

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

IN THE MATTER OF:

██████████
██████████

Reg. No: 201346377
Issue No: 2010
Case No: ██████████
Hearing Date: July 18, 2013
Delta County DHS

ADMINISTRATIVE LAW JUDGE: Suzanne D. Sonneborn

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 received by the Department of Human Services (department) on May 9, 2013. After due notice, a telephone hearing was held on July 18, 2013. Claimant's husband and authorized representative, ██████████, appeared and provided testimony on Claimant's behalf. The department was represented by ██████████, an eligibility specialist with the department's Delta County office.

ISSUE

Whether the department properly determined that Claimant was subject to a divestment penalty for Medical Assistance (MA AD-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 February 1, 2013, Claimant applied for MA AD-Care benefits.
2. On February 27, 2013, Claimant transferred to her son real property with a fair market value of \$11,660.00. (Department Exhibits 2-3)
3. On April 19, 2013, the department mailed Claimant a Notice of Case Action (DHS 1605), advising Claimant that Medicaid will not pay for her long-term care and home and community-based waiver services from May 1, 2013 through June 19, 2013 because Claimant or Claimant's spouse transferred assets or income for less than their fair market value. (Department Exhibits 1, 5, 6)

4. On May 8, 2013, Claimant's husband filed a request for a hearing challenging the department's application of a divestment penalty to Claimant's MA AD-Care benefits. (Request for Hearing)

CONCLUSIONS OF LAW

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. Department of Human Services Bridges Administrative Manual (BAM) 600 (2011), p. 1. The regulations governing the hearing and appeal process for applicants and recipients of public assistance in Michigan are found in sections 400.901 to 400.951 of the Michigan Administrative Code (Mich Admin Code). An opportunity for a hearing shall be granted to an applicant who requests a hearing because his claim for assistance is denied. Mich Admin Code R 400.903(1).

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 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 Program Reference Manual (PRM).

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).

Department policy provides that an eligible Medicaid recipient may not possess in excess of \$2000 in assets. BEM 400. Assets are defined as 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 400, p. 1.

Countable assets cannot exceed the applicable asset limit, however not all assets are counted. An asset is countable if it meets the availability tests and is not excluded. An

asset is “available” if someone in the asset group has the right to use or dispose of the asset. BEM 400, p. 5. All types of assets are considered for SSI-related MA.

Department policy further provides that a divestment will result in a penalty period in MA, not ineligibility. BEM 405. A divestment is a type of transfer of a resource by a client or his/her spouse that is all of the following: (1) within a specified time (ie. a look-back period); (2) a transfer for less than fair market value; and (3) not excluded by policy as a transfer that is not a divestment. BEM 405.

Transferring a resource means giving up all or partial ownership in (or rights to) a resource. Not all transfers constitute divestments. 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;
- 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);
- Purchasing an annuity that is not actuarially sound (divestment);
- Giving away a vehicle (divestment); and
- Putting assets or income into a Limited Liability Company (LLC). BEM 405, p. 2.

In order to determine the period of time in which transfers may be reviewed for purposes of divestment, the department must first determine the baseline date. A person’s baseline date is the first date that the client was eligible for Medicaid and the client is one of the following: (i) in a long-term care (LTC) facility; (ii) approved for a waiver under BEM 106; (iii) eligible for Home Health services; or (iv) eligible for Home Help services. BEM 405, p. 5. A person’s baseline date does not change even if one of the following happens: (i) the client leaves LTC; (ii) the client is no longer approved for a waiver under BEM 106; (iii) the client no longer needs Home Health services; or (iv) the client no longer needs Home Help services. BEM 405, p. 5.

After determining the baseline date, the department must then 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. BEM 405, p. 4. 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.

The second inquiry in a divestment determination is determining whether a resource was transferred for less than fair market value. Less than fair market value means the compensation received in return for a resource was worth less than the fair market value of the resource. That is, the amount received for the resource was less than what would have been received if the resource was offered in the open market. BEM 405, p. 5. Moreover, the compensation must have tangible form and intrinsic value. BEM 405, p. 5.

Once the department has determined that the client's transfer of a resource was within the look-back period, for less than fair market value, and not otherwise excluded by policy such that the transfer constitutes a divestment, the department must calculate the penalty period. The manner by which the department performs this calculation is set forth on page 10 of BEM 405. During the penalty period, MA will not pay the client's cost for: LTC services; home and community-based services; home help; and home health. BEM 405, p. 1.

There is no maximum limit on the penalty period for a divestment. BEM 405, p. 9. Nor is there a minimum amount of resource transfer before incurring a penalty. The department is required to determine the penalty on any amount of resources that are transferred and meet the definition of a divestment even if the penalty is for one day. A divestment is a type of transfer not an amount of transfer. BEM 405, p. 9.

The department is required to cancel a divestment penalty if either of the following occurs before the penalty is in effect: (i) all the transferred resources are returned and retained by the individual; or (ii) fair market value is paid for the resources. BEM 405, p. 12. Likewise, the department shall recalculate the penalty period if either of the following occurs while the penalty is in effect: (i) all the transferred resources are returned; or (ii) full compensation is paid for the resources. BEM 405, p. 12.

Once a divestment penalty is in effect, the return of, or payment for, resources cannot eliminate any portion of the penalty period that has since expired. Rather, the department is required to recalculate the penalty period. The divestment penalty ends on the later of the following: (i) the end date of the new penalty period; or (ii) the date the client notified the department that the resources were returned or purchased. BEM 405, pp. 12-13.

Department policy further provides that the department may waive a divestment penalty if the penalty creates undue hardship. BEM 405, p. 13. The department must assume that there is no undue hardship unless evidence is provided to the contrary. Specifically, undue hardship exists when the client's physician (M.D. or D.O.) has indicated that necessary medical care is not being provided, and the client needs treatment for an emergency condition. BEM 405, p. 13.

In the instant case, the department determined that Claimant's husband's February 27, 2013 transfer of real property worth \$11,660.00 to their son was considered a divestment that is subject to a divestment penalty from May 1, 2013 through June 19, 2013, during which Medicaid would not pay for Claimant's long-term care and home and community-based waiver services.

At the July 18, 2013 hearing, Claimant's husband, [REDACTED], testified that while he did indeed transfer Claimant's real property to their son on February 27, 2013 by putting their son's name on the deed to the property at that time, [REDACTED] indicated that their son actually purchased the property from him and Claimant in 2011 through an arrangement by which [REDACTED] obtained the mortgage for their son and mistakenly included [REDACTED] name on the deed rather than their son's name. [REDACTED] acknowledged, however, that he has no documentation establishing that their son made any payments to him for the property, nor does [REDACTED] have a sworn, notarized statement from their son verifying that he purchased this property in the amount of its fair market value.

Testimony and other evidence must be weighed and considered according to its reasonableness. *Gardiner v Courtright*, 165 Mich 54, 62; 130 NW 322 (1911); *Dep't of Community Health v Risch*, 274 Mich App 365, 372; 733 NW2d 403 (2007). Moreover, the weight and credibility of this evidence is generally for the fact-finder to determine. *Dep't of Community Health*, 274 Mich App at 372; *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997). In evaluating the credibility and weight to be given the testimony of a witness, the fact-finder may consider the demeanor of the witness, the reasonableness of the witness's testimony, and the interest, if any, the witness may have in the outcome of the matter. *People v Wade*, 303 Mich 303 (1942), *cert den*, 318 US 783 (1943).

This Administrative Law Judge has carefully considered and weighed the testimony and other evidence in the record and finds, based on the competent, material and substantial evidence presented during the July 18, 2013 hearing, the department properly determined that Claimant's eligibility for MA AD-Care was subject to a divestment penalty. The Administrative Law Judge further finds that the department properly determined the penalty period from May 1, 2013 through June 19, 2013.

DECISION AND ORDER

The Administrative Law Judge, based upon the above findings of fact and conclusions of law, decides that the department properly determined that Claimant's eligibility for MA AD-Care was subject to a divestment penalty from May 1, 2013 through June 19, 2013. Accordingly, the department's decision is **UPHELD**.

It is SO ORDERED.

/s/

Suzanne D. Sonneborn
Administrative Law Judge
for Maura D. Corrigan, Director
Department of Human Services

Date Signed: July 31, 2013

Date Mailed: July 31, 2013

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.

The Claimant may appeal this 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 errors, or other obvious errors in the hearing decision that affect the substantial rights of Claimant;
 - The failure of the ALJ to address other relevant issues in the hearing decision.

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A request for a rehearing or reconsideration must be submitted through the local DHS office or directly to MAHS by mail at:

Michigan Administrative Hearings System
Reconsideration/Rehearing Request
P.O. Box 30639
Lansing, MI 48909-07322

SDS/aca

cc:

