



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of



DECISION

FOO/152687

PRELIMINARY RECITALS

Pursuant to a petition filed October 07, 2013, under Wis. Admin. Code § HA 3.03(1), to review a decision by the Ozaukee County Department of Social Services in regard to FoodShare benefits (FS), a hearing was held on December 12, 2013, at Port Washington, Wisconsin. The record was held open post-hearing to allow the Petitioner to submit additional evidence. On January 14, 2013, additional evidence was received by DHA and the record was closed.

The issue for determination is whether the agency properly terminated Petitioner's FS benefits effective September 1, 2013 due to a positive drug test result.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:



Respondent:

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

By: Pahoua Vang

Ozaukee County Department of Social Services
121 W. Main Street
PO Box 994



ADMINISTRATIVE LAW JUDGE:

Debra Bursinger
Division of Hearings and Appeals

FINDINGS OF FACT

- 1. Petitioner (CARES # [redacted]) is a resident of Ozaukee County.

2. On August 28, 2013, the agency completed a FS interview and processed Petitioner's application of August 23, 2013.
3. On her application and in her interview, Petitioner reported that she has been convicted of a drug felony within the last five years.
4. On August 29, 2013, the agency referred the Petitioner for a drug test with results of the test due to the agency before September 23, 2013.
5. Petitioner was convicted of a felony - Manufacture/Deliver THC, in violation of Wis. Stats. § 961.41(1)(h)1 on June 12, 2012.
6. On September 18, 2013, the agency received copies of Petitioner's prescription for Lisdexamfetamine Vyvanse and prescription for LamoTrigine. The agency also received the Petitioner's drug test results dated September 11, 2013 showing positive for K2/Spice. In addition, the agency received communication from an agency RN stating that there are no over the counter or prescription medications that she knew of that would cause a positive K2 result.
7. On September 19, 2013, the agency issued a Notice of Decision informing the Petitioner that her application for FS benefits was approved for August 23 – 31, 2013. It further informed her that her FS benefits would terminate effective September 1, 2013 due to the positive drug test result.
8. On October 7, 2013, the Petitioner filed an appeal with the Division of Hearings and Appeals.

DISCUSSION

For FoodShare eligibility purposes, a drug felon is a person who is convicted of a felony in a state or federal court involving the possession, use or distribution of a controlled substance Illegal or unauthorized medicines, inhalants, drugs or narcotics. Convicted drug felons must have a negative drug test result to become eligible for FS. FS Handbook § 3.19.1 & 7 CFR § 273.11(m).

Drug tests required by another credible source may be used if taken within the last 30 days. Examples of credible sources include, but are not limited to, probation officers, employers, FEPs, etc. FSH § 3.19.1.

FS applicants who meet the definition of a drug felon and agree to take a drug test will be tentatively approved until a drug test is taken. FSH § 3.19.1.1. If the individual passes this test, s/he remains eligible. If the applicant refuses to take a drug test, s/he will be denied indefinitely until s/he agrees to take a drug test. FSH § 3.19.1.1. If the drug test result is negative, the individual remains eligible.

The Petitioner does not dispute that she is convicted drug felon and she does not dispute that her drug test was positive for K2. She argues that her prescription for Lamictal caused a false positive for K2 and she should not, therefore, be denied FS on the basis of a false positive.

In support of her argument, the Petitioner submitted a document from Drug Check K2/Spice Test Under a section entitled "Expected Results", the following is noted:

NOTE: This test has been determined to cross react with the drug Lamictal (Lamotrigine). Specimen from individuals taking this prescription drug will likely register a false positive for K2. All presumptive positive screens should be sent to a confirmation lab for analysis.

In addition, on January 14, 2013, DHA received a written statement from the Petitioner's probation and parole agent for the State of Wisconsin. He indicates as follows:

“I have been asked by [REDACTED] to report to you the results of verification testing done on a quick UA sample which showed that [REDACTED] was positive for the substance K2. The verification test revealed that the quick test was false positive and that [REDACTED] was negative for the use of K2.”

Though submission of the verification test would have been the best evidence, I conclude the evidence submitted by [REDACTED], specifically the statement by her probation and parole agent that the verification test was negative for K2, is sufficient to demonstrate that she should not be deemed ineligible for benefits based on the initial positive drug test.

I suggest that, in the future, if [REDACTED] needs to submit to further testing for FS benefits, she obtain a copy of the verification test and submit it to the agency to avoid a break in benefits.

CONCLUSIONS OF LAW

The agency cannot find the Petitioner ineligible for FS benefits based on the false positive drug test dated September 11, 2013.

THEREFORE, it is

ORDERED

That this matter is remanded to the agency to take all administrative steps necessary to process the Petitioner’s eligibility for FS benefits based on her application dated August 23, 2013 and any other information needed to determine eligibility effective September 1, 2013. The agency shall issue a notice of decision to the Petitioner. These actions shall be completed within 10 days of the date of this decision.

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 served and 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 Milwaukee,
Wisconsin, this 23rd day of January, 2014

\sDebra Bursinger
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 January 23, 2014.

Ozaukee County Department of Social Services
Division of Health Care Access and Accountability