



54334A

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

DECISION

c/o Atty. Mary Lansing
Western Wisconsin Legal Services
205 5th Ave South, Suite 300
La Crosse, WI 54602-2617

WWW-62/41789

PRELIMINARY RECITALS

Pursuant to Wis. Stat. §49.152(1), petitioner requested a W-2 fact finding review with the Vernon County Dept. of Health and Human Services, in its capacity as a Wisconsin Works (W-2) agency. A fact finding review was held by that agency on September 24, 1999 and a fact finding decision was issued on September 28, 1999.

Petitioner timely appealed to the Department from the fact finding decision on October 13, 1999. See Wis. Stat. §49.152(2)(b), (c). The fact finding file was received by the Division on October 19, 1999.

There are two issues for determination: (1) whether the W-2 agency properly processed petitioner's application for assistance; (2) whether any remedy exists when a W-2 agency fails to properly process an individual's W-2 application.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

c/o Atty. Mary Lansing
Western Wisconsin Legal Services
205 5th Ave South, Suite 300
La Crosse, WI 54602-2617

Respondent:

Wisconsin Department of Workforce Development
P.O. Box 7946
Madison, WI 5707-7946

By: June Buros, FEP
Vernon County Dept. of Human Services
Route 3
Viroqua, WI

FACT FINDER: Janelle Olson

EXAMINER:

Kenneth P. Adler, Attorney
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (S S N . CARES # [REDACTED]) is a resident of Vernon County.
2. On May 4, 1999 petitioner requested W-2 assistance from the county agency. At that time the agency agreed petitioner could not obtain employment due to a back injury. Petitioner was determined eligible for W-2T assistance.
3. At the time of application, petitioner was given a DES-2012 Medical Examination form to be completed by her treating physician.
4. On May 10, 1999 petitioner's physician completed the Medical Examination form stating petitioner was restricted from working until June 24, 1999. Exhibit 1.
5. The agency did not find the May 10th form sufficient, and supplied petitioner with another Medical Examination form to be completed by her physician.
6. On June 7, 1999 petitioner's physician completed the second Medical Examination form stating petitioner was restricted from working until July 7th. At that time she was to be reevaluated to determine whether she could return to work. Exhibit 2.
7. The agency again concluded the information supplied by petitioner's physician was not sufficient.
8. On July 18, 1999 petitioner's physician submitted a letter stating petitioner was unable to work at the present time, was in the process of further evaluation, and petitioner would be restricted from employment indefinitely "until further notice." Again, the agency concluded this information was not sufficient. Exhibit 3.
9. Petitioner secured the assistance of her worker, and a "sufficient" letter was obtained from the treating physician on August 24, 1999. That letter stated petitioner was unable to work until October 31, 1999. Exhibit 4
10. Following submission of the physician's August 24th letter, petitioner was formally assessed for IV-2 eligibility by the agency.
11. On August 30, 1999 an Employability Plan was executed by petitioner. Pursuant to the Plan, she began receiving W-2T cash benefits effective September 1, 1999.

DISCUSSION

There are two issues for determination: (1) whether the W-2 agency failed to follow applicable procedures in processing the petitioner's request for assistance; and (2) whether there is any remedy available to the petitioner if her application was not correctly processed.

Operations Memo 98-26 states the FEP is required to assess and place individuals within seven (7) days of the initial interview with the FEP. Pursuant to Wis. Admin. Code § DWD 12.06(4), the FEP may extend the application processing to 30 days, when necessary. However, clear documentation is to be provided for this decision, and the FEP is instructed to assist the client in obtaining the verification necessary for processing the application.

The following administrative code provisions detail the responsibilities of the W-2 agencies in accepting and processing an application for W-2.

DWD 12.06 Application for Wisconsin works.

(4) DECISION DATE. (a) As soon as possible, *but no later than 5 working days after the date the agency receives a signed application, completed to the best of the applicant's ability, the W-2 agency shall schedule and hold a personal interview with the applicant.*

(b) *The W-2 agency shall give the applicant 7 working days to provide requested verification.*

(c) Following the interview and after verifying eligibility information, the W-2 agency shall *with reasonable promptness* make a decision as to the appropriate placement in a W-2 employment position.

(5) NONENTITLEMENT: Notwithstanding fulfillment of the eligibility requirements for any component of Wisconsin works, an individual is not entitled to services or benefits under Wisconsin works.

(e m p h a s i s a d d e d)

DWD 12.11 Verification.

(1) The W-2 agency shall verify that an individual meets nonfinancial and financial eligibility criteria under s. DWD 12.09 (2) and (3) prior to placing an individual in a W-2 employment position, nonfinancial and financial eligibility criteria under s. DWD 12.26 (2) prior to providing a child care subsidy or other appropriate eligibility criteria prior to providing any other W-2 benefit or service.

(2) If the individual does not have the power to produce verification, or requires assistance to do so, the IS-2 agency shall proceed immediately to seek the verification.

(3) NO eligibility shall exist when an individual has the power to produce required verification as determined by the W-2 agency but refuses or fails to do so.

History: Cr. Register, October, 1997, No. 502, eff. 11-1-97.

(emphasis added)

DWD 12.12 Eligibility date.

The eligibility date for a W-2 employment position wage or benefit payment is the date the applicant has met all W-2 eligibility requirements and has begun participating in a W-2 employment position.

History: Cr. Register, October, 1997, No. 502, eff. 11-1-97.

The county agency asserted verification of petitioner's disability was necessary before the petitioner could be placed in any component of the W-2 program as the agency believed the only placement possible for the petitioner was W-2T. Therefore, as the specific documentation verifying an expected incapacity for 90 days or more had not been secured, the agency continued to "hold" the petitioner's W-2 application until the information needed was provided. The agency did not explain why it did not assist

the petitioner in securing the verification necessary to assess her eligibility for placement in a particular W-2 component.

The petitioner's representative asserts the W-2 agency did not follow correct procedure by failing to place the petitioner in any level of W-2 until the agency had "sufficient" documentation there was a 60-day period of disability. Ms. Lansing argues the petitioner met the requirements of the Wisconsin Works Manual, section 7.3.2.1 on July 4, 1999. At that time the petitioner had presented documentation confirming she was expected to be incapacitated for a period of 60 days or more. See Exhibit 4. In addition, there was concurrent medical verification through the end of August, 1999 verifying her inability to work.

Ms. Lansing suggests the petitioner should have been assessed and placed in *some* tier of W-2 at the time she applied for assistance in May, 1999, or given a denial which she could appeal. While the petitioner was *told* several times that her medical verification was insufficient, no written notice was ever issued stating her application was denied or that additional time was necessary to process her application. As no notice or decision was ever issued, the petitioner spent several months with no determination, no placement and no benefits. In addition, the agency did not immediately assist the petitioner in obtaining the verification the agency found necessary to complete the application processing;

Based upon the above, Ms. Lansing requests the petitioner be awarded W-2T cash benefits back to May 4, 1999 or at least July 4, 1999.

In reviewing the case, I am persuaded the W-2 agency failed to process the petitioner's application pursuant to the administrative and policy provisions cited above. It is clear that the agency is to act on an application, within five (5) days and request verification immediately. If verification cannot be obtained by the applicant within seven (7) working days, the W-2 agency is to *immediately* assist the individual in securing the necessary verification. In this particular case, the agency did not assist the petitioner in obtaining the requisite verification until almost three months after her initial application date. There is no possible way to interpret such delay as fulfilling the requirements of the administrative code.

In addition, there is no information in the record to confirm the county agency informed the petitioner what information was needed to complete the application. Nowhere can I find any notice issued which would have instructed the petitioner as to what information was needed from her physician. And, as her application was never officially denied, the petitioner had no action which she could appeal.

However, while I conclude the W-2 agency did not correctly process the petitioner's application, I must also conclude there is no ability to provide retroactive benefits as sought by the petitioner.

Wis. Stat. § 49.152, describes the W-2 review process. Originally the statute was silent on the topic of remedies, but was amended in 1997 to contain the following instructions:

(3) REMEDIES. (a) If, following review under sub. (2), the Wisconsin works agency or the department determines that an individual, whose application for a Wisconsin works employment position was denied based on eligibility, was in fact eligible, or that the individual was placed in an inappropriate Wisconsin works employment position, the Wisconsin works agency shall place the individual in the first available Wisconsin works employment position that is appropriate for that individual, as determined by the Wisconsin works agency or the department. An individual who is placed in a Wisconsin works employment position under this paragraph is eligible for the benefit for that position under s. 49.148 beginning on the date on which the individual begins participation under s. 49.147.

(b) If, following review under sub. (2), the Wisconsin works agency or the department determines that a participant's benefit was improperly modified or canceled, or was calculated incorrectly, the Wisconsin works agency shall restore the benefit to the level determined to be appropriate by the Wisconsin works agency or by the department retroactive to the date on which the benefit was first improperly modified or canceled or incorrectly calculated.

Subsection (3)(a) provides that the agency or the department may only provide prospective placement and W-2 cash assistance as of the date of placement, if upon fact finding review, it is found that an application was wrongly denied or the individual was wrongly placed in a W-2 employment position. Subsection (3)(b) provides for a retroactive remedy only for a participant whose benefit was improperly modified, canceled, or incorrectly computed.

The department's policy statement on the remedies available to a second level reviewer are described in the Wisconsin Works Manual § 19.3.3, as follows:

If following the Departmental Review, it is determined the W-2 agency *incorrectly denied an application for a W-2 employment position* or the employment position placement was inappropriate, DHA may direct the W-2 agency to place the individual in the first available employment position beginning on the date the individual begins participation. No retroactive cash payment for the period prior to participation shall be issued. If the Department determines that a W-2 cash payment was calculated, reduced, or terminated improperly, the W-2 agency shall restore the W-2 payment to the appropriate level retroactive to the date on which the payment was improperly calculated, reduced or terminated.

Emphasis added.

The above policy of denying retroactive payments could provide an impetus for W-2 agencies to intentionally deny or fail to process applications. However, I cannot ignore the plain language of the statute, which provides only for *prospective* placement in cases of improper denial, and does not provide for retroactivity of cash benefits in cases of improper processing.

The Manual at §4.5.1, states that W-2 eligibility does not begin until W-2 activities begin, which is when verifications are completed and the FEP makes a placement. Under this scenario, the agency could simply ignore requests for W-2 and wait until a Department reviewer ordered placement. It appears that there would be no remedy for the client other than to accept the late placement. The W-2 agency's contract with the department could possibly be in jeopardy, but neither the legislature nor the department anticipated a retroactive remedy for the client.

CONCLUSIONS OF LAW

1. That the W-2 agency failed to appropriately process petitioner's application for W-2.
2. That although the W-2 agency failed to appropriately process petitioner's application for W-2, there is no provision for retroactive relief; the remedy is to place her into a W-2 category as soon as possible and to begin benefits at that time.

NOW, THEREFORE, it is

O R D E R E D ,

That the petition for review herein be and the same is hereby dismissed.

REQUEST FOR A NEW HEARING

This is a final fair hearing decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a new hearing. You may also ask for a new hearing if you have found **new** evidence which would change the decision. To ask for a new hearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875.

Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST."

Your request must explain what mistake the examiner made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

Your request for a new hearing must be received no later than twenty (20) days after the date of this decision. Late requests cannot be granted. The process for asking for a new hearing is in sec. 227.49 of the state statutes. A copy of the statutes can be found at your local library or courthouse.

APPEAL TO COURT

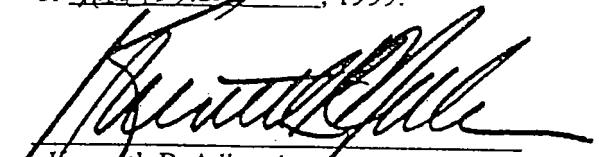
You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed no more than thirty (30) days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

Appeals for benefits concerning must be served on

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for Court appeals is in sec. 227.53 of the statutes.

THIS IS A CERTIFIED COPY OF THE
FINDINGS AND DECISION MADE IN THIS
MATTER AND FILED IN THE DIVISION OF
HEARINGS AND APPEALS IN THE CITY
OF MADISON, WISCONSIN.

Given under my hand at the City of
Madison, Wisconsin, this 21st day
of December, 1999.


Kenneth P. Adler, Attorney
Division of Hearings and Appeals
1220/

cc: VERNON COUNTY DHS
Division Of Economic Support - Anthony Esealuka
County Work Program
Leonor Rosas DeLeon, DWD
Bill Goehring, DWD Regional Office, Milw.
Dave Schwarz, DHA
Lou Dunlap, DHA
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