

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: 2009-11912

Issue No: 2010

Case No: [REDACTED]

Load No: [REDACTED]

Hearing Date:

July 1, 2009

Houghton County DHS

ADMINISTRATIVE LAW JUDGE: Jana A. Bachman

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 telephone hearing was held on July 1, 2009. Claimant was represented by [REDACTED].

ISSUE

Whether the department properly determined claimant's divestment penalty and penalty period.

FINDINGS OF FACT

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

(1) On or about June 2007, claimant applied for MA. Claimant entered long-term care during June 2007.

(2) October 18, 2007, the department sent claimant written notice that her assistance was closed effective November 1, 2007, due to claimant being released from long-term care (LTC) on August 4, 2007 (reported on October 18, 2007). Department Exhibit A, pgs 2-3.

(3) September 12, 2008, the department received notice that certain specific assets were returned to claimant during May 2008 and June 2008. Claimant requested the divestment penalty/amount be recalculated. Department Exhibit A, pgs 4-5.

(6) November 7, 2008, the department informed claimant that the request was denied. Department Exhibit A, pg 22.

(7) September 25, 2008, in compliance with Administrative Decision and Order issued September 16, 2008 (Reg. No. 2008-9864), the department recalculated claimant's divestment amount and penalty (DHS-1843, Administrative Hearing Order Certification).

(8) The recalculation ordered by the Administrative Decision and Order related to an irrevocable trust and were not the same assets returned to claimant during May 2007 and June 2007. Department Exhibit A, pgs 4-5; Reg. No. 2008-9864, September 16, 2008.

(9) The department informed claimant that no LTC payments would be made on her behalf for the time in LTC during June and July 2007 due to the divestment penalty. Department Exhibit A, pgs 19-20.

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)/

Clients must cooperate with the local office in determining initial and ongoing eligibility. Clients must completely and truthfully answer all questions on forms and in interviews. Clients must take actions within their ability to obtain verifications. Clients must report changes in circumstance that potentially affect eligibility or benefit amount. Changes must be reported within ten days:

- After client is aware of them or
- The start date of employment.

Finding of Fact 1-9. BEM 405; Social Security Act Sections 1902(a)(18, 1917); and Section 1917.

The first step in determining the period of time that transfers can be looked at for a divestment is determining the baseline date. A person's baseline date is the first date that the client was eligible for Medicaid and in one of the following:

- In LTC.
- Approved for waiver.
- Eligible for Home Health Services.
- Eligible for Home Help Services.

A client's baseline date does not change even if one of the following happens:

- The client leaves LTC.
- The client is no longer approved for the waiver.
- The client no longer needs Home Health.
- The client no longer needs Home Help.

Once the baseline date is determined, the look back period can also be determined. The look back period is 60 months for all transfers made after February 8, 2006, and 36 or 60 months depending on the type of resource transfers transferred or transfer made on or before February 8, 2006. Transfers that occur on or after a client's baseline date must be considered for

divestment. In addition, transfers that occurred within the 60 month look back period must be considered for divestment. There is no maximum limit on the penalty period for divestment under policy. Any penalty period established under previous policy continues until it ends. Apply the penalty policy in place at the time of transfer for any transfers made before February 8, 2006. Recalculate the penalty period if either of the following occurs while the penalty is in effect:

- All the transferred resources are returned.
- Full compensation is paid for the resources.

The divestment penalty ends on the later of the following:

- The end date of the new penalty period.
- The date the client notified you that the resources were returned or paid for.

Use the same per diem rate originally used to calculate the penalty period. Once the divestment penalty is in effect, return of, or payment for, resources cannot eliminate any portion of the penalty period already passed. Brides Eligibility Manual (BEM) 405, Social Security Act, Sections 1902(a)(18, 1917.

In this case, the department determined divestment occurred and instituted the penalty period beginning June 2007. The department indicates the penalty is in effect only during the months when claimant is in a “penalty situation,” i.e. in LTC, approved for waiver, eligible for Home Health, or eligible for Home Help. BEM 405 is clear that a base line date is established and does not change even if claimant leaves LTC, is no longer approved for waiver, no longer approved for Home Health or no longer approved for Home Help. See policy statements above. Regarding the issue of whether the penalty tolls when client is not in one of the “penalty situation” circumstances is not so clearly stated. Accordingly, the Administrative Law Judge looks to the law for clarity. Social Security Act Sections 1902(a)(18, 1917) indicates that department programs must comply with the provisions of Section 1917, liens, adjustments, and

recoveries, and transfers of assets. In pertinent part, Section 1917 states that “with respect to a non institutionalized individual, the number of months of ineligibility under this subparagraph for an individual shall not be greater than a number equal to total, cumulative, uncompensated value of all assets transferred by the individual or individual’s spouse on or after the look back date, divided by the average monthly cost to a private patient of nursing facility services in the state (or, at the option of the state, in the community in which the individual is institutionalized) at the time of application. Thus, the Social Security Act does not indicate that the penalty tolls while an individual is not institutionalized or not in a “penalty situation.” As such, a preponderance of the evidence indicates that the penalty does not toll while claimant is not in a penalty situation. The penalty continues in effect for each of the months sequentially regardless of claimant’s institutional status or other “penalty situation.” As such, the department has not met its burden of proof and its assertion that claimant’s penalty is only in effect when she is in a “penalty situation” cannot be upheld.

Regarding claimant’s request to have the divestment penalty recalculated, the department asserts that claimant was not in a penalty situation during September 2008. As discussed in the paragraph above, claimant is found to have been in a penalty situation during the consecutive months following her release from LTC and continuing each month until the full penalty is served. The department asserts that the transfer of partial assets was not timely reported and so policy in effect at the time of transfer should not be applied. New, stricter policy should be applied that was in effect at the time of untimely report. The new policy states that the department is to apply penalty policy in place at the time of transfer for any transfers made before February 8, 2006. The same statement is included in the policy that was in effect at the time the transfers were made. Accordingly, a preponderance of the evidence indicates that the

policy in effect at the time of the report of the transfers should be used. As claimant was returned to part, not all her assets, she was not entitled to a recalculation regardless of being in a penalty period. The recalculation done due to the Administrative Decision and Order must be within department policy as well as the Decision and Order. The department could not recalculate based on the returned assets as it was prohibited by department policy. The department properly recalculated based on the Administrative Law Judge deciding that some of the transferred assets were not divested. As such, the department has met its burden of proof and its action must be upheld. Finding of Fact 1-9. BEM 405; PEM 405.

DECISION AND ORDER

The Administrative Law Judge, based upon the above findings of fact and conclusions of law, decides that claimant's divestment penalty does not toll when she is out of LTC. Claimant is not entitled to have a divestment penalty recalculation based on partial assets being returned in May and June 2008, but reported and verified to the department in September 2008.

Accordingly, the department's action is partially REVERSED. The department is to initiate a determination of the last month of claimant's divestment penalty in compliance with department policy and this Decision and Order.

/s/ _____
Jana A. Bachman
Administrative Law Judge
for Ismael Ahmed, Director
Department of Human Services

Date Signed: April 29, 2010

Date Mailed: April 30, 2010

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 receipt 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.

JAB/db

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