

**STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS**

**PROVIDENCE, SC.**

**SUPERIOR COURT**

**FILED: (SEPTEMBER 25, 2012)**

**MARK FOLGER**

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**v.**

**C.A. No. PC 10-7499**

**RHODE ISLAND DEPARTMENT  
OF HUMAN SERVICES**

**DECISION**

**MCGUIRL, J.** Before this Court is an appeal from a December 7, 2010 decision by the Rhode Island Department of Human Services (“DHS”), denying Mark Folger (“Appellant”) Medical Assistance (“MA”) benefits on the grounds of disability under G.L. 1956 § 40-8-1, et seq. Appellant filed his timely appeal on December 23, 2010, seeking a reversal of the DHS decision. Jurisdiction is pursuant to G.L. 1956 § 42-35-15.

**I**

**Facts and Travel**

In April 2010, Appellant applied for MA, claiming disability based on “cirrhosis, alcohol abuse, depression, hypertension, hepatitis C, anemia, and a history of asthma.” (Administrative Hearing Decision at 2.) Appellant is a 49 year old male with a 10<sup>th</sup> grade education who worked as an iron worker and in other hard labor for many years. (AP-70,

April 29, 2010, Ex. 9 at 4.) Appellant stopped working because of his injuries in November 2007.<sup>1</sup> (AP-70, April 29, 2010, Ex. 9 at 4.)

Appellant submitted an AP-70 form (Information for Determination of Disability), in which he explained that he is only able to perform daily household tasks when his physical and mental ailments permit. (AP-70, April 29, 2010, Ex. 9 at 3.) In April 2010, Appellant's doctor, Dr. Keigwin, completed a MA-63 form (Physician Examination Report) finding that Appellant was physically able to perform basic activities, such as walking, standing, and bending less than 2 hours per workday, and that Appellant was moderately limited in mental activities. (MA-63, April 22, 2010, Ex. 8 at 3.) Dr. Keigwin further noted that Appellant's prognosis for eliminating or reducing his conditions through medication or other treatments was poor. (MA-63, April 22, 2010, Ex. 8 at 1.)

Appellant also submitted records from Newport Hospital, where Appellant was admitted for treatment in February 2010. (Newport Hospital Discharge Summary, Ex. 12 at 1.) Appellant was diagnosed with hepatic encephalopathy, recurrent alcohol abuse, a history of alcoholic cirrhosis, and hypertension, but was stable at the time of discharge with instructions to follow up with his primary care doctor. (Newport Hospital Discharge Summary, Ex. 12 at 1; Administrative Hearing Decision at 3.)

Appellant's history of alcohol dependence and drug abuse is documented in both Dr. Keigwin's records and the letter from Appellant's other treating physician, Dr. Boshes. (Administrative Hearing Decision at 3; Letter from Dr. Boshes, October 1, 2010,

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<sup>1</sup> During the Administrative Hearing, however, Appellant stated that he stopped working because his employer went out of business. (Transcript of Hearing, September 29, 2010, Ex. 16 at 6.)

Ex. 11.) Both Dr. Keigwin's records and the Newport Hospital records recommend that Appellant avoid alcohol abuse. (Administrative Hearing Decision at 3; Newport Hospital Discharge Summary, Ex. 12 at 1.) However, a Progress Note on Appellant, submitted by Dr. Hmadeh, a partner of Dr. Keigwin's, noted that Appellant was "still drinking alcohol and still smoking despite the fact that he has advanced liver disease and asthma." (Progress Note, August 13, 2010, Ex. 13.) Appellant testified that his alcohol abuse became heavier after he lost his job in 2007. (Transcript of Hearing, September 29, 2010, at 6.)

Appellant testified that he is unable to hold a job because it takes him about four hours just to get up and start the day. (Transcript of Hearing, September 29, 2010, Ex. 16 at 6.) He further testified that he has chronic back and leg pain and can sit or stand for an hour at most during the day. (Transcript of Hearing, September 29, 2010, Ex. 16 at 6.) Appellant also submitted diagnostic MRI reports on his spine and shoulder from January 2010. (Administrative Hearing Decision at 4.)

Appellant's other treating physician, Dr. Boshes, also submitted a letter confirming that Appellant suffers from "severe chronic pain centered on his lumbosacral spine area and left shoulder" as well as "paraesthesias in both hands particularly in the distribution of the radial nerve." (Letter from Dr. Boshes, October 1, 2010, Ex. 11.) Dr. Boshes further noted that Appellant suffered from "generalized anxiety disorder, agoraphobia with panic, and social anxiety." (Letter from Dr. Boshes, October 1, 2010, Ex. 11.) Dr. Boshes concluded that Appellant was "permanently disabled." (Letter from Dr. Boshes, October 1, 2010, Ex. 11.)

The Progress Note by Dr. Hmadeh indicated that Appellant's asthma was "well controlled" with the use of medication. (Progress Note, August 13, 2010, Ex. 13.) The Office of Medical Review's Worksheet assessment of Appellant concluded that he was capable of doing sedentary and light work and was only mildly limited in his ability to perform complex tasks. (Office of Medical Review Worksheet, Ex. 5.) The Office of Medical Review further noted that Appellant's mental and emotional restrictions were "stable" through the use of medication. (Office of Medical Review Worksheet, Ex. 5.)

The Medical Assistance Review Team (MART)<sup>2</sup> reviewed the MA-63 form (completed by Appellant's physician), an AP-70 form (Information for the Determination of Disability completed by the Appellant), a letter of denial of Appellant's disability application from the Social Security Administration, and medical records from Appellant's physician and Newport Hospital. (Administrative Hearing Decision at 2.) After evaluating the evidence, the MART determined that Appellant did not qualify as disabled and denied Appellant's application for MA benefits on July 14, 2010. Appellant timely requested and received a hearing to challenge the MART's determination that he was not disabled and was ineligible for MA benefits.

The hearing was held on September 29, 2010. At the hearing, a representative of DHS and Appellant both testified. The DHS representative testified that pursuant to the Department of Human Services Policy Manual, the MART must establish an applicant's eligibility in order to grant MA benefits. The DHS representative explained that in order to qualify for MA, he or she must be over the age of sixty-five, blind, or disabled. The

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<sup>2</sup> The MART's duties include "analyz[ing] the complete medical data, social findings, and other evidence of disability submitted by or on behalf of the applicant" and "issu[ing] a decision on whether the applicant meets the criteria for disability based on the evidence submitted." Rhode Island Department of Human Services Manual § 0352.15.20.

MART, finding that Appellant is neither blind nor over the age of sixty, used a five-step evaluation process to determine if Appellant was disabled. In order for an illness or injury to qualify as a disability, the impairment must be “severe enough to render him incapable of any type of work, not necessarily his past work” and must also “last, or be expected to last for a continuous period of not less than twelve (12) months.” (Administrative Hearing Decision, at 2.)

The DHS representative testified that the MART’s review provided a diagnosis of cirrhosis, alcohol abuse, depression, hypertension, hepatitis C, anemia, and a history of asthma. (Administrative Hearing Decision, at 2.) The records indicate that Appellant’s hypertension and asthma were being managed through medication. (Administrative Hearing Decision, at 3.) The MART determined that Appellant does have a severe impairment because of his chronic liver disease and hypertension. (Administrative Hearing Decision, at 3.) The MART concluded that the medical records did not support the level of limitation noted on the MA-63 and that Appellant does have some functional restrictions but is otherwise able to do light work. (Administrative Hearing Decision, at 3-4.) Consequently, the Mart determined that Appellant was not disabled under Step 5 of the disability analysis. (Administrative Hearing Decision, at 4.)

After reviewing the medical records and hearing the DHS representative’s and Appellant’s testimony, the DHS Hearing Officer made the following relevant findings of fact:

1. “The appellant is not engaging in substantial gainful activity.
2. At the time of this decision, the appellant had the following severe impairments: liver disease, back pain and depression/anxiety.
3. At the time of this decision, the appellant did not have an impairment or combination of impairments that met or medically equaled any of the listed impairments in the Social Security listings.

4. The appellant was born on March 21, 1962 and is 48 years old, which is defined as a younger individual. (20 CFR 416.963.)
5. Based on the appellant's residual functioning, he retains the ability to do light work.
6. The appellant is not disabled for the purposes of the Medical Assistance program." (Administrative Hearing Decision at 5-6.)

Based on these findings, the Hearing Officer issued a written decision on December 7, 2010, sustaining the MART's determination that Appellant was not disabled and thus ineligible for MA benefits. On December 23, 2010, Appellant timely appealed that decision to this Court. Appellant seeks to reverse the DHS decision and require DHS to provide him with MA benefits, or, alternatively, reverse and remand for issuance of a revised decision.

## II

### Standard of Review

Rhode Island General Laws § 42-35-15 governs the Superior Court's scope of review for an appeal of a final agency decision. Sec. 42-35-15(g). The statute provides, in relevant part:

- “(g) The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings, or it may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
- (1) In violation of constitutional or statutory provisions;
  - (2) In excess of the statutory authority of the agency;
  - (3) Made upon unlawful procedure;
  - (4) Affected by other error or law;
  - (5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
  - (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.” (Sec. 42-35-15.)

The statute also requires that “[a]ny final order shall include findings of fact and conclusions of law, separately stated. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings.” Sec. 42-35-12. Moreover, “[a]n administrative decision that fails to include findings of fact required by statute cannot be upheld.” Sakonnet Rogers, Inc. v. Coastal Resources Management Council, 536 A.2d 893 (R.I. 1988). The Rhode Island Supreme Court has emphasized that “administrative bodies should be meticulous about documenting the fact-finding process that underlies their decision.” State v. Germane, 971 A.2d 555, 588 (R.I. 2009).

Sitting as an appellate court with a limited scope of review, the Superior Court justice may not substitute his or her judgment with respect to the credibility of the witnesses or the weight of the evidence as to questions of fact. Interstate Navigation Co. v. Div. of Pub. Utils. & Carriers of R.I., 824 A.2d 1282, 1286 (R.I. 2003) (citations omitted). This directive applies even if the court may have been inclined to arrive at different conclusions and inferences upon review of the evidence and the record. Johnston Ambulatory Surgical Assocs. v. Nolan, 755 A.2d 799, 805 (R.I. 2000) (quoting Rhode Island Pub. Telecomm. Auth. v. Rhode Island State Labor Relations Bd., 650 A.2d 479, 485 (R.I. 1994)); Barrington Sch. Comm. v. Rhode Island State Labor Relations Bd., 608 A.2d 1126, 1138 (R.I. 1992).

Additionally, as long as “substantial evidence” exists to support the agency’s determination, the Superior Court must uphold the decision. Ctr. for Behavioral Health v. Barros, 710 A.2d 680, 684 (R.I. 1998) (“In reviewing an administrative agency’s decision, the Superior Court is limited to an examination of the certified record to

determine whether the agency’s decision is supported by substantial evidence”); see Environmental Scientific Corp. v. Durfee, 621 A.2d 200, 208 (R.I. 1993) (“The Superior Court is confined to a determination of whether there is any legally competent evidence to support the agency’s decision”). The Rhode Island Supreme Court has defined substantial evidence as “such relevant evidence that a reasonable mind might accept as adequate to support a conclusion, and means an amount more than a scintilla but less than a preponderance.” Lischio v. Zoning Bd. of Review of North Kingstown, 818 A.2d 685, 590 (R.I. 2003) (quoting Caswell v. George Sherman Sand & Gravel Co., 424 A.2d 646, 647 (R.I. 1981)).

### III

#### **The Department of Human Services**

The Department of Human Services is an agency within the Executive Branch. Sec. 42-12-1, et seq. Pursuant to § 42-12-4 of the Rhode Island General Laws, DHS manages federally and state funded public assistance programs, one of which provides MA to persons who qualify for benefits under § 40-8-3. Sec. 42-12-4 (providing that “[t]he department of human services shall have supervision and management of . . . [a]ll forms of public assistance under the control of the state”); Sec. 40-8-3 (outlining eligibility requirements for medical care benefits); see Sec. 40-8-1 (declaration of policy). In order to receive federal funding for the MA program, DHS must “establish income and resource rules, regulations, and limits in accordance with title XIX of the federal Social Security Act, 42 U.S.C. § 1396 et seq., as applicable to the medically needy only applicants and recipients.” Sec. 40-8-3; 42 U.S.C. § 1396 (mandating that “[t]he sums made available under this section shall be used for making payments to States which have



submitted, and had approved by the Secretary, State plans for medical assistance”); see Sec. 40-8-13 (empowering DHS Director to create rules and regulations in conformity with 42 U.S.C. § 1396 et seq.). Thus, when defining “disabled” and creating eligibility requirements, the DHS must promulgate rules that adhere to the federal definitions and guidelines as set forth in federal statutes and regulations. 42 U.S.C. § 1396 et seq.; 20 C.F.R. § 416.901-998.

Section 0352.15 of the DHS Manual outlines the policy relating to eligibility based on disability for MA benefits. See Rhode Island Department of Human Services Manual § 0352.15 (hereinafter DHS Manual); Administrative Hearing Decision at 10-14 (outlining § 0352.15 regarding eligibility based on disability). Mirroring federal provisions, the DHS policy provides, in relevant part:

“To be eligible for Medical Assistance because of permanent or total disability, a person must have a permanent physical or mental impairment, disease or loss, other than blindness, that substantially precludes engagement in useful occupations or appropriate activities (for children) within his/her competence.

A physical or mental impairment is an impairment which results from anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable, clinical and laboratory diagnostic techniques.” DHS Manual § 0352.15; see 42 U.S.C. § 1382c (a)(3) (2003).

To determine whether an applicant qualifies as “disabled” for the purposes of MA eligibility, a Hearing Officer engages in a five-step sequential inquiry, which follows the five-step federal process enunciated in 20 C.F.R. § 416.920. Compare 20 C.F.R. § 416.920 with DHS Manual §§ 0352.15; 0352.15.05; 0352.15.15; 0352.15.20. The Hearing Officer asks:

1. Is the claimant engaged in substantial activity?
2. If not, is the impairment severe?

3. If severe, does it meet or equal an impairment listed in the Supplemental Security Income (SSI) regulations?
4. If it does not meet or equal SSI regulations, does the impairment prevent the claimant from doing past relevant work?
5. Considering age, education, work experience and residual functional capacity, does the impairment(s) prevent the claimant from doing other work in the national economy?

See 20 C.F.R. § 416.920; DHS Manual §§ 0352.15; 0135.15.05; 0352.15.15; 0352.15.20; see also Brown v. Yuckert, 482 U.S. 137, 140-42 (1987) (outlining five-step process enunciated in 20 C.F.R. § 416.920). Because of the sequential nature of this five-pronged analysis, a negative determination at any one of the steps (except for step three) forecloses a finding of “disabled.” McDaniel v. Bowen, 800 F.2d 1026, 1030 (11th Cir. 1986); see Seavey v. Barnhart, 276 F.3d 1, 5 (1st Cir. 2001) (observing that “[a]ll five steps are not applied to every applicant, as the determination may be concluded at any step along the process”).

Finally, although the claimant bears the burden of proof as to the first four steps, the burden shifts to DHS at Step Five to demonstrate that a claimant can perform work in the national economy other than his or her past relevant work. Pope v. Shalala, 998 F.2d 473, 477 (7th Cir. 1993) (noting that at Step Five, “the burden shifts to the Secretary to show that the claimant can perform some other job”). In determining whether an applicant can perform other work, the Hearing Officer may rely on either the Medical-Vocational Guidelines (the Grid) or testimony of a vocational expert (VE).<sup>3</sup> See Tackett v. Apfel, 180 F.3d 1094, 1100-01 (9th Cir. 1999) (explaining that “[t]here are two ways

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<sup>3</sup> The Grid “is a chart which classifies a claimant as disabled or not disabled, based on the claimant’s physical capacity, age, education, and work experience” and aims to “simplify the determination of disability and to improve its consistency.” Walker v. Bowen, 834 F.2d 635, 640 (7th Cir. 1987).

for the Commissioner to meet the burden of showing that there is other work in ‘significant numbers’ in the national economy that claimant can perform: (a) by the testimony of a vocational expert, or (b) by reference to the Medical-Vocational Guidelines”).

In the present case, the Hearing Officer followed the five-step analysis in the decision of December 7, 2010 and denied Appellant benefits at Step Five. (Administrative Hearing Decision at 10-14). The Hearing Officer found that, while Appellant suffers from severe impairments, including liver disease, depression/anxiety and back pain/disc disease, the medical findings did not equal any listed impairment. Id. at 11-13. The Hearing Officer determined that Appellant could not return to his past work as a construction worker and ironworker, but that Appellant had the residual functional capacity to perform light work. Id. at 14.

#### **IV**

#### **Analysis**

Appellant contends that the DHS Hearing Officer failed to articulate and apply controlling legal standards and applied incorrect legal standards. Appellant further contends that the DHS decision was not supported by substantial evidence and was arbitrary and capricious. Specifically, Appellant asserts: (1) the Hearing Officer failed to give proper weight to the opinion of Appellant’s treating physician; (2) the Hearing Officer failed to properly articulate and apply the legal standards for determining the severity of Appellant’s impairments; and (3) the Hearing Officer failed to make the requisite findings of fact for the RFC determination.

The DHS argues that the findings are supported by competent, reliable, and substantial evidence in the record. The DHS asserts the Hearing Officer applied the correct legal standards to the evidence in the case and exercised the appropriate legal authority in arriving at a decision based upon his interpretation of all of the facts and evidence presented in this matter. Therefore, the DHS requests that this Court affirm its decision.

With regard to Step Three of the disability analysis, the Hearing Officer concluded that the medical records did not support a finding that the claimant's impairments met or equaled one of the listed impairments set forth in 20 C.F.R. Pt. 404 Subpt. P, Appendix I. Specifically, the Hearing Officer determined that the records did not support the listings for 12.06 Anxiety Related Disorders, 12.04 Affective Disorders, or 5.05 Chronic liver disease. See 20 C.F.R. Pt. 404, Subpt. P, App. I. Listing of Impairments. The Hearing Officer's determinations are, however, conclusory in nature, without citation to any facts in the record. In particular, the Hearing Officer merely reiterated the Listing requirement of the various lab results necessary to demonstrate chronic liver disease with no further explanation or analysis of the ways in which Appellant's medical records did not meet the Listing. (Administrative Hearing Decision at 12). The Court finds the lack of explanation or citation to be particularly troubling as there is some evidence in the record that Appellant met at least part of the elements for the Listing of Chronic liver disease. At one point, Appellant met or equaled Listing 5.05(f), with his medical record showing that Appellant had Hepatic encephalopathy with mental confusion and a one-time INR of 1.3 and cognitive dysfunction. (Newport Hospital Discharge Summary, Ex. 12 at 1-2.) The Court is not able to determine if the

Hearing Officer's position is that the Appellant's use of alcohol, as a matter of law, disqualifies him from meeting the Listing.

Absent the necessary specifications for what evidence in the record supported the Hearing Officer's conclusions, this Court is unable to determine what in the Appellant's medical records led the Hearing Officer to conclude that Appellant did not meet the requirements for any of the Listings. Where an agency's decision does not set forth findings of fact and the reasons for the action taken, this Court will not look to the record, even if substantial evidence in the record would support the agency's ultimate conclusions. See Kaveny v. Town of Cumberland Zoning Bd. of Review, 875 A.2d 1, 8 (R.I. 2005). The Decision reveals that the Hearing Officer failed to address what specific evidence in Appellant's medical records led to his findings.

Furthermore, with regard to Step Five of the disability analysis, the Hearing Officer concluded that Appellant was capable of light work, based on his assessment of Appellant's physical and mental residual functional capacity ("RFC") from the medical record and Appellant's testimony. Specifically, the Hearing Officer found that Appellant's "[s]tanding and walking [should be] limited to 2 hour blocks of time with allowances for customary breaks" and that Appellant could "[sit] 4 out of 8 hours with breaks every 2 hours." (Administrative Hearing Decision at 13.) As to Appellant's mental impairments, the Hearing Officer noted that the "MA-63 report indicates that the appellant is moderately limited in his ability to remember and carry out simple instruction, to make simple work related decisions and to work at a consistent pace without extraordinary supervision." (Administrative Hearing Decision at 14.)

The Hearing Officer's determination that Appellant was capable of light work was conclusory without citation to specific facts in the record. In particular, the Court is troubled by the Hearing Officer's failure to address Appellant's testimony that he is currently unable to work because it takes him four hours to get ready for the day and, further, that his chronic back and leg pain limits his ability to sit or stand to an hour at most. (Transcript of Hearing, September 29, 2010, Ex. 16 at 6.) The RFC assessment must be based on all of the evidence in the record, including evidence of additional impairments which are not considered "severe." 20 C.F.R. § 416.945(a)(2). The DHS "bears the burden of demonstrating the claimant's capacity to perform each of the RFC elements . . . and must proffer specific medical evidence in support of such demonstration." Sobolewski v. Apfel, 985 F. Supp. 300, 309-310 (E.D. N.Y. 1997). Moreover, the decision that a claimant can return to work "must be based on more than conclusory statements." Pfizer v. Apfel, 169 F.3d 566, 568 (8th Cir. 1999). Absent any explanation or citation to the record to support his findings, this Court is unable to determine what evidence in Appellant's medical records led the Hearing Officer to conclude that Appellant is capable of light work, particularly as the finding of Appellant's physical RFC is contradicted by Appellant's own testimony.

After careful review of the Hearing Officer's Decision, the Court finds that the Hearing Officer failed to make sufficient findings of fact. Accordingly, the Court must remand the case to the DHS for further proceedings consistent with this opinion. "If the record before the agency does not support the agency action, if the agency has not considered all relevant factors, or if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course, except in

rare circumstances, is to remand to the agency for additional investigation or explanation.” Florida Power & Light Co. v. Lorion, 470 U.S. 729, 744 (1985). Remand is favorable because of “the unique expertise possessed by administrative agencies.” See Sartor v. Coastal Resources Management Council, 542 A.2d 1077, 1081 (R.I. 1988). The Rhode Island Supreme Court has characterized this Court’s authority to remand for further proceedings under § 42-35-15(g) as “a broad grant of power . . . to remand, in a proper case, to correct deficiencies in the record and thus afford the litigants a meaningful review.” Lemoine v. Department of Mental Health, Retardation and Hospitals, 113 R.I. 285, 290, 320 A.2d 611, 614 (1974) (affirming trial justice’s order remanding the case to the agency “for the taking of additional evidence”). Remand to the agency for further consideration has been described as being “not a determination that the [agency] is wrong,” but rather “an indication that the disinterested court, which has reviewed the record, is not satisfied on the basis of that record that the [agency] is right.” State ex rel. Gunstone v. State Highway Comm’n, 72 Wash. 2d 673, 674-75, 434 P.2d 734, 735 (1967).

On remand, the Hearing Officer is directed to adequately set forth his findings of fact, address the specific evidence in Appellant’s medical record that led to his conclusion that Appellant did not meet any of the Listed impairments and that Appellant was able to perform light work, and relate those findings to the applicable law. With regard to Step three, the Hearing Officer is directed to specifically address Appellant’s recurrent liver problems in light of the Listed impairments, without consideration of whether a cessation of alcohol intake would improve Appellant’s condition. The Court notes that the predominant issue in a disability determination is whether Appellant is

currently disabled, not whether any particular course of treatment will improve Appellant's health so as to render him not disabled. The Court further notes that Dr. Keigwin, who completed the MA-63 form, stated that Appellant's prognosis for eliminating or reducing his conditions through medication or other treatments was poor. (MA-63, April 22, 2010, Ex. 8 at 1.) Finally, with regard to Step five, the Hearing Officer is directed to set forth the specific evidence in Appellant's medical records that led to his conclusions regarding Appellant's physical RFC and his ability to perform light work.

### **Conclusion**

Upon review of the record before it, this Court finds that the Hearing Officer's findings of fact amounted to unsupported conclusions. This matter is remanded to the DHS, so that it may make sufficient findings of fact consistent with this opinion. This Court will retain Jurisdiction. Counsel shall submit the appropriate Order for entry.