor sent the completed and signed medical report to the Department. The form indicated that the petitioner's husband had a cardiac pacemaker replaced on December 30, 1992 and that he was improving. He attached a report dated February 4, 1993, from the cardiologist who is following the petitioner's situation. The family doctor concluded that the petitioner's husband's only active medical problem is some dizziness, which at that time was decreasing. He stated that the petitioner's husband could work 35 hours per week at his usual occupation and might benefit

from "vocational counseling" to overcome his fears about returning to work.

5. The cardiologist's report dated February 4, 1993, which was relied upon by the treating doctor, included the results of an echocardiogram and a treadmill exercise stress test. The cardiologist concluded that the petitioner's husband "appears to be making good functional improvement since this past summer . . . I accordingly encouraged [the petitioner's husband] to resume full activities, and I would clear him to return to full-time employment."

6. Based on these reports, the Department's medical reviewer determined that the petitioner was "functioning well" and was medically ineligible for an "ANFC incapacity" designation as of May 4, 1993. Pursuant to this report, the Department notified the petitioner on May 14, 1993 that the family was no longer eligible for ANFC benefits because "there are no eligible children in the home . . . neither parent of your children is absent from the home." That notice did not advise the petitioner that she had a right to request a determination for ANFC eligibility under another category within ten days and receive continuing assistance until a review occurred. A copy of that notice is attached hereto as Exhibit One and incorporated by reference herein.

7. The petitioner appealed that decision, claiming that the information provided by the family doctor was incorrect and asking to submit an updated medical form from the cardiologist himself, whom she believed had reassessed her husband's medical condition since February, and whom she believed would affirm that her husband was still disabled due to cardiac disease.

8. Subsequent to the hearing in this matter, a new medical form based on a more recent examination, was submitted on September 3, 1993 by the petitioner's husband's cardiologist. That form stated that the "exercise stress test shows good effort tolerance (walking/running) but the patient reports persistent easy fatigability with arm-related exertion . . . cardiac testing results would indicate good effort tolerance; would expect patient capable of working 35 hours per week on a cardiac basis, but perhaps some other problem/process is responsible for patient's fatigability."

9. The petitioner's husband, who is forty-six years old, claims that he is too tired and dizzy to return to work. He says he feels like a "seventy year old man" and that performing mechanical and body work (his usual occupation) at home on a daily basis has resulted in exhaustion after a couple of hours. He has never tried to do any other kind of work because, in spite of his possession of a high school diploma, he says he cannot read or write. (He did not present any evidence on that issue.) Although he has Medicaid coverage, he has never had psychological counseling around the issue of his return to work. He insists that he continues to be disabled solely due to his heart condition and disagrees with both doctors' opinions.

10. Although the petitioner's husband certainly knows better than anyone else how he feels, there is nothing at all in the evidence indicating that his feelings of dizziness and fatigue are related to his heart disease or a physical condition. The medical opinion of his treating cardiologist is that his cardiac condition has resolved and that he currently has no impediment from returning to work because of his heart diagnosis. His family doctor had indicated that he concurs with the cardiologist and that the petitioner has no other medical problems which might prevent him from returning to his job. The petitioner makes no claim of being disabled on any ground other than his cardiac abnormalities. It must be found, therefore, that the Department has produced medical evidence which persuasively shows that

the petitioner's husband is no longer suffering a medical condition which prevents him from working thirty-five hours per week at his occupation.

### ORDER

The Department's decision that the petitioner's husband is no longer incapacitated due to a medical problem and is therefore not eligible to receive ANFC under that category is affirmed. However, the Department's decision to terminate the family's ANFC is reversed and the Department is ordered to provide the family with an opportunity to request a redetermination of ANFC eligibility under other possible categories with benefits continuing until a determination on any new request is made.

### REASONS

Under the regulatory definitions adopted by the Department:

A child is deprived of "parental support" when a parent is unable, due to his or her physical or mental condition, to maintain his or her earning capacity for a period of not less than 30 days from the date of application. If an applicant for ANFC Incapacity works 35 hours or more per week he or she is not eligible on the basis of incapacity.

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W.A.M. § 2332

The regulations require that an "Incapacity

determination be made as follows:

Physical or mental incapacity, as defined, requires professional medical determination based on a physician's report or other adequate written medical information which includes a diagnosis of physical or mental disability which may reasonably be expected to continue for 30 days or longer.

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When an incapacitated recipient's prognosis indicates a need for review of continuing incapacity at specified future interval(s), the Income Maintenance Specialist is responsible for following up, gathering current information and transmitting this material to the Incapacity Examiner so that it can render a decision in accordance with the same initial procedures used in the determination.

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W.A.M. § 2332.1

A standard for closing "incapacity" cases is also

established in the regulations:

A closure of ANFC incapacity must be based on the fact that the incapacity no longer prevents the recipient from fulfilling his or her role either as a wage earner or as a homemaker for the assistance group.

When incapacity no longer exists, the IV-A agency shall inform the assistance group of this fact and provide a 10-day period within which the assistance group may apply for ANFC on the basis of unemployment of the principal wage earner(in the case of two-parent families) or on the basis of absence (in the case of

single-parent families). (See Change in Deprivation Factors, W.A.M. 2334.)

W.A.M. § 2332.4

In actions to terminate the petitioner's ANFC benefits, the burden of proof is on the Department to establish that the petitioner is not "incapacitated" as defined in the above regulations. Human Services Board Fair Hearing Rule No. 12, Fair Hearing No. 9281. In this matter, the Department must show by means of a professional medical determination that the petitioner's husband is now able to maintain his work capacity and now has no physical or mental condition which would make him unable to work 35 hours or more per week.

The Department has presented a medical record from the petitioner's own treating family doctor that the petitioner's husband has no physical condition which would at present prevent him from working 35 hours per week. The petitioner herself has presented consistent evidence from the cardiologist based on extensive testing showing that her husband has no cardiac condition which would prevent the exertion needed to complete a 35 hour work week. Although the petitioner's husband may sincerely believe that he cannot work, there is no medical evidence supporting his claim of disability due to cardiac or other physical abnormalities.

The petitioner's husband's treating physician has indicated that the petitioner may be experiencing fears over returning to work following his cardiac problems. However, he does not suggest that these fears are so extreme as actually prevent work or to require mental health (as opposed to vocational) counseling. The petitioner himself makes no claim of a mental disability and has not sought mental health counseling although such counseling could be covered through his Medicaid benefits. In the absence of evidence of any medical condition, physical or mental, which seriously interferes with the petitioner's husband's ability to work, it must be concluded that the Department has met its burden of showing that the petitioner's husband is no longer incapacitated from work.

Even though the Department has shown that the petitioner's husband is no longer "incapacitated", it has not shown that the petitioner's family is no longer eligible for ANFC benefits. The regulation above clearly requires the Department to notify persons who have been eliminated from the incapacity category of their right to request a determination under another category before their benefits are terminated. The notice sent to the petitioner did not notify her of that right but rather attempted to immediately terminate benefits based on the adverse incapacity finding. Had the petitioner known of her right and had made such a request, the regulations would have indicated further inquiry into eligibility and a continuation of her benefits:

An assistance group which requests assistance based on the unemployment of the principal wage earner because it is no longer eligible for ANFC-Incapacity shall have its grant continued for a 30-day period from the date on which assistance on the basis of unemployment was first requested. During this 30-day period eligibility based on ANFC-UP shall be determined.

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W.A.M. § 2334.25

In the absence of the proper notification and consideration required by its own regulations, the Department's decision to terminate the petitioner's ANFC benefits (as opposed to its finding of incapacity) cannot be upheld. The ANFC termination should be reversed and remanded to give the petitioner the opportunity to request consideration of eligibility under other categories before her benefits are terminated. In the meantime, the petitioner should be aware that while she and her family continue to receive Medicaid benefits, her husband may be able to receive mental health counseling, if he so desires, with regard to his fears over returning to work. If he does believe that he may be prevented from working by a mental (or other) disability, he should ask for reconsideration on that ground. He should also inquire as to his eligibility for vocational rehabilitation services.

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