

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

IN THE MATTER OF:

[REDACTED]

Reg. No.: 201013419
Issue No.: 2010
Case No.: [REDACTED]
Load No.: [REDACTED]
Hearing Date: September 1, 2010
Macomb County DHS (12)

ADMINISTRATIVE LAW JUDGE: Christian Gardocki

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 September 1, 2010. The Claimant's representative, [REDACTED], appeared and testified on behalf of Claimant. On behalf of Department of Human Services (DHS), [REDACTED], Manager, and [REDACTED], Specialist, appeared and testified.

ISSUE

Whether DHS properly determined that Claimant was subject to a divestment penalty effective 9/1/09 because Claimant was ineligible to meet a disability requirement for setting up a pooled accounts trust because he was over the age of sixty five years of age at the time the trust was created.

FINDINGS OF FACT

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

1. Claimant applied for MA benefits on an unspecified date seeking MA benefits beginning 9/1/09.
2. At the time of Claimant's application for MA benefits, Claimant was an individual receiving Social Security Administration income due to his age.

3. At the time of Claimant's application for MA benefits, Claimant asserted that he was a disabled individual.
4. In 8/2009, Claimant had \$284,663.69 in cash assets.
5. In 8/2009, Claimant, through his power of attorney, set up an irrevocable pooled account trust through [REDACTED], a non-profit agency.
6. In 8/2009, Claimant's \$284,663.69 cash assets were transferred into the pooled account trust.
7. On 10/27/09, DHS summarily determined that Claimant could not be disabled because he was over the age of 65 years of age. Exhibit B.
8. DHS did not evaluate whether Claimant was a disabled person based on any factors other than his age.
9. On 11/14/09, DHS mailed Claimant a Notice of Case Action denying Claimant's long-term care benefits from 9/1/09 through 5/22/13 because Claimant allegedly transferred assets or income at less than their fair market value. Exhibit C.
10. On 11/23/09, Claimant's representative requested a hearing concerning the DHS determination that Claimant divested his assets and was ineligible for long-term care services.
11. Claimant passed away on 3/31/10.

CONCLUSIONS OF LAW

The Medical Assistance (MA) program is established by the 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 (formerly 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 Reference Tables Manual (RFT).

MA provides medical assistance to individuals and families who meet financial and nonfinancial eligibility factors. The goal of the MA program is to ensure that essential health care services are made available to those who otherwise would not have financial resources to purchase them.

Clients may qualify under more than one MA category. Federal law gives them the right to the most beneficial category. The most beneficial category is the one that results in

eligibility or the least amount of excess income. BEM 105 at 2. At the time of Claimant's application, Claimant was a resident of a long-term care facility, non-pregnant, non-caretaker of minor children. Claimant also was 65 years of age and alleged having a disability. As a person over the age of sixty five years, Claimant's most beneficial MA program would be through Aged-Disability Care (AD-Care). As a long-term care resident, Claimant could also be eligible for Extended Care (EC) though DHS policy requires that Claimant's eligibility for AD-Care must be evaluated first. BEM 164 at 1.

Eligibility for AD-Care requires asset-eligibility. BEM 163 at 1. Countable assets cannot exceed the asset limit in BEM 400. *Id.* Countable assets are determined based on MA policies in BEM 400, 401 and 402. *Id.*

An asset must be available to be countable. BEM 400 at 6. "Available" means that someone in the asset group has the legal right to use or dispose of the asset. *Id.* Trusts are not subject to the aforementioned rules. Trusts and whether they are a countable asset or a divestment of assets are considered in BEM 401 and BEM 405.

Divestment is a type of transfer of a resource and not an amount of resources transferred. BEM 405 at 1. Divestment results in a penalty period in MA, not ineligibility. *Id.*

In the present case, Claimant transferred \$284,663.69 in cash assets into a trust in 8/2009. In a memorandum dated 10/27/09 (Exhibit B), DHS concedes that the cash was transferred into an irrevocable trust and should not be considered an asset for purposes of MA eligibility. However, DHS contends that a divestment penalty should apply to Claimant's MA eligibility based on the transfer of assets.

A Medicaid trust is a trust requiring a divestment analysis and a divestment penalty. BEM 401 at 5 states that a Medicaid trust is one which 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, an MA post-eligibility patient-pay amount, a divestment penalty or an initial assessment amount. A person's resources include his spouse's resources;
2. The trust was established by the person, person's spouse, person acting with legal authority or on the person's direction
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" below.

An Exception B Pooled Trust, as referenced in #5 above, is a non-Medicaid trust which meets the following conditions:

- The trust must be unchangeable with regard to the provisions that make it an Exception B, Pooled Trust. This is necessary to ensure that a trust initially meeting the other conditions still meets those conditions when the person dies.
- The trust contains the resources of a person who is disabled (not blind) per BEM 260.
- The trust is established and managed by a nonprofit association.
- 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.
- Accounts in the trust are established for the benefit of persons who are disabled (not blind) per BEM 260. This means the trust must ensure that none of the principal or income attributable to a person's account can be used for someone else during the person's lifetime, except for "Trustee Fees" per BEM 405.
- Accounts in the trust are established by courts or by disabled persons' parents. Grandparents or legal guardians/conservators.
- 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.

DHS relied on a memorandum from the Medicaid Policy Unit which stated Claimant's trust failed to meet the guidelines for an Exception B Trust. The basis for this conclusion was that, "BEM 401, page 6 requires that the person must be disabled according to BEM 260, which specifies that the individual must be under the age of 65." Claimant is over 65 years old and thus, according to DHS, cannot be disabled under BEM 260. The DHS argument completely misstates the disability requirements of BEM 260.

BEM 260 at 8 states a person is disabled when all of the following are true:

- he/she has a medically determined physical or mental impairment.
- his/her impairment prevents him/her from engaging in any substantial gainful activity; and
- his/her 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.

Nowhere in the above definition for disability is it required that a person be younger than 65 years of age. The DHS argument that only a person under 65 years of age can be disabled is pure fallacy.

Although the DHS memorandum unquestionably cites incorrect policy as a basis for applying a divestment penalty, it does not necessarily follow that a divestment penalty was inappropriate.

It was not disputed that Claimant's trust met the requirements of an Exception B Pooled Trust. Transfers to an 'Exception B Pooled Trust' by a person age 65 or older might be divestment." (*Emphasis added*). BEM 401 at 8. The use of "might" indicates that a person over 65 creating an Exception B Pooled Trust might be subject to a divestment penalty, but also might not be subject to the divestment penalty. BEM 401 further reads, "Do a complete divestment determination if the person is in a "Penalty Situation" per BEM 405." *Id.*

A divestment determination is not required unless, sometime during the month being tested, the client was in a penalty situation. BEM 405 at 4. To be in a penalty situation, the client must be eligible for MA (other than QDWI) and be one of the following: in an LTC facility, approved for the waiver (see BEM 106), eligible for home help or eligible for home health. *Id.*

In the present case, Claimant was eligible for MA benefits and in a penalty situation by being a resident of a long-term care facility. Thus, a divestment determination is required. Although BEM 405 goes on to state that transfers to a trust solely for the benefit of a disabled individual are not considered divestment, the exception only applies to transfers made by persons under 65 years of age. *Id.* at 7. This exception is consistent with BEM 401 which indicated that it could be divestment if a person over 65 years of age transfers funds to an Exception B Pooled Trust. Although the DHS explanation for applying a divestment penalty to Claimant was flawed, it is found that Claimant's MA benefit eligibility was properly subject to a divestment penalty.

DECISION AND ORDER

The actions taken by DHS are AFFIRMED. The Administrative Law Judge, based upon the above findings of fact and conclusions of law, finds that DHS properly found Claimant eligible for MA benefits subject to a divestment penalty.

Christian Gardocki
Administrative Law Judge
For Ismael Ahmed, Director
Department of Human Services

Date Signed: _____

Date Mailed: _____

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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.

CG / hw

cc:

