

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.: 2011-21520
Issue No.: 2010
Case No.: [REDACTED]
Hearing Date: March 24, 2011
DHS County: Oakland (63-03)

ADMINISTRATIVE LAW JUDGE: Jan Leventer

HEARING DECISION

This matter is before the undersigned Administrative Law Judge pursuant to Michigan Compiled Laws (MCL) Sections 400.9 and 400.37 and Claimant [REDACTED]' request for a hearing. After due notice, a telephone hearing was held on March 24, 2011. Claimant did not appear. Claimant's Authorized Representative, [REDACTED] Attorney, appeared and testified. [REDACTED], appeared and testified on behalf of the Department of Human Services (DHS).

ISSUE

Whether DHS properly assessed a Medical Assistance (MA or Medicaid) divestment penalty against Claimant?

FINDINGS OF FACT

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

1. Claimant's date of birth is [REDACTED], and she is currently seventy-eight years old.
2. Claimant is in long-term care (LTC) at [REDACTED].
3. Claimant is unable to engage in any substantial gainful activity.
4. Claimant is unable to engage in substantial gainful activity because of her medically determinable physical impairments.

5. Claimant's medically determinable physical impairments can be expected to continue for no less than one year.
6. On May 8, 1997, when she was sixty-four, Claimant established a self-funded trust for the payment of her supplemental medical care and living expenses.
7. On July 7, 2010, Claimant executed an Irrevocable Joinder Agreement, making her self-funded trust irrevocable.
8. On July 14, 2010, Claimant transferred her assets into the trust.
9. On August 23, 2010, Claimant applied for MA benefits with DHS.
10. On January 26, 2011, the DHS Medical Policy Unit issued a Memo, stating that Claimant's transfer of funds is a divestment. The Memo is unsigned.
11. On January 27, 2011, DHS issued a Notice of Case Action denying MA benefits to Claimant, stating as the reason for the denial that the DHS Medical Policy Unit determined there was a divestment of assets.
12. On February 17, 2011, Claimant requested a hearing with DHS.
13. Claimant seeks MA LTC coverage from August 1, 2010-May 13, 2011, which is the period of time for which DHS has imposed a divestment penalty.

CONCLUSIONS OF LAW

MA was established by Title XIX of the U.S. Social Security Act and is implemented by Title 42 of the Code of Federal Regulations. DHS administers the MA program pursuant to MCL 400.10, *et seq.* and MCL 400.105. DHS' policies are found in the Bridges Administrative Manual (BAM), the Bridges Eligibility Manual (BEM) and the Reference Tables (RFT). These manuals are available online at www.michigan.gov/dhs-manuals.

The administrative manuals are the policies and procedures DHS officially created for its own use. While DHS manuals are not laws created by the U.S. Congress or the Michigan Legislature, they constitute legal authority which DHS must follow. It is to the manuals that I look now in order to see what policy applies in this case. After setting forth what the applicable policy is, I will examine whether it was in fact followed in this case.

In this case, I shall refer to DHS policies and procedures that were in effect on August 23, 2010, the date Claimant applied for MA benefits. The policy I begin with is BEM Item 401, "Trusts – MA," which went into effect March 1, 2010. The March 2010 version is no longer in effect and is not available online, but the current version is similar and can be found online.

In the Medicaid application process, DHS' first step is to determine the customer's eligibility. Once a person is determined eligible, if they have made a money transfer, they may or may not be subject to a penalty. There is no dispute that Claimant is eligible for the MA program.

The word "divestment" is defined in BEM 405, "MA Divestment," adopted July 1, 2010, as

... a type of transfer of a resource and not an amount of resources transferred. BEM 405, p. 1.

In this case, Claimant transferred her assets to a trust account. The word "trust" has a special meaning in MA. BEM 401, "Trusts – MA," states that for Medicaid purposes, there are only three types of trust accounts: the Medicaid Trust, the Exception A Special Needs Trust, and the Exception B Pooled Trust. Depending on which type of trust the client creates, the trust may be an illegal divestment which was made for the purpose of reducing one's assets and receiving Medicaid, or it may be a legitimate transfer of funds which is not made for the purpose of reducing one's assets in order to receive MA.

Also, LTC recipients who create a Medicaid Trust are in a situation where for a period of time to be calculated by DHS, they will suffer a divestment penalty and will temporarily be unable to receive MA benefits.

Divestment results in a penalty period in MA, **not** ineligibility.

...

During the penalty period, MA will **not** pay the client's costs for ... LTC services. *Id.* (bold print in original).

If, however, DHS determines the trust to be an Exception A Special Needs Trust or an Exception B Pooled Trust, then a legitimate transfer has occurred and there will not be a divestment penalty. BEM 401, pp. 5-8.

As there is no question that Claimant has not created an Exception A Special Needs Trust, the only question before me is whether Claimant has created a Medicaid Trust or an Exception B Pooled Trust. If she has not met the seven requirements for an Exception B Trust, then I must find that she has not created an Exception B Trust and

the Medicaid Trust penalty applies. There is also no dispute that Claimant's trust meets six of the seven requirements for the Exception B Trust, and the only requirement in dispute is number two, whether Claimant is disabled as defined in BEM 260. BEM 401, pp. 6-7.

However, BEM 401 also attempts to impose an extra requirement, in essence an eighth requirement, for clients who create a valid Exception B Pooled Trust but who happen to be LTC consumers over sixty-five. This specific group of clients is identified in BEM 401 as clients who, even though they have a true Exception B Trust, "might be" penalized with divestment. A subsection of BEM 401, titled "Transfers to Exception B Trust," states that

... [t]ransfers to an "Exception B, Pooled Trust" by a person age 65 or older **might be divestment**. Do a complete divestment determination if the person is in a "Penalty Situation" per BEM 405. BEM 401, p. 8 (emphasis added).

Following the direction from BEM 401 to refer to BEM 405, I note that the "Penalty Situation" in BEM 401, states, in relevant portion:

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 ... and be one of the following: ... **[i]n an LTC facility**. BEM 405, p. 5 (emphasis added).

LTC is the type of care Claimant is receiving, so the sole guidance provided in this paragraph of BEM 401 is that DHS does require a divestment determination to be made. I note that the outcome of such a determination is not predetermined in BEM 401.

DHS fails, however, to articulate when a transfer to a valid Exception B Trust by a person sixty-five years or older "might be divestment." BEM 401 states only that it "might be." Stated in other words, DHS has not provided a separate procedure for determining divestment for clients over sixty-five years of age in LTC. Indeed, the words "might be" in BEM 401 indicate that, in general, it is not a divestment and only "might be" one in certain situations. Certainly, age *per se* is not such a situation. Therefore, if the client has created a valid Exception B Trust, they cannot be subjected to a divestment penalty period simply because of their age.

I find that to reason otherwise would be to determine that all disabled persons over sixty-five in LTC who create a valid Exception B Trust must undergo a penalty period.

Such an arbitrary conclusion flies in the face of the MA program purpose and the program requirements.

But, if I read this paragraph to mean that a sixty-five-or-older customer's transfer to an Exception B Trust "might be divestment," I must return to the question of what standards to use to decide which transfers are, and which are not, penalty situations. I find no authority for evaluating the phrase "might be divestment," and I decline to create it.

Turning now to the case before me, Claimant submits she has a valid Exception B Pooled Trust, DHS should not consider this transaction to be a divestment transaction, and DHS should not penalize her under the divestment procedures. If Claimant is correct, DHS' ruling is incorrect and must be reversed. If, however, Claimant's transaction is a transaction Claimant made to divest herself of assets in order to receive full coverage MA, then DHS has correctly considered it to be a Medicaid Trust, DHS acted correctly and should be affirmed.

I will consider first DHS' position. In its Hearing Summary addressed to the Administrative Law Judge, DHS states only that the DHS Medicaid Policy Unit determined that Claimant's trust is a divestment of property. The Hearing Summary does not state why this is so; it merely refers the Administrative Law Judge to the Medical Policy Unit Memo of January 26, 2011.

However, this Memo is not signed and I find it has no credibility whatsoever. I do not know who created this document, what their position title or background is, and how its contents were selected. It is even possible that this is a form letter generated by a computer for reasons unknown to anyone. There was no testimony at the Administrative Hearing about the Memo. Moreover, I certainly cannot consider a Memo in one person's case to be legal authority comparable to a DHS manual Item, a U.S. law, or a law of the State of Michigan. As I have determined the memo to be unreliable evidence, I will simply use it as information that may or may not assist me in reaching my decision in this case.

The Medicaid Policy Unit Memo of January 26, 2011, states:

BEM 401, page 7 requires that the person must be disabled according to BEM 260. This is based on the Social Security Act, 42 U.S.C. 1396p(d)(4)(C). Mary Williams is over the age of 65 (she is 78 years old, DOB 7/18/1932). Exhibit 1, p. 110.

I read the first two sentences above to mean that the Social Security Act is the basis of BEM 260, and BEM 260 is the basis of BEM 401. Stated in other words, DHS policy and procedure stems from the Social Security Act. Accordingly I will start my analysis with the Social Security Act.

The Social Security Act Section 1396p(d)(4)(C) is a subsection that defines the four Federal Medicare requirements for a disability trust which is validly transferred and is not the customer's resource:

- (i) The trust is established and managed by a non-profit association.
- (ii) 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.
- (iii) Accounts in the trust are established solely for the benefit of individuals who are disabled (as defined in section 1382c(a)(3) of this title) by the parent, grandparent, or legal guardian of such individuals, by such individuals, or by a court.**
- (iv) To the extent that amounts remaining in the beneficiary's account upon the death of the beneficiary are not retained by the trust, the trust pays to the State from such remaining amounts in the account an amount equal to the total amount of medical assistance paid on behalf of the beneficiary under the State plan under this subchapter. 42 USC Sec. 1396p(d)(4)(C) (bold print added for emphasis).

As this subsection uses a definition of disability from a second section of the Social Security Act, I now turn to that section, which is 42 USC Sec. 1382c(a)(3)(A):

[A]n individual shall be considered to be disabled for purposes of this subchapter if he is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to last for a continuous period of not less than twelve months. 42 USC Sec. 1382c(a)(3)(A).

This definition of disability is reiterated in BEM 260, "MA Disability/Blindness." I have examined all of the evidence and testimony in this case and made the three required findings of fact that establish that Claimant is disabled. The definition of disability in the Social Security Act and in BEM 260 makes no reference to age, and no law requires the client to be in receipt of disability benefits in order to prove they are disabled. See *also*, SSR [Social Security Ruling]-03-3p: Policy Interpretation Ruling – Titles II and XVI: Evaluation of Disability and Blindness in Initial Claims for Individuals Aged 65 or Older," effective November 10, 2003. This SSR states that Social Security Act disability standards are the same for persons under and over sixty-five years old.

The factual basis for my disability finding in this case is the credible and un rebutted testimony and evidence that Claimant is seventy-eight years old, she is unable to take care of her own personal needs, she has been in LTC for over seven months, she has severe peripheral artery disease and chronic obstructive pulmonary disease, and her

prognosis is “declining.” I find that DHS, by its failure to send this case to the DHS Medical Review Team office for a disability determination, either initially or via the Medical Policy Unit, has arbitrarily determined that Claimant cannot be disabled because she is over sixty-five years old. I regard this as the equivalent of a denial of disability by DHS, and I find there is clear and convincing evidence in the record to prove the contrary.

Also in the record is the original trust document created in 1997, and I see that on page one this document states the trust was established to benefit disabled persons. Indeed, the trustee is authorized to make her or his own disability decision in the absence of a government entity’s decision about disability. I base my finding of disability on this document as well, and also on the fact that Claimant’s presentation of this document to DHS and to the Administrative Law Judge establishes that the Trustee has determined Claimant is disabled. Department Exhibit 1, p. 11, “Declaration of Trust,” Article II, “Definitions,” Section 1, “Beneficiary.”

In conclusion, I find Claimant has established by clear and convincing evidence that she is disabled and she has created an Exception B Pooled Trust. I find and conclude that DHS erred in its imposition of a divestment penalty period in this case, and DHS is REVERSED. DHS shall rescind the divestment penalty and provide MA benefits and supplemental benefits to Claimant without imposition of a divestment penalty period in accordance with DHS policy and procedures.

DECISION AND ORDER

The Administrative Law Judge, based on the above findings of fact and conclusions of law, REVERSES the DHS action taken in this case. IT IS ORDERED THAT DHS shall rescind the divestment penalty from August 1, 2010-May 13, 2011, imposed upon Claimant, and provide full MA benefits, including all supplements to which Claimant is otherwise entitled, in accordance with DHS policy and procedures.



Jan Leventer
Administrative Law Judge
for Maura Corrigan, Director
Department of Human Services

Date Signed: April 6, 2011

2011-21520/JL

Date Mailed: April 13, 2011

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.

JL/pf

cc:

