

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

IN THE MATTER OF:

[REDACTED]

Reg. No.: 2012-48305
Issue No.: 2010
Case No.: [REDACTED]
Hearing Date: May 31, 2012
County: Kent

ADMINISTRATIVE LAW JUDGE: C. Adam Purnell

HEARING DECISION

This matter is before the undersigned Administrative Law Judge pursuant to MCL 400.9 and MCL 400.37 following Claimant's request for a hearing. After due notice, a telephone hearing was held on May 31, 2012, from Lansing, Michigan. Participants on behalf of Claimant included [REDACTED] (Claimant's attorney) and [REDACTED] (Claimant's daughter). Participants on behalf of Department of Human Services (Department) included [REDACTED] (Assistant Attorney General), [REDACTED] (Assistance Payments Supervisor) and [REDACTED] (Eligibility Specialist).

ISSUE

Did the Department properly determine that Claimant had divested herself of assets to warrant the imposition of a penalty for purposes of Medical Assistance (MA) for Long Term Care (LTC)?

FINDINGS OF FACT

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

1. The Department received Claimant's MA or "Medicaid" application on November 30, 2011.
2. Proper verification information was provided to the Department.
3. On January 18, 2012, the Department's Medicaid Policy Unit (MPU) determined that Claimant's husband purchased an annuity for [REDACTED] that was not actuarially sound on December 7, 2011. According to the MPU, Claimant's husband was 87 (eighty-seven) years old at the time and his life expectancy was 4.73 years. The

MPU found that the annuity would make monthly payments of [REDACTED] for 5 (five) years beginning January 7, 2012. The MPU found that a divestment had occurred.

4. On January 20, 2012, the Department mailed Claimant a Notice of Case Action (DHS-1605) which indicated that the annuity was a divestment.
5. Claimant's attorney requested a hearing challenging the Department's divestment determination on April 19, 2012.

CONCLUSIONS OF LAW

The Medical Assistance (MA) program was established by Title XIX of the Social Security Act and is implemented by Title 42 of the Code of Federal Regulations (CFR). The department administers the MA program pursuant to MCL 400.10, et seq., and MCL 400.105. Department policies for the MA programs are contained in the Bridges Administrative Manual (BAM), the Bridges Eligibility Manual (BEM), the Bridges Reference Manual (BRM), and the Reference Tables Manual (RFT). The MA program is also referred to as "Medicaid." BEM 105. The goal of the Medicaid program is to ensure that essential health care services are made available to those who otherwise could not afford them. BEM 105.

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).

A "divestment" is a transfer of assets that would create a penalty period. BEM 405. The "penalty period" is a period of disqualification from Medicaid assistance for Long Term Care (LTC). BEM 405. In other words, the penalty period is the number of months of long term care that will not be covered by Medicaid. BEM 405. Divestment is a type of transfer of a resource and not an amount of resources transferred. BEM 405. Divestment results in a penalty period in Medicaid, not ineligibility. BEM 405. The divestment policy does not apply to "Qualified Working Individuals."¹ BEM 405.

Divestment means a transfer of a "resource" by a client or his spouse that are all of the following: (1) is within a specified time (look-back period); (2) is a transfer for less than

¹ See BEM 169.

fair market value; (3) is not considered by policy as a “transfer that is not divestment.” BEM 405. Resource is defined as all of the client’s and his/her spouse’s assets and income. BEM 405. It includes all assets and all income, even countable and/or excluded assets, the individual or spouse receive. BEM 405. It also includes all assets and income that the individual (or their spouse) were entitled to but did **not** receive because of action by one of the following: (1) the client or spouse; (2) a person (including a court or administrative body) with legal authority to act in place of or on behalf of the client or the client’s spouse; (3) any person (including a court or administrative body) acting at the direction or upon the request of the client or his spouse. BEM 405.

During the penalty period, Medicaid (or MA) will not pay the client’s cost for: (1) LTC services; (2) home and community-based services; (3) home help; and (4) home health. BEM 405. However, Medicaid will pay for other MA-covered services. BEM 405.

Transferring a resource means giving up all or partial ownership in (or rights to) a resource. BEM 405. Not all transfers are divestment. BEM 405. Examples of transfers include: (1) selling an asset for fair market value (not divestment); (2) giving an asset away (divestment); (3) refusing an inheritance (divestment); (4) payments from a Medicaid Trust that are not to, or for the benefit of, the person or his spouse; see BEM 401 (divestment); (5) putting assets or income in a trust²; (6) giving up the right to receive income such as having pension payments made to someone else (divestment); (7) giving away a lump sum or accumulated benefit (divestment); (8) buying an annuity that is not actuarially sound (divestment); (9) giving away a vehicle (divestment); and (10) putting assets or income into a Limited Liability Company (LLC). BEM 405.

According to BEM 405, transfers by any of the following individuals are considered transfers by the client or spouse: (1) parent for minor; (2) legal guardian; (3) conservator; (4) court or administrative body; (5) anyone acting in place of, on behalf of, at the request of or at the direction of the client or the client’s spouse.

The purchase of an annuity that is not actuarially sound is a transfer for less than fair market value. BEM 405. An annuity is not actuarially sound if the annuitant is not expected to live until the end of the guarantee period of the annuity. BEM 405. The Department uses the Life Expectancy Tables contained in BEM 405.

The amount transferred for less than fair market value for an annuity that is not actuarially sound is the amount that would be paid after the end of the person’s life expectancy. BEM 405. The amount transferred for less than fair market value is the value of the payments due in the last 5.5 years of the annuity (25 minus 19.50 = 5.50). BEM 405.

The first step in determining the period of time that transfers can be looked at for divestment is determining the baseline date. BEM 405. A person’s baseline date is the first date that the client was eligible for Medicaid and one of the following: (1) in LTC; (2)

² See BEM 401.

approved for the waiver under BEM 106; (3) eligible for Home Health services; or (4) eligible for Home Help services. BEM 405.

Once the baseline date is established, the Department determines the look-back period. BEM 405. The look back period is 60 months prior to the baseline date for all transfers made after February 8, 2006. BEM 405.

Policy requires the Department follow the BEM 405 gender-specific life expectancy tables to compute the fair market value of a lifetime income source such as a pension. BEM 405. The calculations are based on the person's sex and age on the date of transfer. BEM 405.

The penalty period is computed on the total Uncompensated Value of all resources divested. BEM 405. The Department shall determine the Uncompensated Value for each resource transferred and combine into a total Uncompensated Value. BEM 405. The Department must then 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. Then the Department will multiply the fraction remaining by 30 to determine the number of days for the penalty period in the remaining partial month. BEM 405.

The Department will apply the total penalty months and days. BEM 405. Then it will apply a penalty even if the total amount of the penalty is for only a partial month. BEM 405. The penalty is applied to the months (or days) an individual is eligible for Medicaid and actually in LTC, Home Health, Home Help, or the MIChoice Waiver. BEM 405. The divestment penalty period cannot be applied to a period when the individual is not eligible for Medicaid for any reason (that is the case closes for any reason or is eligible for Medicaid but is not in LTC, Home Help, Home Health, or the MIChoice Waiver. BEM 405. The Department will restart the penalty when the individual is again eligible for Medicaid and in LTC, Home Help, Home Health, or MIChoice Waiver. BEM 405. When a medical provider is paid by the individual, or by a third party on behalf of the individual, for medical services received, the individual is not eligible for Medicaid in that month and the month is not a penalty month. BEM 405. That month cannot be counted as part of the penalty period. BEM 405.

The penalty period starts on the date which the individual is eligible for Medicaid and would otherwise be receiving institutional level care (LTC, MIChoice waiver, or home help or home health services), and is not already part of a penalty period. BEM 405. When a medical provider is paid by the individual, or by a third party on behalf of the individual, for medical services received, the individual is not eligible for Medicaid in that month and the month is not a penalty month. BEM 405. That month cannot be counted as part of the penalty period. BEM 405.

Timely notice must be given to LTC recipients and (BEM 106) waiver recipients before actually applying the penalty. BEM 405. Adequate notice must be given to new applicants. BEM 405.

A client can be penalized if he or his spouse divests. BEM 405. The penalty is imposed on whichever spouse is in a Penalty Situation; see BEM 211, MA Group Composition. BEM 405. If both spouses are in a penalty situation, the penalty period (or any remaining part) must be divided between them. BEM 405.

Example: Mr. and Mrs. Brown divested themselves of assets prior to [REDACTED] entering a LTC facility and applying for Medicaid. [REDACTED] is in LTC and under a divestment penalty for 24 months. When [REDACTED] enters the facility 6 months later, the remaining 18 months of [REDACTED] penalty are divided between them, giving Mr. and [REDACTED] each 9 months of the penalty still to complete. If either [REDACTED] dies before they complete their penalty the remainder of their penalty is transferred to their spouse. Example: [REDACTED] enters a LTC facility and applies for Medicaid. He is found eligible for Medicaid. During the presumed asset eligibility period [REDACTED] transfers [REDACTED] assets to herself and then transfers the assets to her children (the first transaction is permitted the second transaction is divestment). [REDACTED] then enters the LTC facility. [REDACTED] incurs the investment penalty. BEM 405.

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 [REDACTED] 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. BEM 400. 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 all other SSI-related MA categories, the asset limit is: (1) [REDACTED] an asset group of one and (2) [REDACTED] for an asset group of two. BEM, Item 400, page 5.

In the instant matter, the Department determined that Claimant's annuity was not actuarially sound and that a divestment resulted. The annuity was purchased on December 7, 2011 and that the purchaser was 87 (eighty-seven) years old at the time. Here, the Department calculated that Claimant's husband (who was 87 years old at the time) "annuitized" a [REDACTED] contract for 5 years that was not actuarially sound based on a **life expectancy of 4.73 years**. This Administrative Law Judge notes that BEM 405 (effective April 1, 2011) indicates that the life expectancy for an 87 (eighty-seven) year old male is **4.81**. Claimant's attorney did not dispute that 4.81 is accurate.

The Department clearly erred when it used 4.73 for the life expectancy of a male aged 87 because the applicable policy clearly shows that 4.81 is the proper figure.

Based on the substantial, material and competent evidence on the whole record, this Administrative Law Judge finds that the Department did not appropriately follow departmental policy. It should also be noted; however, that the Department appropriately determined that divestment occurred in this instance, but the Department must recalculate the penalty period because the life expectancy was incorrect.

DECISION AND ORDER

The Administrative Law Judge, based upon the above Findings of Fact and Conclusions of Law, finds that the Department did not act properly when it calculated the applicable life expectancy in determining Claimant's had divested herself of assets.

Accordingly, the Department's determination is REVERSED.

THE DEPARTMENT IS ORDERED TO DO THE FOLLOWING WITHIN 10 DAYS OF THE DATE OF MAILING OF THIS DECISION AND ORDER:

The Department shall recalculate Claimant's Medicaid eligibility including Claimant's countable assets.

IT IS SO ORDERED.

/s/ _____
C. Adam Purnell
Administrative Law Judge
for Maura Corrigan, Director
Department of Human Services

Date Signed: 7/2/12

Date Mailed: 7/2/12

NOTICE: Michigan Administrative Hearing System (MAHS) 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. MAHS 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. (60 days for FAP cases)

The Claimant may appeal the Decision and Order to Circuit Court within 30 days of the receipt 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.

Claimant may request a rehearing or reconsideration for the following reasons:

- A rehearing **MAY** be granted if there is newly discovered evidence that could affect the outcome of the original hearing decision.
- A reconsideration **MAY** be granted for any of the following reasons:
 - misapplication of manual policy or law in the hearing decision,
 - typographical errors, mathematical error, or other obvious errors in the hearing decision that effect the substantial rights of the claimant:
 - the failure of the ALJ to address other relevant issues in the hearing decision.

Request must be submitted through the local DHS office or directly to MAHS by mail at
Michigan Administrative Hearings
Reconsideration/Rehearing Request
P. O. Box 30639
Lansing, Michigan 48909-07322

CAP/ds

