

STATE OF MICHIGAN  
STATE OFFICE OF ADMINISTRATIVE HEARINGS AND RULES  
ADMINISTRATIVE HEARINGS FOR THE  
DEPARTMENT OF HUMAN SERVICES

IN THE MATTER OF THE CLAIM OF:

[REDACTED]

Reg. No.: 201034781  
Issue No.: 2010  
Case No.: [REDACTED]  
Load No.: [REDACTED]  
Hearing Date: August 9, 2010  
Macomb County DHS

**ADMINISTRATIVE LAW JUDGE:** Aaron McClintic

**HEARING DECISION**

This matter is before the undersigned Administrative Law Judge pursuant to MCL 400.9 and MCL 400.37 upon the Claimant's request for a hearing. After due notice, a telephone hearing was held on August 9, 2010. The Claimant's Authorized Hearings Representative [REDACTED], appeared and testified. [REDACTED], ES appeared on behalf of the Department.

**ISSUE**

Whether the Department properly denied Claimant's Medicaid Assistance ("MA") Long Term Care benefits effective 9/1/09 – 9/16/09 due to a divestment because it found that the Claimant must be under 65 in order to be considered disabled for purposes of meeting the pooled trust contribution guidelines for an Exception B trust?

**FINDINGS OF FACT**

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

1. Claimant is an eighty-nine year old single woman who has been diagnosed with dementia.
2. Claimant currently resides at [REDACTED] in Sterling Heights, Michigan.

3. Claimant transferred assets to a Pooled Accounts Trust for her benefit on September 30, 2009, and the Joinder Agreement was executed on September 25, 2009(Exhibit 1). This Pooled Trust Accounts Trust is an Exception B Trust under Medicaid Program Eligibility Manual 401 pages 6, 7, and 8(Exhibit 2).
4. On November 4, 2009, the Medicaid Policy Unit of the Department of Human Services issued a Memo to Claimant's case worker, [REDACTED], indicating that the trust does not meet the disability requirement of BEM 260 due to the fact that she is over the age of 65, therefore the funding of the trust is divestment. (Exhibit 3).
5. On November 20, 2009, the Department determined that [REDACTED] was ineligible for Medicaid payment of nursing home Long Term Care costs from September 1, 2009 through September 16, 2009. (Exhibit 4).
6. The stated reasons for the period of ineligibility was that Claimant's transfer to the Pooled Accounts Trust was a divestment solely because Claimant was over the age of sixty-five and therefore could not be disabled.
7. The Department, relying on an unsigned 10/28/09 Memo from The Medicaid Policy Unit, ruled that the payment to the trust was a divestment as PEM 401 p. 7 requires that an individual be under age 65 to qualify for disability, BEM 260 and, therefore, for an Exception B trust.
8. As a result, the Department denied Claimant's Medicaid Assistance ("MA") Long Term Care benefits effective 9/1/09 – 9/16/10 in its Notice of Case Action issued November 20, 2009.
9. Claimant requested a hearing on February 11, 2010 contesting the Department's determination to consider the transfer to the pooled trust a divestment and deny the Claimant MA Long Term Care benefits from 9/1/09 – 9/16/10.

### **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, formally known as the Family Independence Agency, administers the MA program pursuant to MCL 400.10, *et seq* and MCL 400.105. Department policies are found in the Bridges Administrative Manual ("BAM"), the Bridges Eligibility Manual ("BEM"), and the Bridges Program Reference Manual ("PRM").

Under Department policy, all assets and resources of Medical Assistance (“MA”) applicants must be counted in determining eligibility under the program. An individual may not be eligible for MA if the countable assets and resources exceed certain limits. BEM 400. Trust accounts may be considered assets under the MA program and the value of those assets counted in making a determination of eligibility. BEM 410, pp. 8-9. However, certain trusts are excluded from this asset determination. Trust assets in an “Exception B” pooled trust, are not counted in determining eligibility, although income a MA recipient receives from the trust is considered. BEM 401, pp. 7-8.

BEM 401 indicates that a Medicaid trust (requiring divestment analysis) is a trust that meets the following conditions:

1. The person whose resources were transferred to the trust is someone whose assets or income must be counted to determine MA eligibility . . . or a divestment penalty.
2. The trust was established by the person or someone acting on the person’s behalf.
3. The trust was established on or after August 11, 1993.
4. The trust was not established by a will
5. The trust is not described in Exception A – Special Needs Trust or Exception B – Pooled trust. PEM 401, p. 5.

There are two exceptions to trusts requiring a divestment analysis. These exceptions are based upon 42 U.S.C. §§1396p (d)(4)(A)&(C). The first exception is Exception A, Special Needs Trust which requires that a person be under the age of 65 when money is first paid into the trust. BEM 401, p. 6.

The Exception B, Pooled Trust, on the other hand, must meet the following conditions:

1. The trust must be unchangeable with regard to the provisions that make it an Exception B, Pooled Trust.
2. The trust contains the resources of a person who is disabled.
3. The trust is established and managed by a nonprofit association.

4. A separate account is maintained for each beneficiary of the trust, but for purposes of investment and management of funds, the trust pools these accounts.
5. Accounts in the trust are established for the benefit of persons who are disabled (not blind) per PEM 260.
6. The trust provides that to the extent any amounts remaining in the beneficiary's account upon the death of the beneficiary are not retained by the trust, the trust will pay to the state the amount remaining up to an amount equal to the total amount of medical assistance paid on behalf of the beneficiary under a State Medicaid plan. BEM 401 p. 7

While age is specifically referenced to in the definition of an Exception A trust, it is not referenced in the definition of the Exception B Trust. In fact, the only reference to age in the Exception B, Pooled Trust is located in BEM 401, p. 8 where it says "transfers to an "Exception B, Pooled Trust" by a person age 65 or older might be divestment. Caseworkers are instructed to do a complete divestment determination if the person is in a "Penalty Situation" per BEM 405." BEM 405 reads: "Transfers to a trust established "SOLELY FOR THE BENEFIT OF" a disabled (see BEM 260) person under age 65 are not divestment. At best this provision infers that a transfer to an Exception B, Pooled Trust might be a divestment if it is transferred *over* the age of 65, however this interpretation is rejected as it requires an inference be made regarding a specifically separate and different exception and type of trust and BEM 401 uses the word "might", not shall without further comment. Thus taken together DHS policy does not clearly and definitively explain what is required and leaves the question open with regard to the intent of policy with regard to Exception B Trusts by a person 65 or older.

In the present case, the Claimant transferred funds from a bank account into an irrevocable pooled trust account. The trust conforms to standards of an "Exception B, Pooled Trust" as set forth in policy cited above. Therefore, the assets are not countable toward determining eligibility and transfers to the trust are not considered "divestment" under the Medical Assistance program. The Department's position, however, is stated in a memo dated April 30, 2009 which reads in part:

This trust does not meet the guidelines for an Exception B Trust. BEM 401, p. 7 requires that the person must be disabled according to BEM 260. This is based on the Social Security Act, 42 U.S.C. 1396 p(d)(4)(C). Maria Quagliato is over the age of 65 ( she is 78 years old... This is divestment.

(Exhibit 1, p. 7).

The Department argues that in order to have an “Exception B Trust” the trust must be for a “disabled person” and that Claimant is not considered “disabled” per PEM 260 since she is over the age of 65. Therefore, Claimant “divested” the income when the transfer to the trust was made and Claimant is subject to a divestment penalty. The Department’s interpretation of its Policy is in error. BEM 260 does not require that a person be under the age of 65 to be disabled.

A person who is eligible for Retirement, Survivors and Disability Insurance (RSDI) benefits based on his disability or blindness meets the disability or blindness criteria for Medicaid based MA in Michigan. BEM 260, p. 1. A person is disabled when all of the following are true:

1. He has a medically determined physical or mental impairment.
2. His impairment prevents him from engaging in any substantial gainful activity.
3. His impairment can be expected to result in death, or has lasted at least 12 consecutive months, or is expected to last at least 12 consecutive months.

BEM 260, p. 8 and 9 ; 42 U.S.C. 1382(c).

In this case, the Department agreed that Claimant was disabled but the Department deemed the Claimant’s trust contribution to be considered a divestment solely because the Claimant is over the age of 65. Nothing in the referenced regulations or the United States Code indicates that Claimant needs to be under age 65 in order to qualify as disabled. Applying for disability over the age of 65 might be applicable for an individual who does not have enough work credits for retirement. See also WWR 03-3p Policy Interpretation Ruling Titles II and XVI: Evaluation of Disability and Blindness in Initial Claims for Individuals Aged Sixty Five and Older. Furthermore, a person who reaches retirement age who is disabled does not lose that designation as disabled just because their disability payments are not converted to retirement payments.

Nothing in 42 U.S.C §1396p (d)(4)(C), 42 U.S.C. §1382(c), or BEM 260 refer to age as a determinant or requirement for purposes of determining disability. Accordingly, the Department’s decision to apply a divestment penalty in determining Claimant’s eligibility under the MA program did not conform to Department policy and is REVERSED.

**DECISION AND ORDER**

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The Administrative Law Judge, based upon the above findings of fact and conclusions of law, finds that the Claimant's trust is an "Exception B, Pooled Trust" and that the Department erred in applying a Divestment penalty in disqualifying Claimant for benefits December 1, 2009 to April 9, 2010 as Claimant does not need to be under 65 to be disabled per federal rules.

Accordingly, it is ORDERED:

1. The Department's determination is REVERSED.
2. It is further ordered that the Department shall reopen Claimant's MA case for the period September 1, 2009 to September 16, 2009 and shall supplement the Claimant with any lost benefits she was otherwise entitled to receive.

*Is/ Aaron McClintic*

Aaron McClintic  
Administrative Law Judge  
For Ismael Ahmed, Director  
Department of Human Services

Date Signed: August 26, 2010

Date Mailed: August 26, 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 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.

AM/hw

cc: 