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

IN THE MATTER OF:



Reg. No: 20142514 Issue No: 2008

Case No:

Hearing Date: December 4, 2013

Clinton County DHS

ADMINISTRATIVE LAW JUDGE: Suzanne D. Sonneborn

HEARING DECISION

This matter is before the undersigned Admini strative Law Judge pursuant to MCL 400. 9 and MCL 400.37 upon Claimant's request for a hear ing received by the Department of Human Services (department) on September 24, 2013. A fter due notice, a telephone hearing was held on December 4, 2013. Claimant's daughter and authorized representative, appeared and provided test imony on Claim ant's behalf. The department was represented by a lead worker with the department's Clinton County office.

<u>ISSUE</u>

Whether the department properly determined that Claimant was subject to a divestment penalty for Medical Assistance (MA AD-Care) for the period October 1, 2013 through October 31, 2013?

FINDINGS OF FACT

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

- In July 2013, Claimant's DHS case specialist erroneously advise d Claimant's authorized r epresentative that if Claimant transferred ownership of the life i nsurance policies, she could avoid having to cas h them out.

- 3. On July 11, 2013 and July 13, 2013, Claim ant transferred ownership of her three life insurance policies to Sandra Bailor. (Department Exhibits 3, 4, 5, 6)
- 4. On September 15, 2013, Claimant's authorized r epresentative submitted written requests to each insurance company, requesting that the three life insurance policies be canceled and the cash values surrendered.
- 5. On September 17, 2013, the department notifie d Claimant that her transfer of ownership of her three lif e insurance policies was a divestment of assets, resulting in the department's imposition of a divestment penalty and denial of payment of Claimant 's long-term care and home and community-based waiver services fr om October 1, 2013 through October 31, 2013. (Department Exhibits 7, 8)
- 6. On September 24, 2013, Claimant's authorized representative filed a request for a hearing challenging the divestment penalty to Claimant's MA AD- Care benefits. (Request for Hearing)
- 7. On October 3, 2013, the department held a prehear ing conference wit h Claimant's authorized representative and advised her that the department would cancel the div estment penalty upon receipt of verification that the three insurance policies had been can celed and the cash values surrendered.
- 8. On October 22, 2013, Claimant's authorized representative provided the department with verification that the three insurance policies had been canceled and the cash values surrendered, as well as verification that the total surrendered amount from the policies had been applied to Claimant's outstanding balanced owed at her nursing home facility, lowing Claimant's assets to below \$2,000.00.

CONCLUSIONS OF LAW

Clients have the right to c ontest a department decis ion affe cting eligibil ity or benefit levels whenever it is believed that the decision is incorrect. The department will provide an administrative hearing to rev iew the decision and determine the appropriateness of that decision. Department of Human Serv ices Bridges Administrative Manual (BAM) 600 (2011), p. 1. The regulations gov erning 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 Medic al Assistance (MA) program was established by Tit le XIX of the Social Security Act and is implemented by Title 42 of the Code of Federal Regulations (CFR). The Department of Human Serv ices (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 gove rnments 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 oper ate its Medicaid program in accordance with mandatory feder al requirements, i mposed both by the Medicaid Act and by im plementing federal regulations authorized under the Medicaid Act and promulgated by HHS.

Participating states must pr ovide at leas t seven categories of medical services to persons determined to be eligible Medic aid recipients. 42 U SC §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 (July 1, 2013). Assets are defined as cash, any other personal property, and real property. A life insurance policy is an asset only if it can generate a cash value or a cash surrender value, which is the amount of money the policy owner may obtain by canceling the policy before it matures or before the insured dies. BEM 400, p. 41.

Countable assets cannot exceed the applic able 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 fur ther provides that a dive stment will result in a penalt y period in MA, not ineligibility. BEM 405 (J uly 1, 2013). 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 resour ce 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 inc ome 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 fi rst date that the client was eligible for Medicaid and the client is o ne of the follo wing: (i) in a lo ng-term care (LTC) facilit y; (ii) approved for a waiver under BEM 106; (iii) elig ible for Ho me Health services; or (iv) eligible for Home Help services. BEM 405, p. 5. A pers on'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 deter—mination 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 reso—urce 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 resour—ce was offered in the open market. BE—M 405, p. 5. Moreover—, the compensation mu—st have t angible for m and intrinsic va—lue. 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 t han fair m arket 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 pages 10 and 11 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.

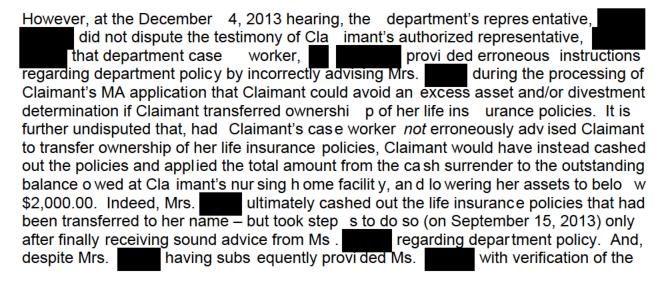
There is no maximum limit on the penalty period for a divestm ent. BEM 405, p. 9. Nor is there a minimum amount of resource transfer before incurring a penalty. The department is required to determine the penalty on any amount of resources that are transferred and meet the definition of a divestment 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 an d retained by the individual; or (ii) fair market value is paid for the resources. BEM 405, p. 12. Likewise, the department shall recalcul ate the penalty period if eit her of the following occurs while the penalty is in effect: (ii) 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 sinche 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 hards hip. BEM 405, p. 13. The department must assume that there is no undue hardship unles sevi dence is provided to the contrary. Specifically, undue hardship exists when the client's physician (M.D. or D.O.) has indicated that necess ary 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 July 11, 2013 and July 14, 2013 transfers of ownership of her three life insurance policies was a divestment of assets, resulting in the department's imposition of a divestment penalty and denial of payment of Claimant's long-term care and home and community-based waiver services from October 1, 2013 through October 31, 2013.



cash surrender total of the three policie s on October 22, 2013, at which time the divestment penalty was in effect, there is no indication that the department recalculated the penalty period to determine whether the divestment penalty should end on the end date of the new penalty period or on October 22, 2013.

Testimony and other evidence must be we ighed 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 credi bility 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).

This Administrative Law Judge has carefully considered and weighed the testimony and other evidence in the record as well as relevant department policy. Having done so, this Administrative Law J udge finds, based on t he competent, material and substantia evidence presented during the hearing, that despite Claimant having relied upon the her case specialist's erroneous interpretation of department policy to Claimant's detriment, this Administrative Law Judge lacks the aut hority to grant equitable relief based on principles of fairness but is instead bound by the delegation of authority given by the Director of the Department to determine whether the Department's negative action was in accordance with department policy - and, here, the transfer of ownership of Claimant's life insuranc e policies was indeed a divestment under department policies y. However, this Administrative Law Judge further finds that, had Claimant not transferred ownership of the three life in surance policies, valued in total at \$ would not have been eligible for MA benefits due to her assets ex ceeding the \$ limit until Claimant provided the Department with veri fication of the reduction in her asset amount to below \$ through pay ment of her outstanding balance at her nursing home, which Claimant ul timately did on October 22, 2013. Acc ordingly, the Department's divestment determination, albeit the result of erroneous advice to v, was harmless error in this Claimant of department polic instance, where the Department would have alternatively found Claimant to have been ine ligible for MA-Ad Care benefits through October 31, 2013 due to excess assets.

DECISION AND ORDER

The Administrative Law Judge, based upon the above findings of fact and conclusion sof law, decides that the department acted properly in determining that Claimant was subject to a divestment penalty for MA-Ad Care benefits for the period October 1, 2013 through October 31, 2013. Ac cordingly, the department's decision in this regard is **AFFIRMED.**

It is **SO ORDERED**.



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

Date Signed: <u>December 11, 2013</u>

Date Mailed: December 11, 2013

NOTICE OF APPEAL: 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 or Reconsideration was made, within 30 days of the receipt date of the Decision and Order of Reconsideration or Rehearing Decision.

Michigan Administrative Hearing System (MAHS) may order a rehearing or reconsideration on either its own motion or at the req uest of a p arty within 30 days of the mailing date of this De cision and Order. MAHS will not order a rehearing or reconsideration on the Department's motion where the final deci sion cannot be implemented within 90 days of the filing of the original request (60 days for FAP cases).

A Request for Rehearing or Reconsideration may be granted when one of the following exists:

- Newly discovered evidence that existe d at the time of the original hearing 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 a ddress in the hearing decision relevant issues raised in the hearing request.

The Department, AHR or the claimant must specify all reasons for the request. MAHS will not review any response to a request for rehearing/reconsideration. A request must be *received* in MAHS within 30 days of the date the hearing decision is mailed.

The written request must be faxed to (517) 335-6088 and be labeled as follows:

Attention: MAHS Rehearing/Reconsideration Request

If submitted by mail, the written request must be addressed as follows:

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

