

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

IN THE MATTER OF:

[REDACTED]

Reg. No: 2011-41131
2011-16645

Issue No: 2023

Case No: [REDACTED]

March 13, 2011

Macomb County DHS (12)

ADMINISTRATIVE LAW JUDGE: Landis Y. Lain

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 held on March 31, 2011. Claimant was represented at the hearing by [REDACTED]

ISSUE

Did the Department of Human Services (the department) properly determine that claimant had a divestment period for Medical Assistance (MA-Long Term Care)?

FINDINGS OF FACT

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

- (1) On October 28, 2010, the claimant transferred assets from a bank account into a Pooled Accounts Trust.
- (2) On October 29, 2010, claimant applied for Medical Assistance benefits.
- (3) The claimant resides in a Long Term Care Facility, was 80 years old on the date of hearing, suffers from dementia and requires assistance with all activities of daily living.
- (4) On December 9, 2010, the department determined that the Pooled Trust was not an "Exception B" trust because claimant was over the age of 65

years of age and that the transfer of assets to the trust constituted “divestment” pursuant to department policy.

- (5) On December 9, 2010, the department caseworker sent claimant’s representative notice that the application was denied based upon a divestment period.
- (6) On January 24, 2011, the claimant’s representative filed a request for a hearing to contest the department’s negative action.
- (7) On March 31, 2011, the hearing was held.
- (8) On May 19, 2011, Administrative Law Judge [REDACTED] overruled the department’s decision and stated that the claimant’s trust is an “Exception B, Pooled Trust” and department erred in applying a divestment penalty.
- (9) On June 14, 2011 the Macomb County Department of Human Services filed a request for reconsideration.
- (10) On September 15, 2011, Administrative Law [REDACTED] Nelson-Davis granted the request for reconsideration.

CONCLUSIONS OF LAW

The regulations governing the hearing and appeal process for applicants and recipients of public assistance in Michigan are found in the Michigan Administrative Code, MAC R 400.901-400.951. An opportunity for a hearing shall be granted to an applicant who requests a hearing because his or her claim for assistance has been denied. MAC R 400.903(1). Clients have the right to contest a department decision affecting eligibility or benefit levels whenever it is believed that the decision is incorrect. The department will provide an administrative hearing to review the decision and determine the appropriateness of that decision. BAM 600.

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 (BAM), the Program Eligibility Manual (BEM) and the Program Reference Manual (PRM).

A **reconsideration** is a paper review of the facts, law and any new evidence or legal arguments. It is granted when the original hearing record is adequate for purposes of judicial review and a rehearing is **not** necessary, but one of the parties believes the ALJ failed to accurately address all the relevant issues **raised in the hearing request**.

Rehearing/ Reconsideration Requests

All Programs

The department, client or authorized hearing representative may file a written request for rehearing/reconsideration. Request a rehearing/ reconsideration when one of the following exists:

- Newly discovered evidence that existed at the time of the original hearing, and that could affect the outcome of the original hearing decision.
- Misapplication of manual policy or law in the hearing decision which led to a wrong conclusion.
- Typographical, mathematical, or other obvious error in the hearing decision that affects the rights of the client.
- Failure of the ALJ to address in the hearing decision relevant issues raised in the hearing request.

The Department, AHR or the client must specify all reasons for the request.

A written request made by the AHR or, if none, by the client, must be faxed to:

- (517) 335-6088- Attention: SOAHR Client Requested Rehearing/Reconsideration
- SOAHR (now MAHS) will not review any response filed to any rehearing/reconsideration requests.

A request must be received within 30 days of the date the hearing decision is mailed. The request must be received as follows:

- Department request -- received in SOAHR (MAHS).
- Client or authorized hearing representative request -- received anywhere in DHS.

Granting A Rehearing/ Reconsideration

All Programs

SOAHR (MAHS) will either grant or deny a rehearing/reconsideration request and will send written notice of the decision to all parties to the original hearing. SOAHR (MAHS) grants a rehearing/reconsideration request if:

- The information in the request justifies it; **and**
- **There is time to rehear/reconsider the case and implement the resulting decision within the standard of promptness; see STANDARDS OF PROMPTNESS in this item.**
- **If the** client or authorized hearing representative made the request and it is impossible to meet the standard of promptness, the client or authorized hearing

representative may waive the timeliness requirement in writing to allow the rehearing/reconsideration.

All Programs

Pending a rehearing or reconsideration request, implement the original Decision and Order unless a circuit court or other court with jurisdiction issues an Order which requires a delay or stay.

If such an order is received by the client, SOAHR, the court or the Legal Affairs, or if there are questions about implementing the order; see Administrative Handbook manual Legal & FOIA Issues (AHN) item 1100, How to Obtain Legal Services. BEM, Item 600.

Title XIX of the Social Security Act, commonly referred to as “The Medicaid Act,” provides for medical assistance services to individuals **who lack the financial means to obtain needed health care**. 42 U.S.C. §1396. (Emphasis added)

The Medicaid program is administered by the federal government through the Centers for Medicaid and Medicare Services (CMS) of the Department of Health and Human Services (HHS). The state and federal governments share financial responsibility for Medicaid services. Each state may choose whether or not to participate in the Medicaid program. Once a state chooses to participate, it must operate its Medicaid program in accordance with mandatory federal requirements, imposed both by the Medicaid Act and by implementing federal regulations authorized under the Medicaid Act and promulgated by HHS.

Participating states must provide at least seven categories of medical services to persons determined to be eligible Medicaid recipients. 42 USC §1396a(a)(10)(A), 1396d(a)(1)-(5), (17), (21). One of the seven mandated services is *nursing facility services*. 42 USC §1396d(a)(4)(A).

For medical assistance eligibility, the Department has defined an asset as “any kind of property or property interest, whether real, personal, or mixed, whether liquid or illiquid, and whether or not presently vested with possessory rights.” NDAC 75-02-02.1-01(3). Under both federal and state law, an asset must be “actually available” to an applicant to be considered a countable asset for determining medical assistance eligibility. Hecker, 527 N.W.2d at 237 (On Petition for Rehearing); Hirschberger v. Griggs County Social Serv., 499 N.W.2d 876, 882 (N.D.1993); 42 U.S.C. § 1396a(a)(17)(B); 1 J. Krauskopf, R. Brown, K. Tokarz, and A. Bogutz, Elderlaw: Advocacy for the Aging § 11.25 (2d ed. 1993). Yet, “actually available” resources “are different from those *in hand*.” Schweiker v. Gray Panthers, 453 U.S. 34, 48, 101 S.Ct. 2633, 2642, 69 L.Ed.2d 460 (1981) (emphasis in original). NDAC 75-02-02.1-25(2) explains: Only such assets as are actually available will be considered. Assets are actually available when at the disposal of an applicant, recipient, or responsible relative; when the applicant, recipient, or responsible relative has a legal interest in a liquidated sum and has the legal ability to make the sum available for support, maintenance, or medical care; or when the applicant, recipient, or responsible relative has the lawful power to make the asset

available, or to cause the asset to be made available. Assets will be reasonably evaluated.... See also 45 C.F.R. § 233.20(a)(3)(ii)(D).

As noted in *Hecker*, if an applicant has a legal ability to obtain an asset, it is considered an “actually available” resource. The actual-availability principle primarily serves “to prevent the States from conjuring fictional sources of income and resources by imputing financial support from persons who have no obligation to furnish it or by overvaluing assets in a manner that attributes non-existent resources to recipients.” *Heckler v. Turner*, 470 U.S. 184, 200, 105 S.Ct. 1138, 1147, 84 L.Ed.2d 138 (1985).

The focus is on an applicant's actual and practical ability to make an asset available as a matter of fact, not legal fiction. See *Schrader v. Idaho Dept. of Health and Welfare*, 768 F.2d 1107, 1112 (9th Cir.1985). See also *Lewis v. Martin*, 397 U.S. 552, 90 S.Ct. 1282, 25 L.Ed.2d 561 (1970) (invalidating California state regulation that presumed contribution of non-AFDC resources by a non-legally responsible and non-adoptive stepfather or common law husband of an AFDC recipient's mother).

Determining whether an asset is “actually available” for purposes of medical assistance eligibility is largely a fact-specific inquiry depending on the circumstances of each case. See, e.g., *Intermountain Health Care v. Bd. of Cty. Com'rs*, 107 Idaho 248, 688 P.2d 260, 264 (Ct.App.1984); *Radano v. Blum*, 89 A.D.2d 858, 453 N.Y.S.2d 38, 39 (1982); *Haynes v. Dept. of Human Resources*, 121 N.C.App. 513, 470 S.E.2d 56, 58 (1996). Interpretation of the “actually available” requirement must be “reasonable and humane in accordance with its manifest intent and purpose....” *Moffett v. Blum*, 74 A.D.2d 625, 424 N.Y.S.2d 923, 925 (1980). That an applicant must sue to collect an asset the applicant has a legal entitlement to usually does not mean the asset is actually unavailable. See, e.g., *Wagner v. Sheridan County S.S. Bd.*, 518 N.W.2d 724, 728 (N.D.1994); *Frerks v. Shalala*, 52 F.3d 412, 414 (2d Cir.1995); *Probate of Marcus*, 199 Conn. 524, 509 A.2d 1, 5 (1986); *Herman v. Ramsey Cty. Community Human Serv.*, 373 N.W.2d 345, 348 (Minn.Ct.App.1985). See also *Ziegler v. Dept. of Health & Rehab. Serv.*, 601 So.2d 1280, 1284 (Fla.Ct.App.1992) At issue here is the methodology utilized in determining the availability of an individual's “resources” for purposes of evaluating his or her eligibility. SSI recipients, and thus SSI-related “medically needy” recipients, may not retain resources having a value in excess of \$2,000. 42 U.S.C. § 1382(a)(1)(B).

The regulations governing the determination of eligibility provide that resources mean cash or other liquid assets or any real or personal property that an individual (or spouse, if any) owns and could convert to cash to be used for his support and maintenance. If the individual has the right, authority or power to liquidate the property, or his share of the property, it is considered a resource. If a property right cannot be liquidated, the property will not be considered a resource of the individual (or spouse).20 C.F.R. § 416.1201(a).

Under BEM, Item 400, an eligible Medical Assistance recipient may not possess in excess of \$2000 in assets.

Assets mean cash, any other personal property and real property. **Real property** is land and objects affixed to the land such as buildings, trees and fences. Condominiums are real property. **Personal property** is any item subject to ownership that is **not** real property (examples: currency, savings accounts and vehicles). BEM, Item 400, page 1. Countable assets **cannot** exceed the applicable asset limit. Not all assets are counted. An asset is countable if it meets the availability tests and is **not** excluded. Available means that someone in the asset group has the right to use or dispose of the asset. BEM, Item 400, page 5. All types of assets are considered for SSI-related MA. BEM, Item 400, page 2. For Medicare Savings Programs (BEM 165) and QDWI (BEM 169) the asset limit is:

- . \$4,000 for an asset group of one.
- . \$6,000 for an asset group of two.

For all other SSI-related MA categories, the asset limit is:

- . \$2,000 for an asset group of one.
- . \$3,000 for an asset group of two. BEM, Item 400, page 5.

Pursuant to BEM, Item 405, a divestment means a transfer of an asset within the specified look-back period.

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 for fair market value (not divestment).
- **Giving an asset away (divestment).**
- Refusing an inheritance (divestment).
- Payments from a **MEDICAID TRUST** that are **not** to, or for the benefit of, the person or his spouse; see BEM 401 (divestment).
- Putting assets or income in a trust; see BEM 401. (emphasis added)
- Giving up the **right** to receive income such as having pension payments made to someone else (divestment).
- Giving away a lump sum or accumulated benefit (divestment).
- Buying an annuity that is **not** actuarially sound (divestment).
- Giving away a vehicle (divestment).
- Putting assets or income into a Limited Liability Company (LLC) (BEM 405, page 2)

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.

- Using \$5,000 from savings to buy a used car priced at \$5,000 is conversion for equal value.
- Trading a boat worth about \$8,000 for a car worth about \$8,000 is conversion for equal value.

Payment of expenses such as one's own taxes or utility bills is also **not** divestment. BEM 405, page 8.

The department is to count only the value of assets that are countable for the MA category being tested per BEM, Item 400. Assume the person owns the assets in determining what is countable. The department is to do a complete divestment determination when a person has transferred assets of the trust, the principle is unavailable, and the person is in a penalty situation per BEM, Item 405.

Trust accounts may be considered assets under the MA program and the value of those assets counted in making a determination of eligibility. PEM 410 p. 8-9. However certain trusts are excluded from this asset determination. In an "Exception B" Pooled trust assets are not counted in determining eligibility, although income a MA recipient receives from the trust is considered. PEM Item 401 pp. 7-8.

An "Exception B" pooled trust meets all of 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), and **under age 65, per BEM 260. (emphasis added)**
- * 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 PEM 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 PEM 405.
- * Accounts in the trust are established by courts or by disabled persons':
 - Parents.
 - Grandparents.
 - Legal guardians/conservators.

- * The trust says that if any funds are distributed from the trust after the person's death, the trustee has an automatic duty to repay Medicaid.

When a person has lived in more than one state, the trust must provide that the funds remaining in the trust are distributed to each state in which the individual received Medicaid, based on the state's proportionate share of the total amount of Medicaid benefits paid by all of the states on the person's behalf. Examples of circumstances under which a trust **fails** this repay condition are: Requiring a trustee to reimburse Medicaid only if Medicaid first submits a claim; failing to provide that repaying Medicaid has priority over all debts and expenses except those given higher priority by law. PEM 401 p. 7. The department treats assets and income transferred into an "Exception B, Pooled Trust" as a part the trust for the entire month of transfer. PEM 401 p. 8.

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 prior to the baseline date for all transfers made after February 8, 2006.

Entire Period

Transfers that occur **on** or **after** a client's baseline date must be considered for divestment. In addition, transfers that occurred within the 60 month look-back period must be considered for divestment.

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 one of the following:

- In an LTC facility.
- APPROVED FOR THE WAIVER; see BEM 106.
- Eligible for Home Help. BEM, Item 405, page 4.

There is no maximum limit on the penalty period for divestment under this new policy. There is no minimum amount of resource transfer before incurring a penalty, determine a penalty on **any** amount of resources that are transferred and meet the definition of a divestment even if the penalty is for one day. Divestment is a type of transfer **not** an amount of transfer. BEM, Item 405, page 9.

This Administrative Law Judge finds that the department policy is explicit. It states that an Exception B, Pooled trust contains resources for a person who is disabled and under age 65. Claimant is over the age of 65. The department has established that the transfer of claimant's assets to an "Exception B, Pooled Trust" is divestment. The

department has established this case by the necessary competent, substantial and material evidence on the record.

DECISION AND ORDER

The Administrative Law Judge, based upon the above findings of fact and conclusions of law, decides that Department has established by a preponderance of evidence that there has been divestment under the circumstances.

Accordingly, the May 19, 2011 decision by ALJ Michael Bennane reversing the department's decision to deny claimant's Medical Assistance application claimant eligibility for Retroactive Medical Assistance benefits is hereby **VACATED**. **The department's that the transfer of claimant's assets results in divestment is AFFIRMED.**

/s/

Landis Y. Lain
Administrative Law Judge
for Maura D. Corrigan, Director
Department of Human Services

Date Signed: 1/12/12

Date Mailed: 1/12/12

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.

LYL/ds

