

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: 2009-29201
Issue No: 2010
Case No: [REDACTED]
Load No: [REDACTED]
Hearing Date:
October 1, 2009
Ottawa County DHS

ADMINISTRATIVE LAW JUDGE: Carmen G. Fahie

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 Thursday, October 1, 2009. The claimant was not present, but represented by her son, [REDACTED], power of attorney, and Attorney [REDACTED], [REDACTED]

ISSUE

Was the department acting in compliance with department policy when it determined that a divestment had occurred and the claimant would not be eligible for Medical Assistance (MA) for long-term care?

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 May 14, 2008, the claimant's son filed an application for MA on her behalf.

(2) Subsequently, the department determined a 12 month and 8 day divestment penalty based on the claimant having transferred ██████████ in assets to her son two days prior to her entry into nursing care and applying for Medicaid. The divested assets consisted of ██████████ shares of ██████████ valued at ██████████ per share on May 12, 2008 ██████████, ██████████ shares of ██████████ stock valued at ██████████ per share on May 12, 2008 ██████████, and \$7,610.54 in money market funds for a total of ██████████

(3) On November 3, 2008, the claimant's son returned ██████████ shares of ██████████ ██████████, then valued at ██████████ per share ██████████), and ██████████ shares of ██████████ stock then valued at ██████████ per share ██████████, for a total of ██████████ to the claimant. During the time that the assets were in the claimant's son's name, the claimant's son paid ██████████ in care and personal items for the claimant. He also paid ██████████ to an attorney for filing the Medicaid application for his mother. The department did receive receipts showing these expenditures. ██████████ shares of ██████████ were liquidated in order to pay for the claimant's care. This liquidation resulted in a market loss of ██████████. The remaining ██████████ shares were returned to the claimant in November 2008 resulting in a market loss of ██████████. The ██████████ shares returned to the claimant in November 2008 resulted in a market loss of ██████████

(4) On November 25, 2008, the claimant had total assets of ██████████, when she made an actuarially sound loan to her son in the amount of ██████████

(5) Subsequently, the department determined that all resources must be returned or fair compensation paid in order to recalculate the penalty period. Since this has not occurred, the department felt that they were unable to recalculate the penalty period.

(6) On May 26, 2009, the department caseworker sent the claimant a denial notice for MA.

(7) On June 3, 2009, the department received a hearing request from the claimant, contesting the department's negative action.

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).

The department manuals provide the following relevant policy statements and instructions for caseworkers:

ASSETS

DEPARTMENT POLICY

FIP, SDA, LIF, Group 2 Persons Under Age 21, Group 2 Caretaker Relative, SSI-Related MA, and AMP

Assets must be considered in determining eligibility for FIP, SDA, LIF, Group 2 Persons Under Age 21 (G2U), Group 2 Caretaker Relative (G2C), SSI-related MA categories and AMP.

- . "CASH" (which includes savings and checking accounts)
- . "INVESTMENTS"
- . "RETIREMENT PLANS"
- . "TRUSTS" PEM, Item 400.

Assets Defined

Assets means cash, any other personal property and real property. **Real property** is land and objects affixed to the land such as

buildings, trees and fences. Condominiums are real property. **Personal property** is any item subject to ownership that is **not** real property (examples: currency, savings accounts and vehicles). PEM, Item 400.

Overview of Asset Policy

Countable assets **cannot** exceed the applicable asset limit. Not all assets are counted. Some assets are counted for one program, but **not** for another program. Some programs do **not** count assets (see “PROGRAMS WITH NO ASSET TEST” below).

You must consider the following to determine whether, and how much of, an asset is countable.

- . Availability
 - .. see “AVAILABLE”
 - .. see “JOINTLY OWNED ASSETS”
 - .. see “NON-SALABLE ASSETS”

Exclusions. PEM, Item 400, p. 1.

An asset is countable if it meets the availability tests and is **not** excluded. PEM, Item 400, p. 1.

SSI Related MA

All types of assets are considered for SSI-related MA categories. PEM, Item 400, p. 2.

MA ASSET ELIGIBILITY

LIF, G2U, G2C, AMP and SSI-Related MA Only

Asset eligibility is required for LIF, G2U, G2C, AMP and SSI-related MA categories. PEM, Item 400, p. 3.

Note: Do not deny or terminate TMA-Plus, Healthy Kids or Group 2 Pregnant Women because of a refusal to provide asset information or asset verification requested for purposes of determining LIF, G2U, G2C or SSI-related MA eligibility.

Use the special asset rules in PEM 402 for certain married L/H and waiver patients. See PRG, Glossary, for the definition of L/H patient and PEM 106 for the definition of waiver patient.

Asset eligibility exists when the asset group's countable assets are less than, or equal to, the applicable asset limit at least one day during the month being tested. PEM 400.

SSI-Related MA Asset Limit

SSI-Related MA Only

For Freedom to Work (PEM 174) the asset limit is \$75,000. IRS recognized retirement accounts (including IRA's and 401(k)'s) may be of unlimited value.

For Medicare Savings Program (PEM 165) and QDWI (PEM 169) the asset limit is:

- . \$4,000 for an asset group of one
- . \$6,000 for an asset group of two

For all other SSI-related MA categories, the asset limit is:

- . \$2,000 for an asset group of one
- . \$3,000 for an asset group of two. PEM, Item 400, p. 4.

AVAILABLE

FIP, SDA, LIF, G2U, G2C, SSI-Related MA and AMP

An asset must be available to be countable. **Available** means that someone in the asset group has the legal right to use or dispose of the asset. PEM, Item 400, p. 6.

Assume an asset is available unless evidence shows it is **not** available. PEM, Item 400, p. 6.

CASH

FIP, SDA, LIF, G2U, G2C, SSI-Related MA and AMP

This section is about the following types of assets:

- . Money/currency
- . Uncashed checks, drafts and warrants
- . Checking and draft accounts

- . Savings and share accounts
- . Money market accounts
- . LTC patient trust fund
- . Money held by others--**Example:** Sally does **not** have a bank account. She puts money in her mother's checking account, but it is **not** a joint account.
- . Time deposits--A **time deposit** is a contract between a person and a financial institution whereby the person agrees to leave funds on deposit for a specified period in return for a specified interest rate. Common time deposits are certificates of deposit (CDs) and savings certificates. PEM, Item 400, p. 9.

INVESTMENTS

FIP, SDA, LIF, SSI-Related MA and AMP

This section is about the following types of assets:

- . U.S. Savings bonds
- . Securities such as:
 - .. Stocks
 - .. Bonds
 - .. Mutual funds. PEM, Item 400, p. 14.

Current Income Exclusion

FIP, SDA, LIF, SSI-Related MA and AMP

Do not count funds treated as income by a program as an asset for the same month for the same program.

When income must be prorated or averaged (example: self-employment) exclude the resulting assets for the months of proration. PEM, Item 400, p. 12.

MA DIVESTMENT

DEPARTMENT POLICY

MA ONLY

Divestment results in a penalty period in MA, **not** ineligibility. Only LTC and waiver clients (see PEM 106) are penalized. Divestment policy does **not** apply to Qualified Working Individuals (PEM 169). PEM, Item 405, p. 1.

Divestment means a transfer of a resource (see "RESOURCE DEFINED" below) by a client or his spouse that:

- . is within a specified time (see "LOOK-BACK PERIOD" below), and
- . is a transfer for "LESS THAN FAIR MARKET VALUE," and

Note: See "Annuity Not Actuarially Sound" and "Joint Owners and Transfers" below and PEM 401 about special transactions considered transfers for less than fair market value.

- . is not listed below under "TRANSFERS THAT ARE NOT DIVESTMENT." PEM, Item 405, p. 1.

During the penalty period, MA will **not** pay the client's cost for:

- . LTC services, and
- . home and community based services.
- . Home Help, or
- . Home Health.

MA will pay for other MA-covered services. PEM, Item 405, p. 1.

RESOURCE DEFINED

Resource means all the client's and his spouse's assets and income. It includes assets and income the client or spouse were entitled to but did **not** receive because of action by:

- . the client or spouse, or

- . a person (including a court or administrative body) with legal authority to act in place of or on behalf of the client or his spouse, or
- . any person (including a court or administrative body) acting at the direction or upon the request of the client or his spouse. PEM, Item 405, p. 1.

TRANSFER OF RESOURCES

Transferring a resource means giving up all or partial ownership in (or rights to) a resource. **Not** all transfers are divestment. Examples of transfers include.

- . Selling an asset
- . Giving an asset away
- . Refusing an inheritance
- . Payments from a "MEDICAID TRUST" that are **not** to, or for the benefit of, the person or his spouse. See PEM 401.
- . Putting assets or income in a trust. See PEM 401.
- . Giving up the **right** to receive income such as having pension payments made to someone else.
- . Giving away a lump sum or accumulated benefit.
- . Buying an annuity that is **not** actuarially sound. PEM, Item 405, p. 2.

Transfer by Representatives

Treat transfers by any of the following as transfers by the client or spouse.

- . Parent for minor
- . Legal guardian
- . Conservator
- . Court or administrative body
- . Anyone acting in place of, on behalf of, at the request of or at the direction of the client or spouse. PEM, Item 405, p. 2.

LOOK-BACK PERIOD

The first step in determining the period of time that transfers can be looked at for divestment is determining the **baseline date**. See “Baseline Date” below.

Once you have determined the baseline date, you determine the look-back period. 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 transferred) for transfers made on or before February 8, 2006. See “Medicaid Trusts” PEM 401. PEM, Item 405, p. 4.

Entire Period

Transfers that occur **on** or **after** a client's baseline date can be considered for divestment. In addition, transfers that occurred within the 60 month look-back period must be considered for divestment. PEM, Item 405, p. 4.

Penalty Situation

A divestment determination is **not** required unless, sometime during the month being tested, the client was in a penalty situation. To be in a penalty situation, the client must be eligible for MA (other than QDWI) and be:

- . in an LTC facility, or
- . "APPROVED FOR THE WAIVER." (PEM 106) PEM, Item 405, p. 4.

PENALTY PERIOD

No Maximum Penalty

There is no maximum limit on the penalty period for divestment under this new 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. PEM, Item 405, p. 9.

Computing Penalty Period

The penalty period is computed on the total “Uncompensated Value” of all resources divested.

Determine the “Uncompensated Value” for each resource transferred and combine into a total “Uncompensated Value.”

Divide the total “Uncompensated Value” by the average monthly private LTC Cost in Michigan for the client’s “Baseline Date.” This gives the number of full months for the penalty period. Divide the fraction remaining by 30 to determine the number of days for the penalty period in the remaining partial month.

Apply the total penalty months and days.

The 1st day the client is eligible to receive MA coverage for LTC, MIChoice, home help, or home health services is the 1st day after the penalty period ends.

The penalty period starts with the first day of the calendar month in which divestment occurred provided it is not already part of a penalty period. When periods overlap, start the new period on the date after the previous period ends. PEM, Item 405, p. 9.

Resources Returned

Cancel a divestment penalty if either of the following occurs before the penalty is in effect:

- . All the transferred resources are returned.
- . Fair market value is paid for the resources.

Recalculate the penalty period if either of the following occurs while the penalty is in effect:

- . Some or all the transferred resources are returned.
- . Full or partial compensation is paid for the resources.

Use the same per diem rate originally used to calculate the penalty period.

Once a divestment penalty is in effect, return of, or payment for, resources cannot eliminate any portion of the penalty period already past. However, you must recalculate the penalty period. 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. PEM, Item 405, p. 11.

In the instant case, the claimant applied for MA on May 14, 2008. The claimant had transferred stock from herself to her son on May 12, 2008, which is considered divestment. The claimant's son returned all of the stock minus what he liquidated to pay for the claimant's care. This Administrative Law Judge has reviewed the material and if the stocks were in the claimant's name, they would still be valued to the same point as if they were in the son's name. The claimant's son has returned and accounted for every stock that was transferred in his name and has returned the subsequent stock minus the liquidated assets for the claimant's Medicaid application and to pay for her care. This Administrative Law Judge rules that since the stocks were returned or accounted for in use for the claimant's care, the stock value was not considered divestment.

The second issue is [REDACTED] that the claimant's son, who has Power of Attorney, paid to an attorney to assist the family in applying for MA. The claimant's attorney on October 1, 2009 provided an additional description of the services provided that would warrant the fees that he charged the family. This Administrative Law Judge does not feel that to question of the fee as excessive is within her jurisdiction as long as the fee was used for the purpose of applying for Medicaid for the claimant. This Administrative Law Judge rules that the amount of money that the claimant's son, who has power of attorney, paid for the claimant's attorney to assist in applying for Medicaid was not divestment. The fee of [REDACTED] to apply for MA is a very high fee and the claimant's son should have done further investigation before hiring an attorney that cost [REDACTED] to apply for Medicaid, but that is between the claimant's son, who has power of attorney,

and the court that granted him that power of attorney. This Administrative Law Judge's jurisdiction is whether the money used was for the claimant's benefit and it was.

The promissory note that the claimant paid to her son for the principle of [REDACTED] indicates that the claimant's life expectancy is 3.22 years and the term of the note is 38.64 months. This Administrative Law Judge rules that this is divestment. The loan will not be paid back in the claimant's lifetime and that money should be used for the claimant's care in long-term care.

DECISION AND ORDER

The Administrative Law Judge, based upon the above findings of fact and conclusions of law, decides that the department was acting in compliance with department policy when it determined that divestment had occurred. The claimant's divestment penalty should apply to the promissory note in the amount of [REDACTED]

Accordingly, the department is ordered to calculate the divestment penalty for the promissory note of [REDACTED]. The claimant's son returned the stocks and bonds or liquidated them for her care and for her legal expenses.

/s/ _____
Carmen G. Fahie
Administrative Law Judge
for Ismael Ahmed, Director
Department of Human Services

Date Signed: December 15, 2009

Date Mailed: December 15, 2009

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.

CGF/vmc

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