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

IN THE MATTER OF:

Reg. No.: 2013-49530

REHD/RECON

Issue No.: <u>2010</u>

Case No.:

Hearing Date: June 25, 2013 County: Muskegon

ADMINISTRATIVE LAW JUDGE: Vicki L. Armstrong

#### **DECISION AFTER REHEARING**

This matter is before the undersigned Administrative Law Judge pursuant to MCL 400.9, MCL 400.37, and Mich Admin Code Rule 400.909 upon an Order Granting Rehearing and Order Vacating a Hearing Decision generated by the assigned Administrative Law Judge (ALJ) at the conclus ion of a hear ing conducted on Sept ember 25, 2013, and mailed on October 4, 2012, in the above-captioned matter. The date for a new hear ing having been assigned and due notice having been provided, a telephone hearing was conducted from Lansing, Michigan, on June 25, 2013. Participants on behalf of Claimant included At torney Participant s on behalf of the Department of Human Services (Department) included Family Independence Manager Long Term Care Worker and Assistant Attorney General

#### PROCEDURAL HISTORY

- On September 25, 2013, a hearing was conducted by Administrative Law Judge Lain pursuant to Claimant's Request for Hearing filed August 14, 2012, on the iss ue of whet her the Department of Hum an Services (Department) properly determined a divestment period for Medical Assistance (MA-Long Term Care).
- A Hearing Decis ion was generated on October 4, 2012 which affirmed the Department's determination that a divestment had occurred and the imposition of a penalty period.
- 3. On November 5, 2012, Claimant, the rough her attorney, filed a Request for Rehearing/Reconsideration of the Administrative Law Judge's Decision.
- 4. On November 7, 2012, Administ rative Law Judge Lain issued an Amende d Hearing Decision in response to the reconsideration of her earlier Hearing

Decision dated October 4, 2012. Th is Amended Hearing Decision was misfiled.

- 5. Subsequently, Claimant's November 5, 2012 Request for Rehearing/Reconsideration went before a Supervising Administrative Law Judge who, on March 15, 2013, unaware th at Administrative Law Judge Lain had generated an Amended Hear ing Decision, granted the request and issued an Order Granting Request for Rehearing and Vac ating Hearing Decision and Order, specifically the October 4, 2012, Hearing Decis ion generated by Administrative Law Judge Lain.
- 6. On April 8, 2013, a St ipulated Request for Clarification of the March 15, 2013 Order was filed with the Michigan Admi nistrative Hearing Syst em, seeking clarification of the Order Granti ng reques t for Rehearing and Vacating Hearing Decision and Order as it did not reference the Novem ber 7, 2013, Amended Hearing Decision.
- 7. Pursuant to the Stipul ated Request for Clarificati on, a telephone status conference was held, during which time the parties agreed to pend any circuit court action until a *de novo* Administrative Hearing could be conducted.
- 8. On June 5, 2013, MAHS mailed the Noti ce of Hearing to Claim ant notifying her of the scheduled Rehearing on June 25, 2013.

#### **ISSUES**

- 1. Whether the Caregiver C ontract provisions of BEM 405 pages 5- 7, apply to non-relative caregivers, in particula r, whether payment s to an unrelated person for services provided to a Medi caid Claimant lack consideration and are divestment unless there is a preexisting written, notarized contract and a recommendation by a phys ician that the services are necessary to prevent institutionalization?
- 2. Whether the Caregiver Contract rules under BEM 405 pages 5-7 apply to reimbursement, in particular, whether mileage reimbursement is a permitted expense and does not require a pre-existing, written, notarized contract and a recommendation by a phys ician that the services are necessary to prevent institutionalization?

#### FINDINGS OF FACT

The Administrative Law Judge, based upon the clear and conv incing evidence on the whole record, finds as material fact:

1. Claimant went into a long term care facility on March 21, 2012.

- 2. On April 30, 2012, Claimant applied for Medical Assistance (MA).
- 3. On June 4, 2012, the Notice of Case Action was mailed to Claimant approving a patient pay/deductibl e amount of \$ beginnin g April 1, 2012. (Depart Ex 27-28).
- 4. Subsequent to Claim ant's appr oval for MA effective April 1, 2012, the department explained the approval was based on a divestment total of \$\$ was a gift to Claim ant's grands on, \$\$ was paid to the non- relative car etaker beginning May, 2011, up until Claimant went into long term care on Marc h 21, 2012. The remaining \$\$ was paid to Jas on Jensen as r eimbursement for mileage. (Hearing Summary; Dept Ex 37-41).
- 5. On July 30, 2012, Claimant submitted a Request for a Hearing, disputing the divestment. (Dept Ex 46).

#### **CONCLUSIONS OF LAW**

The Medical Assistance (MA) program is estab lished by Title XIX of the Social Sec urity 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 Bridges Administrative Manual (BAM), the Bridges Eligibility Manual (BEM) and the Reference Tables Manual (RFT).

The goal of the Medicaid program is to ensure that essentia I health care s ervices are made available to those who otherwise could not afford them. BEM 105. Medicaid is also known as Medical Assistance ("MA"). *Id.* The Medicaid program is comprised of several categories; one category is for FIP recipients while another is for Supplemental Security Income ("SSI") recipients. *Id.* Programs for individuals not receiv ing FIP or SSI are based on eligibility factors in either the FIP or SSI program thus are categorized as either FIP-related or SSI-related. *Id.* To receive MA under an SSI-related category, the person must be aged (65 or older), blind, disabled, entit led to Medicare or formally blind or disabled. *Id.* FIP- and SSI-related Group 2 eligibility is possible even when net income exceeds the income limit because in curred medical expenses are considered. *Id.* Eligibility is determined on a calendar month basis. BEM 105. MA income eligibility exists for the calendar month tested when there is no excess income or allowab le medical expenses that equal or exceed the excess income. BEM 545.

Divestment results in a penalty period in MA, not in eligibility. B EM 405. D uring the penalty period, MA will not pay for long-term care services. *Id.* Divestment means a transfer of a resource by a client (or spouse) that is w ithin the look-back period and is transferred for less than fair market value ("FMV"). *Id.* Transferring a resource means giving up all or partial ownership in, or rights to, a resource. *Id.* Resource means all the client's (and spouse's) assets and income. *Id.*; 20 CFR 416.1201. Les s than FMV

means the compensation received in return for a resource was worth less than the FMV of the resource. BEM 405. When a pers on gives up the right to receive income, the FMV is the total amount of income the person could have expected to receive. *Id.* 

The first step in det ermining the period of time that transfers can be looked at for divestment is to determine the baseline date. BEM 405. The baseline date (applicable in this case) is the date which the client was an MA applicant and in a long-term care facility. *Id.* After the baseline date is established, the look-back period is established. BEM 405. The look-back period is 60 months for all transfers made after February 8, 2006. *Id.* Transfers made by anyone acting in place of, on behalf of, at the request of, or at the direction of the client/s pouse during the look-back period are considered. *Id.* In this case, the baseline date and look-back period are not in dispute.

The issue in this case concerns the applicat ion of BEM 405 to a non-relative caregiver and mileage reimburse to Cla imant's nephew, That Claimant's nephew and thus her relative is not at dispute here. Looking first at the mileage reimbursement, BEM 405 indicates that compensation must have tangible form and intrins ic value. Relatives can be paid for providing services; however, the department assumes services were provided defor free when no payment was made at the time services were provided. A client can rebut this presumption by providing tangible evidence that a payment obligation existed at the time the service was provided (for example a written agreement signed at the time services were first provided). The policy in BAM 130 allowing use of best available information or best judgment as verification does **not** apply. BEM 405, p 5.

In this case, an Agreement for Compens ation and Reimbursement was notarized and signed by Claimant on May 17, 2012. The Agreement confirmed that Claimant paid her nephew Jason Jensen, \$ back in July, 2011, to reimburse him for his time spent taking care of her affairs and for the mileage from the num erous trips from Kalamazoo to Muskegon her nephew made on her behalf between January, 2011 and July, 2011.

Claimant argues that the \$ paid to her nephew was for mileage reim bursement under a Durable Power of At torney for Financ ial Matters and is not divestment. Claimant points to page 6 of the Power of Attorney dated April 22, 2010. Compensation on page 6 reads, "[m]y Agent shall be reimbursed for reasonable expens es incurred while acting as Agent and may receive reasonable compensation for acting as Agent."

Policy clearly states that relatives can be paid for providing ser vices. Ho wever, the department is to assume the services provided were free when no payment was made at the time services were provided. BEM 405, p 5. Here, Cl aimant's nephew drove between Kalamazoo and Muskegon during Januar y, 2011, and July, 2011 to care for Claimant's needs. But the Agreement for Compensation and Reimbursement was not signed until May, 2012. Apply ing DHS policy, because payment was not made at the time the services were provided in 2011, the department properly found the paid to Claimant's nephew in May, 2012 was dive stment under BEM 405, p 5. Moreover, policy indicates that relatives who provide as sistance or services are presumed to do so

for love and affection, and compensation fo r past assistance or s ervices shall create a rebuttable presumption of a transfer for less than fair market value.

The second issue is whether the Caregiver C ontract provisions of BEM 405 pages 5-7, apply to non-relative c aregivers. Home Caretaker and Pe rsonal Care Contracts under BEM 405 indicate:

A contract/agreement that pays prospectively for expenses such as repairs, maintenance, property taxes, homeowner's insurance, heat and utilities for re al property/homestead or that provides for monitoring health care, securing hospitalization, medical treatment, visitation, entertainment, travel and/or transportation, financial management or shopping, etc. would be considered a divestment. The department will consider all payments for care and services which the client made during the look back period as divestment. BEM 405, p 6.

Relatives who provide assistance or servic es are presumed to do so for love and affection, and compensation for past assistance or servic es shall create a rebuttable presumption of a transfer for le ss than fair market value. A relative is anyone related to the client by blood, marriage or adoption. BEM 405, p 6.

In this case, Claimant's authorized represent ative contends that strict adherence to BEM 405 is to prevent the unaut horized enrichment of relatives. Claimant's authorized representative argues that because the caregiver was a non-relative, the department's strict adherence to BEM 405 in this cas e is illogical. There is no dispute that the caregiver was not a relative.

BEM 405 reads, the department will consider all payments for care and ser vices which the client made during the look back period as divestment. BEM 405, p 6. Contracts for "monitoring health care, securing hospitalization, medical treatment, visitation, entertainment, travel and/or transportation, financial management or shopping, etc. would be considered a divestment." BEM 405, p 6.

Here, Claimant's nephew hired a caregiver to care for Claimant between J une, 2011, and February, 2012. The caregiver monitored Claimant's health care and provided daily updates to Claimant's nephew. Claimant's nephew paid for the caregiver's services biweekly. Claimant's authorized representative adm its that Claim ant's nephew did not obtain a written statem ent from Claimant's physician indicating that in-home care was necessary and did not prepare a written contract with the caregiver for in-home care. Claimant's authorized representative contends that be cause the caregiver was a non-relative, and was paid contemporaneously with the services, BEM 405 should not apply and this was not divestment.

However, policy c learly indicates that c ontracts/agreements shall be considered a transfer for less than fair market value unless the compensation is in accordance with all of the following:

- The services must be performed **after** a written legal contract/agreement has been executed between the clie nt and provider. The services are not paid for until the services hav e been provided. The contract/agreement must be dated and the signatures must be notarized; **and**
- At the time of the receipt of the services, the client is not residing in a nursing facility, adult foster care hom e, institution for mental di seases, inpatient hospital, intermediate care facility for mentally retarded or eligible for home and community based waiver, home health or home help; and
- At the time services are received, the services must have been recommended in writing and signed by the client's physician as necessary to prevent the transfer of the client to a residential care or nursing facility. Such services cannot include the provision of companionship; **and** (BEM 405, p.6).
- DHS will verify the contract/agreement by reviewing the written instrument between the client and the provider which must s how the type, frequency and duration of such ser vices being prov ided to the client and the amount of consideration (money or property) being received by the provider, or In accordance with a service plan approved by DHS. If the amount paid for services is above fair market value, then the client will be considered to have transferred the asset for less than fair market value. If in question, fair market value of the services may be determined by consult ation with an area business which provides such services; and
- The cont ract/agreement must be signed by the client or legally authorized representative, such as an agent under a power of attorney, guardian, or conservator. If the agreement is signed by a representative, that representative cannot be the provider or beneficiary of the contract/agreement. BEM 405, p 7.

In this case, there was never a signed or notarized contract between Claimant and the provider/caregiver. However, the services were not paid for until the ser vices were provided. At the time the services were re ceived, Claimant was not in a long term care facility, but residing in her home. Howeve r, the services were ne ver recommended in writing and signed by Claimant's physic ian as necessary to prevent the transfer of Claimant to a long term care facility. Claimant's authorized representative did submit a page out of Claimant's medical records dat ed 11/29/10 highlighting the phrase, "doing better with meals on wheels and home health aid starts," as proof of Claimant's nephew's consultation with Clai mant's physician concerning hi s hiring a caregiver. However, this does not satisfy the require ment of an actual s igned recommendation by Claimant's physician for services to prevent her transfer to a long term care facility.

Furthermore, policy requires that D HS actually verify and review the contract/agreement, which was also not done in this case because ther e was no contract. Finally, the contract/agreement must be signed by the Claimant or legally authorized representative. Again, this was not done because there was no contract.

Claimant's authorized representative argues that the strict requirements of BEM 405 as they apply to contracts and agreements only appl ies to relatives and is the "tangible evidence" described in BEM 40 5, page 5 t hat can be provided by relatives as rebuttal proof that payment for past services is allowable.

However, looking at the pl ain language of the first sentenc e of the first requirement under the contract/agreement requirements, policy reads the "services must be performed **after** a wri tten legal contract/agreem ent has been executed between the client and provider." The client in this case is Claimant and the provider in this instance is the caregiver. Had the department intended that the requirements only pertained to relatives, then the department could have substituted "relative" for "provider."

Therefore, looking at the plain language of the policy, because there was never a signed contract before the services were performed, and the in-home services were not recommended in writing by Claim ant's physician to prevent her transfer to a long term care facility, and DHS never reviewed the contract because the contract never existed, the department properly found that the payments made to the caregiver were divestment.

#### **DECISION AND ORDER**

The Administrative Law Judge, based upon the above Findings of Fact and Conclusions of Law, finds that the Depar trent properly determined divest ment in the amount of \$48,317.01.

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

It is SO ORDERED.

Vicki L. Armstrong Administrative Law Judge for Maura Corrigan, Director Department of Human Services

Date Signed: July 17, 2013

Date Mailed: July 18, 2013

**NOTICE:** The law pr ovides that within 30 days of receipt of this decision, the claiman t may appeal this decision to the circuit court for the county in which he/she lives.

# VLA/las

