

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
ADMINISTRATIVE HEARINGS FOR THE
DEPARTMENT OF HUMAN SERVICES

IN THE MATTER OF:

[REDACTED]

Reg. No: 201044612
Issue No: 2010
Hearing Date: December 14, 2010
Wayne County DHS

ADMINISTRATIVE LAW JUDGE: Janice G. Spodarek

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 scheduled. Claimant was represented at the administrative hearing by

[REDACTED]

ISSUE

Did the DHS properly deny claimant's Medical Assistance (MA) long-term care benefits due to a divestment penalty on the basis of a pooled trust not meeting the guidelines for an Exception B Trust from March 1, 2010 through July 25, 2010?

FINDINGS OF FACT

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

1. An administrative hearing was initially schedule in this matter for November 16, 2010. The department requested a continuance/adjournment in order to have a witness appear from the policy unit. The matter was continued to December 14, 2010. At that time and place, the witness failed to appear. The department was unable to address the substantive issues at issue at the administrative hearing indicating it relied solely on a policy memorandum dated May 17, 2010 instructing the department to do a divestment determination. Exhibit 1.

2. At all relevant times during the time period at issue herein, claimant was a resident of [REDACTED]
3. On April 30, 2010, claimant applied for LTC asking for benefits beginning March 1, 2010.
4. Unrefuted evidence on the record is that claimant is a disabled individual. Claimant has been diagnosed with leukemia, dementia, spinal stenosis and wheelchair bound.
5. On March 30, 2010, claimant transferred her assets into a Pooled Accounts Trust subaccount for her sole benefit and the related Joint Agreement executed on March 30, 2010. Claimant Exhibit A.
6. The local office forwarded the materials to the department policy unit for evaluation. On May 17, 2010, the local office received a memorandum from the Medicaid Policy Unit indicating that claimant should have a divestment penalty applied as she is not under 65. The memorandum does not contain the name of the individual who authored its contents. The stated reason for the period of ineligibility was that:

...This trust does not meet the guidelines for an Exception B Trust. EBT BEM 401, p 6 requires that the person be disabled according to BEM 260, which specifies that the individual must be under the age of 65...Claimant Exhibit D.
7. No where in DHS policy found in BEM 260 is disability defined as an individual under 65.
8. On June 15, 2010, the DHS issued notice of a divestment penalty applied.
9. On July 9, 2010, claimant filed a hearing request.

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 BRIDGES Administrative Manual (BAM), the BRIDGES Eligibility Manual (BEM) and the BRIDGES Reference Manual (BRM).

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, pgs 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, pgs 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. BEM 401, pg 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, pg 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, pg 7.

While age is specifically referenced 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, pg 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 least 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 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.

First, as noted in the Findings of Fact, the department failed to present any evidence or argument at the administrative hearing to support its decision. The department argued that it could not and would not as it did not make the determination in this case but rather such determination was done by the Policy Unit. As already noted, the department was given a continuance in order to have the Policy Unit personally appear and testify at the administrative hearing, and be subject to cross-examination. The department's witness failed to appear at the continuance. The DHS may chose to send individuals to the administrative hearing who do not have knowledge of the case. wever, the department cannot meet its burden of proof in such cases. The Michigan Administrative Procedures Act, BEM 600, and general evidentiary rules as well as the Michigan Administrative Rules with regards to DHS Administrative Hearings requires the department to meet its burden of proof. The department failed to do so in this case.

Having said that the department failed to meet its burden of proof, with regards to the most specific substantive issues herein, 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 BEM 260 since she is over the age of 65. Thus, the department's basic argument is that claimant divested the income when the transfer was made and thus, subject to a divestment penalty.

As to the memorandum from the Policy Unit dated May 17, 2010, first, unrefuted evidence on the record is that claimant is disabled. Second, the department's analysis is flawed as BEM 260 does not indicate that a person is required to be under 65 years of age to be disabled.

A person who is eligible for Retirement, Survivor's and Disability Insurance (RSDI) benefits based on his/her disability or blindness meets the disability or blindness criteria

for Medicaid based MA in Michigan. BEM 260, pg 1. A person is disabled when all 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, PA; 42 USC 1382(c).

In the subject case, the department agreed that claimant was disabled and the sole issue causing claimant's trust contribution to be considered a divestment if that claimant is over the age of 65. Nothing in the regulations or the United States Code indicates that claimant needs to be over 65 in order to qualify as disabled. In fact, SSR03-3p: Policy Interpretation are Rulings Titles II and XVI: Evaluation of Disability and Blindness In Initial Claims for Individual Age 65 or Older, specifically allows for the fact that there may be disability claims for individuals age 65 or older. Applying for disability over the age of 65 might be applicable for an individual who does not have enough work credits for retirement, qualified aliens or to determine state supplements in some states. Furthermore, disability payments are automatically converted to retirement payments at the same rate once the individual reaches the full age of retirement, but that does not mean that the individual is no longer disabled.

While BEM 405 appears to infer that transfers to a trust for the benefit of a disabled person over the age of 65 would be considered divestment, nothing in 42 USC Section 1396p(d)(4)(C), 42 USC Section 1382(c), old PEM 260 referred to age in terms of determining disability. Accordingly, the department's decision to apply divestment penalty in determining claimant's eligibility under the MA program does not conform to department policy and is reversed.

It is further noted that the DHS position appears to rely on 42 USC Section 1396p(c) as a basis of their opinion. The reliance on this section is incorrect as it only applies to third party trusts and not self-funded trusts. The trust in question herein is a self settled pool trust account. The portion of petitioner's brief which the DHS did not make available to the undersigned until after the hearing due to misdelivery found under Section E is adopted and incorporated by reference herein.

DECISION AND ORDER

The Administrative Law Judge, based upon the above findings of fact and conclusions of law, finds that claimant's trust is an Exception B Pooled Trust and that the department erred in applying a divestment penalty and disqualifying claimant from benefits from March 1, 2010 through July 25, 2010.

