

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. 14,759

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Appeal of)

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INTRODUCTION

The petitioner appeals a decision of the Department of Social Welfare terminating her Medicaid benefits. The issues are whether the petitioner got adequate notice of the Department's action and whether the Department gave the petitioner all the deductions to which she was entitled when computing her countable income.

FINDINGS OF FACT

1. The petitioner is a sixty-three-year-old woman who is an insulin-dependent diabetic and who has suffered two strokes. Her diabetes is poorly controlled and she is at high risk for another stroke or diabetic coma unless she follows her prescribed medical treatment which includes daily injections of insulin. She lives with her husband who receives Social Security income and is self-employed in an excavating business.
2. The petitioner was receiving Medicaid based upon her categorical eligibility as an SSI recipient until the Department received a notice from the Social Security Administration on November 6, 1996, that she would no longer receive SSI benefits due to excess family income based upon her husband's receipt of early retirement income. The petitioner was notified on November 22, 1996, to file a new application and undergo a review to see if she might still be eligible for Medicaid.
3. Pursuant to that request, the petitioner filed an application on December 9, 1996, in which she reported in addition to his Social Security income, that her husband had income from his excavation business of \$1,219 per month and expenses of \$769 per month. Because she did not itemize her expenses, the Department asked for more specific information by a letter dated December 16, 1996, which information was provided by the petitioner in the form of a profit and loss statement showing her husband's income reported to the IRS for 1995.
4. On December 27, 1996, the petitioner was mailed a notice denying her eligibility because her income was "more than Department standards allow for basic living expenses for a family her size" and told that she could become eligible again if she incurred \$9,627.71 in medical bills between January 1, 1997 and July 1, 1997. The notice did not tell her how this spend-down figure was calculated and is attached as

Exhibit No. One.

5. On January 3, 1997, the petitioner appealed the Department's decision. She was told at that time that her Medicaid benefits would continue pending her appeal and was advised that her eligibility could be redetermined if she wished to submit her 1996 tax returns. In response, the petitioner provided an IRS form 8829 showing deductions for the business use of her home.
6. The Department recomputed her income and sent her a notice dated January 20, 1997, which advised her that her spend-down had been reduced to \$4,948.50 for the same six month period. No computations were included in that notice telling the petitioner how her eligibility had been redetermined. That notice is attached as Exhibit No. 2.
7. The petitioner thereafter obtained an attorney and the appeal hearing before the Human Services Board scheduled for February 14, 1997, was continued in order for the petitioner to submit her 1996 tax forms. She did submit those forms as well as a new application dated February 19, 1997, which contained a claim for some over the counter medication and medical transportation costs. After the review, the Department sent the petitioner a third notice of decision dated March 10, 1997, advising her that she was still over income for the program but that her spend-down had been reduced to \$4,563.24 to reflect her transportation and over the counter expenses. No further information was provided as to how this figure was obtained. That notice is attached as Exhibit No. 3.
8. At the request of the petitioner's counsel, the Department sent copies of the computation worksheets showing what figures were used as unearned income, what figures were used for earned income and what deductions were allowed. The worksheets did not detail how the petitioner's husband's self-employment earned income was calculated from the IRS information other than to say that his gross income was determined to be \$3,538.50 and the business expenses had been calculated as \$2,269.75 on a monthly basis with depreciation not allowed as a business expense per the regulations. Copies of those worksheets are attached as Exhibit No. 4.
9. The hearing was scheduled again for March 20, 1997, at which time the petitioner came in with a "Motion to Vacate" the notices terminating her Medicaid because they were constitutionally insufficient and did not provide the petitioner with information she needed to prepare for the hearing. The Department was surprised by this motion because the issue of the sufficiency of the notices had not been raised by the petitioner's counsel during their prior negotiations and in addition to the worksheets many oral explanations had been offered to counsel. The Department objected to continuing the matter but as it was not prepared to present evidence on this issue and as the issue had implications as to the fundamental fairness of the process to the petitioner, the matter was continued for the Department to respond and to provide additional information which might have been needed by the petitioner.
10. The Department provided a memorandum opposing the motion to vacate on April 3, 1997. It is not clear at that time whether the Department in the interim provided any further information to the petitioner or whether the petitioner asked for any particular clarifications. The matter was reset for April 17, 1997, at which time the petitioner's counsel said she still did not understand how the petitioner's self-employment income was calculated and renewed the request to vacate the notices which was orally denied as the petitioner still continued to receive benefits which the Department represented would not be recouped from her. The Department was directed to provide the petitioner with a complete written explanation of how the income had been computed forthwith and the petitioner was directed to notify the Department of all issues she had to raise with regard to the proposed termination of her Medicaid

benefits. 11. On April 22, 1997, the Department provided the petitioner with a new corrected notice, a computation sheet and a narrative describing how the income was calculated (including a newly included deduction for depreciation taken from line 13 of Schedule C which had previously been disallowed but which should have been allowed because the petitioner is SSI related to Medicaid) which along with the pertinent IRS pages is attached as Exhibit No. 5.

12. The petitioner's counsel affirmed at the hearing held on April 25, 1997 that she understood the basis for the Department's decision and that the sole issue on the merits of the case (as opposed to the notice issue) was whether the petitioner should have been granted an expense deduction for back tax payments made by the petitioner to the IRS, the state of Vermont and current payments to banks for a promissory note on his equipment and mortgage note on his home as an operating cost necessary to produce cash receipts. The petitioner does not dispute any of the other calculations.

13. The credible testimony of the petitioner's tax preparer and business consultant was that the husband has an installment agreement which he made three years ago to pay the IRS \$200 per month on an unpaid self-employment tax delinquency of a few thousand dollars. This delinquency arose from the husband's failure to make quarterly tax payments which he expected to make up from a customer who defaulted on a bill. If he does not make these payments, the IRS can levy his bank account or put a lien on his property. The petitioner and her husband also have a \$600 per month payment which is primarily interest on their equipment which is reflected as an expense on their income tax return and which was also deducted by DSW. The bank has threatened to call in that loan if there are any more delinquencies and their house has been pledged as collateral. They also make a payment on their home of \$346 per month. The IRS has allowed 27.8% of that mortgaged payment as a deduction based on a home office. In addition, they make back payments to the state of Vermont for overdue taxes but that amount, which was characterized as "small", was not put into evidence. Finally, the petitioner recently had to come up with \$1,700 in a lump sum to pay his income taxes because he was unable to make quarterly payments because of his other expenses. His tax preparer took every possible deduction for him on his tax return which he legally could.

14. The Department's final calculation of the petitioner's husband's self-employment expense was taken from the profit and loss statement provided by the petitioner from their 1996 income tax statement. Every expense deduction allowed by the IRS including depreciation and expenses for the business use of home was also allowed by DSW. Among those deductions was \$7,200 in interest paid by the petitioner on his equipment loans and 27.76% of his mortgage representing the cost for using his home. No deductions were taken on the forms for back taxes owed to the federal and state governments. The final annualized figure of \$11,443 was divided by twelve months with \$65 of that amount disregarded and half of the \$888.58 remainder attributed to the petitioner as income. That amount was added to the petitioner's unearned income of \$1,047 per month for a total applicable income of \$1,491.29 per month. That figure was far in excess of the highest applicable income of \$683 per month for an individual.

ORDER

The decision of the Department is affirmed.

REASONS

The petitioner argues that the three notices of decision which were sent to her were inadequate under the regulations governing the Medicaid program and under the constitution because they failed to provide

her with information she needed to understand why the action was taken and to prepare for her hearing. The regulations adopted by the Department regarding decisional notices requires:

Each Medicaid applicant/recipient must be given written notice of the decision on his or her application or review of eligibility. A group notice must include notice of the decisions about each member of the group.

All notice letters must contain:

A statement of what action the Department intends to take;

When it intends to take the action;

The reason for the intended action;

The policy citation(s) that supports the action;

An explanation of the individual's right to appeal the decision and the circumstances under which a hearing will be granted; and

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An explanation of the circumstances under which Medicaid is continued if a hearing is requested.

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This regulation tracks the requirements found in the federal regulation regarding the content of notices. 42 C.F.R. § 431.210. Those notice requirements apply to both persons who are already receiving or are applying for Medicaid benefits. The Department maintains that each of the notices was sufficient because each contains the information cited above.

The point of contention between the petitioner and the Department comes over whether the citation of the reason in the notice is sufficient to inform her as to how her eligibility was calculated. The Department takes the position that telling the petitioner that she is over income is sufficient reason and that the petitioner can always ask for and will be provided explanations of how that determination was made including calculations performed. In this matter, the Department points out, the petitioner obtained more specific information through extensive conversations and the provision of calculation worksheets before the hearing, as well as the written narrative finally provided to her in April.

The petitioner does not argue that the final information given to her was not adequate to help her prepare for her hearing. Rather she argues that the Department's first three notices should be vacated, that the Department's termination should be nullified and that the petitioner should continue to receive Medicaid until the Department sends her adequate notices. In her view, an adequate statement of the reasons must include an explanation of how her eligibility was calculated not the mere statement that she is "over income". She argues that the burden should not be placed upon her to request this information.

In support of her contention that the notices are inadequate, the petitioner cites several federal cases finding that notices which only contain the ultimate reason for denial but do not include calculations of eligibility for benefits violate the federal constitutional right to due process of ANFC, Food Stamp and Medicaid recipients. Dilda v. Quern 612 F.2d 1055 (1980), Ortiz v. Eichler 794 F.2d 889 (3rd Cir. 1986), and Mayhew v. Cohen 604 F.Supp. 850 (1984). The Department did not attempt to distinguish their notices from those in these cases. Rather the Department argues that subsequent actions it took cured any deficiency that may have existed in the notice, although it does not admit to any such deficiency.

It is not necessary to determine whether the first three notices sent by the Department were themselves inadequate in this matter although they are certainly problematic in that they provide very little information on calculations, unlike Food Stamp and ANFC notices which routinely contain the same. The reason it is not necessary to make such a determination is that the petitioner's hearing was delayed in this matter until she could get information from the Department which made it clear to her how the Department calculated her benefits and other information she needed to present her case. While she was waiting for this information, she continued to receive Medicaid benefits, which benefits will not be recouped.

The Board is empowered to grant "appropriate relief" in any matter before it. 3 V.S.A. § 3091(d). Appropriate relief in this particular situation is not to vacate the notices and require the Department to start over but rather to require the Department to provide additional information necessary for the petitioner to present her case at hearing. The petitioner has suffered no harm by the granting of that relief and is in essence in the same place she would have been if the Department's initial decision had been nullified. The petitioner continues to take this position because she wants a ruling as to whether or not the Department's notices to Medicaid recipients in general are adequate. However, the question of the notice adequacy is one more properly before a court which has the power to enjoin the Department from issuing such notices to all program recipients, a power which the Board does not have. See Swan v. Stoneman 635 F2d 97 (2d Cir. 1980). Of course, if the Department had refused to provide the calculations information or the petitioner did not have continuing benefits, the Board may have been required to take some other course of action. However, the petitioner continued to get Medicaid which would never be recouped and the Department did provide the information, so that issue never became ripe for review in this case. The petitioner's due process rights were protected because her benefits were not terminated for more than four months after her appeal was filed while the Department explained the decision to her attorney both orally and in writing.

Turning to the case on the merits, the petitioner claims that the Department was incorrect in not considering payments made to the IRS and the state of Vermont for overdue taxes, as well as all mortgage payments, as a deductible operating cost necessary to produce cash in the petitioner's husband's business.⁽¹⁾ The Medicaid regulations list the kinds of deductions which can be made from earned income from self-employment:

Deductions from earned Income of Work Expenses

(1) From Income from Self-employment:

Deductions of business expenses from self-employment income are limited to the following:

- operating costs necessary to produce cash receipts, such as office or shop rental, taxes on farm or

business property, hired help, interest on business loans, cost of materials, livestock and equipment required for the production of income and any business depreciation.

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Under the above regulations, the husband can only receive deductions for expenses from his self-employment income if they are necessary to produce cash receipts. The petitioner argues that her husband's back payments to the federal and state governments for his back income taxes are necessary to producing his income because if he does not make those payments their bank account could be levied and a lien could be placed on their house. The argument goes that as the petitioner's equipment loans are secured by his home, his loss of the home could mean loss of the equipment. She also argues that if she does not make her mortgage payments, the equipment could similarly be jeopardized.

It is not unlikely that the IRS would take some action to collect any unpaid back taxes which might include a lien on the house. This is true of any creditor to whom the petitioner's husband might have an overdue debt. It is difficult to see, however, why that expense should be considered a cost of producing income in the husband's excavating business under the regulations for determining self-employment income. That regulation is designed to exclude those costs paid out of pocket by the business owner to make his income. It is not designed to allow the business owner to deduct any and all expenses he might have to pay in connection with his personal finances. The husband's back income tax is merely a monthly personal expense for him, albeit a burdensome one, which is not deductible as a cost of producing income. The same is true of his mortgage payments on his home.

The Department has picked up and allowed every business expense deduction which the IRS allowed for the petitioner and her husband in 1996 on their income tax return. The tax preparer testified that he had taken every business deduction allowed by law on that form, including deducting the total payments made on his equipment loans and his home office. The petitioner has made no persuasive argument as to why her husband should get additional allowances for personal expenses which are clearly not a part of creating his income. It should be noted that even with these deductions, the petitioner would still be considerably over the income level for eligibility for Medicaid (although her spend-down would certainly be reduced). As the petitioner is clearly financially ineligible to receive Medicaid either when the decision was first made or at the present time, the Board is bound to uphold the Department's decision. 3 V.S.A. § 3091(d).

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1. The petitioner also asked for the deduction of interest for the loans on the equipment and the part of the mortgage which went to pay for the home office. The facts show that these two items were deducted because they already appeared as allowable expenses on the IRS profit and loss forms which were used by the Department.