

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. 2010-17446
2010-17445
Issue No. 2010
Case No. [REDACTED]
Load No. [REDACTED]
Hearing Date: September 14, 2010
Kalkaska 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 the claimant's request for a hearing. After due notice, an in-person hearing was held on Tuesday, September 14, 2010. The claimants were not present being in a long-term care facility, but their attorney, [REDACTED] was present on their behalf and their daughter, [REDACTED], who has power of attorney for both of her parents.

ISSUE

Did the department properly deny the claimants' applications for Medical Assistance (MA) based upon its determination that the claimants had excess assets?

FINDINGS OF FACT

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

1. On October 28, 2009, a MA application was filed on behalf of the claimants with retroactive benefits to July 2009.
2. [REDACTED] in RSDI benefits. (Department Exhibit 97-99)
3. [REDACTED] in RSDI benefits. (Department Exhibit 68-69)

4. On December 17, 2009, the department caseworker determined that there had been a transfer of [REDACTED] of the claimants' assets by their daughter, who had power of attorney. (Department Exhibit 66, 96, and 114)
5. On December 14, 2009, the department caseworker calculated the claimants' eligibility for MA to determine that the baseline date for the claimants was July 1, 2009, but that the claimants were not eligible for long-term care from July 1, 2009 through November 24, 2010 because assets were transferred for less than fair market value of [REDACTED] resulting in a divestment penalty of 16 months.
6. On December 14, 2009, the department caseworker sent the claimants a notice that they were not eligible for Medicaid for long-term care from July 1, 2009 through November 24, 2010 because assets were transferred for less than fair market value. (Department Exhibit 8-12 and 6-10)
7. On December 21, 2009, the department received a hearing request from the claimants, contesting the department's negative action.
8. During the hearing, the claimants' attorney stated that the claimants had previously applied for Medicaid in December 2008 and that the divestment penalty should have been started from December 2008.
9. During the hearing, the department caseworker informed the claimants' attorney and daughter who, had power of attorney that the claimants' December 2008 application was denied for failure to provide verification. A hearing was held and the claimants lost for failure to provide verification with no appeal to Circuit Court; the application was denied and never registered and the divestment penalty starts from when the retroactive Medicaid application for the new application was filed of July 1, 2009.

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).

MA DIVESTMENT

DEPARTMENT POLICY

MA ONLY

Divestment results in a penalty period in MA, **not** ineligibility. Only LTC and waiver clients (see BEM 106) are penalized. Divestment policy does **not** apply to Qualified Working Individuals (BEM 169). BEM, 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 BEM 401 about special transactions considered transfers for less than fair market value.

- . is not listed below under "TRANSFERS THAT ARE NOT DIVESTMENT." BEM, 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. BEM, 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. BEM, 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 BEM 401.
- . Putting assets or income in a trust. See BEM 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. BEM, 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. BEM, Item 405, p. 2.

Joint Owners and Transfers

When a client jointly owns a resource with another person(s), any action by the client or by another owner that reduces or eliminates the client's ownership or control is considered a transfer by the client.

The same policy applies to resources that client's spouse owns jointly with other persons.

Exception: No penalty is imposed if the parties involved verify that the resource transferred actually belonged solely to the person to whom it was transferred. BEM, Item 405, pp. 2-3.

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" BEM 401. BEM, 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. BEM, 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." (BEM 106) BEM, Item 405, p. 4.

Baseline Date

A person's baseline date is the **first** date that the client was eligible for Medicaid and:

- . in LTC, or
- . "APPROVED FOR THE WAIVER" (BEM 106), or
- . eligible for Home Health services, or
- . eligible for Home Help services.

A client's baseline date does **not** change even if:

- . the client leaves LTC, or
- . the client is no longer "APPROVED FOR THE WAIVER" (BEM 106). BEM, Item 405, pp. 4-5.

TRANSFERS THAT ARE NOT DIVESTMENT

The following transfers are **not** divestment.

Transferring Excluded Assets

Transfers of assets that are **not** countable assets for SSI-related MA policy are **not** divestment. BEM, Item 405, p. 6.

Transferring Excluded Income

Transferring income that is **not** countable income for SSI-related MA according to BEM 500 is **not** divestment. BEM, Item 405, p. 7.

Asset Conversion

Converting an asset from one form to another of equal value is **not** divestment even if the new asset is exempt. Most purchases are conversions.

Payment of expenses such as one's own taxes or utility bills is also not divestment. BEM, Item 405, p. 7.

Transferring Homestead to Family

It is **not** divestment to transfer a homestead to the client's:

- . spouse (see "Transfers Involving Spouse" above).
- . blind or disabled child (see "Transfers Involving Child" above).
- . child under age 21.
- . child age 21 or over who:
 - .. lived in the homestead for at least two years immediately before the client's admission to LTC or BEM 106 waiver approval, **and**
 - .. provided care that would otherwise have required LTC or BEM 106 waiver services, as documented by a physician's (M.D. or D.O.) statement.
- . brother or sister who:
 - .. is part owner of the homestead, **and**
 - .. lived in the homestead for at least one year immediately before the client's admission to LTC or BEM 106 waiver approval. BEM, Item 405, pp. 7-8.

Transfer for Another Purpose

As explained below, transfers exclusively for a purpose other than to qualify or remain eligible for MA are **not** divestment.

Assume transfers for less than fair market value were for eligibility purposes until the client or spouse provides convincing evidence that they had no reason to believe LTC or waiver services might be needed.

Exception:

- . Preservation of an estate for heirs or to avoid probate court is **not** acceptable as "another purpose."
- . That the asset or income is **not** counted for Medicaid does **not** make its transfer for "another purpose." BEM, Item 405, p. 8.

SOLELY FOR THE BENEFIT OF

All of the following conditions must be met for a transfer or for a trust to be solely for the benefit of a person.

- . The arrangement must be in writing and legally binding on the parties.
- . The arrangement must ensure that none of the resources can be used for someone else during the person's lifetime, except for "Trustee Fees."
- . The arrangement must require that the resources be spent for the person on an actuarially sound basis. This means that spending must be at a rate that will use up all the resources during the person's lifetime. Life expectancies are in "Exhibit I - Female" or "Exhibit II - Male."

Exception: Trusts meeting the criteria for "Exception A" or "Exception B" in BEM 401 do **not** have to spend resources on an actuarially sound basis. BEM, Item 405, p. 9.

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. BEM, 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. BEM, Item 405, p. 9.

In the instant case, the amount of money that was divested of [REDACTED] is uncontested by the attorney and the claimants' daughter, who has power of attorney. The claimants' attorney was under the impression that the divestment had started from the time the previous application had been filed in December 2008, but that application was denied not for divestment with a divestment penalty, but for failure to provide verification to determine eligibility. Even though, the claimants' attorney asked for a hearing, the Administrative Law Judge ruled that the required verifications were not provided to determine MA eligibility. Unfortunately, the claimants' attorney or daughter did not appeal to Circuit Court. As a result, the December 2008 application was denied and never registered so the divestment penalty date could not start from December 2008 or whatever retroactive month was requested, but did not start until a new application was filed on October 28, 2009 with retroactive benefits to July 2009.

In the present case, the department has established by the necessary, competent, material, and substantial evidence that it acted in compliance with department policy when it determined that the divestment had occurred and that the claimants were not eligible for MA long-term care based on a divestment penalty for MA benefits from July 1, 2009 to November 24, 2010.

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 a divestment had occurred and that the claimants under the divestment penalty applied established that the claimants were not eligible for MA benefits from July 1, 2009 through November 24, 2010 because assets were transferred for less than fair market value.

Accordingly, the department's decision is **AFFIRMED**.

/s/_____

Carmen G. Fahie
Administrative Law Judge
For Ismael Ahmed, Director
Department of Human Services

Date Signed: December 10, 2010

Date Mailed: December 10, 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.

CGF / vc

cc:

