STATE OF MICHIGAN
STATE OFFICE OF ADMINISTRATIVE HEARINGS AND RULES

ADMINISTRATIVE HEARINGS FOR THE
DEPARTMENT OF HUMAN SERVICES

IN THE MATTER OF: [redacted],

Claimant

Reg. No: 2009-28667
Issue No: 2010
Case No:
Load No: [redacted]
Hearing Date:
October 5, 2009
Oakland County DHS

ADMINISTRATIVE LAW JUDGE: Robert J. Chavez

HEARING DECISION

This matter is before the undersigned Administrative Law Judge pursuant to MCL 400.9 and MCL 400.37 upon claimant's request for a hearing. After due notice, a hearing was held on October 5, 2009.

ISSUE

Was the claimant's Medicaid LTC application given a proper divestment penalty, rendering claimant ineligible for payment of nursing home LTC costs?

FINDINGS OF FACT

The Administrative Law Judge, based upon the competent, material and substantial evidence on the whole record, finds as material fact:

(1) Claimant was a resident in Oakland County.

(2) Claimant resides at the [redacted] in [redacted], Michigan, a LTC facility.

(3) Claimant purchased an annuity from [redacted] (Mutual) on December 28, 2008.

(4) This annuity was purchased using the proceeds from an IRA as defined under IRC §408(a).

(5) On January 27, 2009, claimant applied for Long Term Care Medicaid, asking for benefits retroactive to December 1, 2008.

(6) On March 2, 2009, DHS determined that claimant was ineligible for Medicaid payment of nursing home LTC costs from December 1, 2008 to April 26, 2010.

(7) The stated reason for the period of ineligibility was the failure to name the State of Michigan as beneficiary of claimant's annuitized IRA.

(8) Subsequent to the determination, claimant provided updated information to DHS, verifying that the State of Michigan was a named beneficiary.

(9) This update was the result of a modification to the original annuity contract, retroactive to December, 2008, which named the State of Michigan as beneficiary.

(10) DHS activated the Medicaid LTC case as of April 14, 2009, leaving a period of ineligibility from December 1, 2008 to April 13, 2009.

(11) The stated reason for this period of ineligibility was that the divestment penalty was in effect until the date the modification was signed, and could not be retroactively removed.

(12) On May 27, 2009, claimant's representatives appealed the DHS determination of ineligibility for Medicaid payment of nursing home long-term costs, arguing that the Department's reasoning in the case was against policy and state and federal law, because the annuity named the State of Michigan as a beneficiary, or in the alternative, federal law does not require a State to be named as beneficiary provided the annuity fulfills other requirements.

(13) On October 5, 2009, a hearing was held in the above matter before Administrative Law Judge Robert J. Chavez.

(14) Claimant was represented by [redacted].

CONCLUSIONS OF LAW

The Medical Assistance (MA) program is established by Title XIX of the Social Security Act and is implemented by Title 42 of the Code of Federal Regulations (CFR). The Department of Human Services (DHS or department) administers the MA program pursuant to MCL 400.10, *et seq.*, and MCL 400.105. Department policies are found in the Program Administrative Manual (PAM), the Program Eligibility Manual (PEM) and the Program Reference Manual (PRM) and Reference Tables (RFT).

Divestment means a transfer of a resource by a claimant or their spouse that is within a specified period of time and is a transfer for less than fair market value. PEM 405. Divestment results in a penalty period in MA, not ineligibility. Only Long Term Care (LTC) and waiver claimants are penalized. During a penalty period, MA will not pay the claimant's cost for LTC services, home and community help based services, and home help or home health based services. PEM 405.

However, while transferring a resource means giving up all or partial ownership in rights to a resource, not all transfers count as divestment. Examples of divestment include selling an asset, giving an asset away, refusing inheritance, putting assets in certain types of trusts, or buying annuities that are not actuarially sound. PEM 405.

Regarding annuities, the purchase of an annuity or the amendment of an existing annuity on or after February 8, 2006 is considered a transfer for less than fair market value, and thus not actuarially sound, unless the annuity names the State of Michigan is named as the remainder

beneficiary for an amount at least equal to the amount of the Medicaid benefits provided. PEM 401. This clause is at issue in the current case.

When claimant applied for LTC Medicaid on January 27, 2009, claimant had recently annuitized an IRA. When this IRA was annuitized, claimant had not named the State of Michigan as a beneficiary. A transfer of assets into an annuity is not actuarially sound unless the State of Michigan is named as a beneficiary. PEM 401. Therefore, the annuity counted as a divestment, and on March 2, 2009, the Department sent notice to the claimant that, while LTC Medicaid was approved, claimant would begin serving a divestment penalty immediately which would not end until April, 2010. This penalty would prevent any LTC Medicaid costs from being paid until the end of the divestment.

Claimant subsequently amended the annuity on April 14, 2009. This amendment retroactively named the State of Michigan as a beneficiary, effective to the date of purchase of the annuity. Claimant then notified the Department, on May 22, 2009, that the annuity had been amended retroactive to the date of purchase and requested a cessation of the penalty.

The Department declined to remove the full penalty. Instead, the Department declared that the penalty stopped as of April 14, 2009, the date the annuity was amended. Claimant then subsequently filed for a hearing.

Claimant's first argument and request for finding of fact was that the annuity in question met all the requirements of PEM 401 and that the divestment penalty was improperly imposed. After much consideration, the Administrative Law Judge disagrees.

PEM 405 states that divestment means a transfer of a resource that is:

a) within the specified look back period;

b) is a transfer for less than fair market value; and,

c) is not a transfer that is specifically excluded as divestment.

The asset in question is clearly in the look back period, and is not an excluded transfer. PEM 401 states that the transfer of an asset through the purchase of an annuity is considered a transfer for less than fair market value unless the State of Michigan is listed as a beneficiary. Therefore, the annuity, as originally contracted, was a divestment as the State of Michigan was not a listed beneficiary.

The Administrative Law Judge does not have equitable powers; his decision must necessarily be limited to a finding as to whether the actions of the Department were correct at the time the action was made, using the knowledge that the Department had in its possession at the time of the action. This original annuity is what the Department relied upon when it made its initial determination. While the annuity eventually did comply with the requirements of PEM 401 and PEM 405, at the time of the determination, it did not; the Department was not even notified of the change until May 22, 2009. Therefore, the argument that the annuity in question met all requirements must fail, for it did not meet all requirements when the Department took its initial action.

However, the scope of the hearing was not limited to only the initial negative action. In the current case, there were actually two separate actions that must be reviewed. With regard to the first action—the initial action of the Department that imposed the 16 month divestment penalty—the undersigned believes that the action was correct at the time it was taken. The second action that must be considered is whether the Department was in error when it lifted the divestment penalty beginning on April 14, 2009. Claimant's second argument and request for finding of fact stated that the modification of the annuity contract beneficiary ab initio results in the proper beneficiary designation as of the date of application, so claimant is eligible for LTC Medicaid benefits as of December 1, 2008. The undersigned agrees, but not for the reasons argued by the claimant.

Claimant first argued that because a retroactive application could have been filed on April 14, 2009—the date the addendum was executed—retroactivity would apply. This is an interesting argument, but is foiled by the plain fact that a retroactive application was not filed. If a second application had been filed, the analysis would be different, but the Administrative Law Judge is not going decide that retroactivity guaranteed by a timely separate application would apply to a completely different application filed months before. Claimant is essentially arguing that because an application could have been filed, that hypothetical application should have bearing on the dispensation of a different application. The hypothetical application wouldn't have had an effect on the application in question even if it weren't hypothetical. This argument is without merit and attempts to stretch the retroactivity and application procedures beyond recognition.

However, claimant is correct in their statement that there is no Department policy in regards to the modification of an annuity contract ab initio. With regards to the ending of a divestment penalty, PEM 405 states that a divestment penalty is to be recalculated if all the transferred resources are returned or full compensation is paid for the resources. This would normally result in the immediate cancellation of the penalty. Once a divestment penalty is in effect, return of, or payment for resources cannot affect the part of the penalty that has already been served.

However, this policy is unusually silent as to what happens when an annuity adds the State of Michigan as a beneficiary retroactively back to the date of purchase. No resources are being transferred, and no compensation is being paid for the annuity; this is simply an example of a contract being modified to include another participant, in this case, the State of Michigan. There is no financial restructuring in effect—the change is, in essence, cosmetic.

Claimant submitted expert testimony to this effect: Two expert witnesses testified that the contract, as modified, would pay the State of Michigan for all care provided to the claimant, beginning in December of 2008. Therefore, the State of Michigan was not materially harmed.

The policy in question deals with material, substantive changes to the disposal of an asset, and does not cover what happened in the present case. Claimant was correct when stating that the policy in PEM 405 does not cover the current situation. In fact, after reviewing all relevant policy, the undersigned was unable to find any guidance as to what should occur in this situation.

Therefore, when faced with a situation where there was no policy, the Department was faced with two choices. First, the Department could have chosen to uphold the full divestment penalty, as there is no policy which authorizes the removal of a penalty for the addition of the State of Michigan as a beneficiary, at which point claimant could have reapplied for Medicaid and retroactive Medicaid. This new application would have resulted in a new Medicaid case, retroactive to three months from the date of application, where claimant did not have a divestment penalty. It should be noted that under this interpretation, the penalty would stand in full, even if the addendum was not ab initio.

Alternatively, as there is no policy which prohibits the removal of a penalty for the addition of the State of Michigan as a beneficiary, the Department could have acknowledged the change, and removed the full divestment penalty, which would have resulted in the establishment of LTC Medicaid eligibility from December 1, 2008. Under this interpretation, the penalty would not apply at any point in time the contract specified that the State of Michigan was a beneficiary.

Either way, PEM 405's utter silence as to what happens when the State of Michigan is added as a beneficiary on a disqualified annuity is a major oversight that the Administrative Law Judge hopes is corrected at some point in the future.

It should be noted that even if the Department was using PEM 405 as a guide, this policy for removing divestment penalties only allows for the removal and recalculation of a penalty on the date the Department is notified of the transfer of an asset; this occurred on May 22, 2009, not April 14, 2009. However, under no interpretation or reasoning could the April 14, 2009 date stand. The Administrative Law Judge can find no support in policy for that date.

Therefore, the only incorrect action was the action in the current case which established eligibility on April 14, 2009. The addendum specifically stated that the change was retroactive to the date of purchase; the Department could not simply ignore that part of the clause and remove the penalty on the date the addendum was placed into the contract. The Department had the choice to accept the full addendum, or none of the addendum. It could not decide to accept part of the addendum. The addendum stated that the State of Michigan was added as a beneficiary as of the date of purchase, not just that the State of Michigan was added as a beneficiary. By ignoring part of the addendum, the Department was in error.

Thus, the Department had the choice to continue the full penalty and require a second application, or admit that the contract met the standards of PEM 401 and PEM 405 and remove the full penalty. It could not split the proverbial baby and remove only part of the penalty.

As the Department, due to the lack of policy in this specific area, could have chosen either course of action, the undersigned will defer to the policy that they chose—accepting that a divestment penalty could be removed once the State of Michigan was named as a beneficiary. If a divestment penalty could be removed, there was no reason supported by policy for removing part of the penalty and failing to remove the full penalty. The Department accepted that the

contract addendum was legitimate and named the State of Michigan as a beneficiary. If the contract addendum was legitimate, and the penalty could be removed, the penalty could be removed for the full period. The Department was thus in error when they did not remove the full penalty.

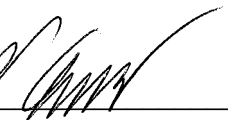
With regard to the claimant's argument, with regard to federal law not requiring a State to be named beneficiary on annuities that otherwise meet the actuarially sound threshold, the Administrative Law Judge holds that because he has decided the case on other, narrower grounds, a finding in this argument is not required. As such, the Administrative Law Judge declines to make a ruling on this argument.

DECISION AND ORDER

The Administrative Law Judge, based upon the above findings of fact and conclusions of law, finds that the Department was in error when it did not remove the divestment penalty on claimant's LTC Medicaid case.

Accordingly, the Department's decision in the above stated matter is, hereby, REVERSED.

The Department is ORDERED to remove claimant's divestment penalty retroactive to December 1, 2008. The Department is FURTHER ORDERED to pay all Medicaid Long Term Care nursing home costs incurred by the claimant retroactive to December 1, 2008.



Robert J. Chavez
Administrative Law Judge
for Ismael Ahmed, Director
Department of Human Services

Date Signed: 04/15/10

Date Mailed: 04/15/10

NOTICE: Administrative Hearings may order a rehearing or reconsideration on either its own motion or at the request of a party within 30 days of the mailing date of this Decision and Order. Administrative Hearings will not order a rehearing or reconsideration on the Department's motion where the final decision cannot be implemented within 90 days of the filing of the original request.

The Claimant may appeal the Decision and Order to Circuit Court within 30 days of the mailing of the Decision and Order or, if a timely request for rehearing was made, within 30 days of the receipt date of the rehearing decision.

RJC/dj

cc: [redacted]