



FH
[REDACTED]

**STATE OF WISCONSIN
Division of Hearings and Appeals**

In the Matter of

[REDACTED]

DECISION

FOO/143025

PRELIMINARY RECITALS

Pursuant to a petition filed August 10, 2012, under Wis. Admin. Code § HA 3.03(1), to review a decision by the Waushara County Human Services in regard to FoodShare benefits (FS), a telephone hearing was held on September 27, 2012, at Wautoma, Wisconsin.

The issue for determination is whether the Department erred in its decision to sanction petitioner as a drug felon due to a positive drug test.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]

Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, Wisconsin 53703

By: Roxanne Binkowski
Waushara County Human Services
205 W Elm
Wautoma, WI 54982-1230

ADMINISTRATIVE LAW JUDGE:

John P. Tedesco
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident of Waushara County.
2. Petitioner had been receiving FoodShare as a drug felon.
3. The agency asked petitioner to submit to a drug test. Petitioner agreed.
4. The drug test was conducted on July 10, 2012.

5. Results were issued on July 17, 2012 showing positive for Benzodiazepines, a family of controlled substances.
6. Petitioner has a valid prescription from a provider for Diazepam and Clonazepam, from the family of benzodiazepines.
7. Petitioner had informed her worker and the lab of certain prescription medication that could cause such a positive test result.
8. The agency worker contacted the lab by telephone to clarify results.
9. The Department issued a 12-month sanction effective September 1, 2012.
10. Petitioner filed a timely appeal.

DISCUSSION

The Department's Food Stamps policy states as follows:

3.19.1.2 Ongoing cases

If a felony drug conviction is reported for an eligible FS member at review or any other time, immediately schedule the individual for a drug test. Refusal to take a drug test will result in the felon being removed from the FS assistance group indefinitely until the individual agrees to take the test. If a felon tests positive on a drug test, deny FS for the individual for 12 months starting in the next possible benefit month.

FoodShare Wisconsin Handbook § 3.19.1.2; see also, 7 C.F.R. § 273.11(m).

In a Fair Hearing concerning the propriety of a denial of benefits, such as this, the county agency has the burden of proof to establish that the action taken by the county was proper. Petitioner must then rebut the agency's case and establish facts sufficient to overcome the evidence of correct action by the agency in determining the denial action was required.

In this case, the agency relied on the drug test results from Options Lab. See exhibit #1. But, these test results are flawed. Petitioner clearly demonstrated at hearing that she has a prescription for Clonazepam and Diazepam. Both of which would cause a positive test result alone.

The agency states that it spoke with the lab conducting the test and the lab reported that the level of benzodiazepines "were by my judgment, inconsistent with the therapeutic use of Clonazepam alone." The first problem with this information from the lab (both the oral report of the conversation, and the written August 24 letter from the lab contained in exhibit #1) is that this is hearsay. I cannot make a finding of fact based on uncorroborated hearsay. Furthermore, I have no idea what the education or other qualifications of the lab director are? Does he have any familiarity at all with the proper therapeutic dose of a drug? I have no way of knowing as he did not testify at the hearing. His "judgment" put forth in the letter is essentially expert testimony. I will not decide a case of this gravity based only on a one sentence scientific conclusion written by a witness who did not even appear at the hearing. His opinion could not be scrutinized, and thus, it carries little weight.

More critically, the letter from the lab explains that the amount of Benzodiazepines is inconsistent with therapeutic use "of Clonazepam alone." But the letter says nothing of the prescription for Diazepam. Did the lab know about the Diazepam? Petitioner states that she informed the lab at the time of the test. Would the Diazepam in her system have made a difference? Is the tested level indicative of abuse? Again, the person did not testify, so I am unable to find that the agency met its burden of proof to demonstrate a prima facie case to support the sanction.

CONCLUSIONS OF LAW

The Department erred in issuing a sanction of suspension beginning September 1, 2012 for a failed drug test.

THEREFORE, it is

ORDERED

This matter is remanded to the Department and its agent to reverse the 12-month sanction that was effective September 1, 2012, and to issue any appropriate supplement of FS retroactive to that date to petitioner. These actions must be completed within 10 days.

REQUEST FOR A REHEARING

This is a final administrative decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a rehearing. You may also ask for a rehearing if you have found new evidence which would change the decision. Your request must explain what mistake the Administrative Law Judge 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.

To ask for a rehearing, 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 for a rehearing must be received no later than 20 days after the date of the decision. Late requests cannot be granted.

The process for asking for a rehearing is in Wis. Stat. § 227.49. 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 with the appropriate court no more than 30 days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

For purposes of appeal to circuit court, the Respondent in this matter is the Department of Health Services. After filing the appeal with the appropriate court, it must be served on the Secretary of that Department, either personally or by certified mail. The address of the Department is: 1 West Wilson Street, Room 651, Madison, Wisconsin 53703. A copy should also be sent to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for appeals to the Circuit Court is in Wis. Stat. §§ 227.52 and 227.53.

Given under my hand at the City of Madison,
Wisconsin, this 9th day of October, 2012

John P. Tedesco
Administrative Law Judge
Division of Hearings and Appeals



State of Wisconsin \DIVISION OF HEARINGS AND APPEALS

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The preceding decision was sent to the following parties on October 9, 2012.

Waushara County Human Services
Division of Health Care Access and Accountability