

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

IN THE MATTER OF:

[REDACTED]

Reg. No.: 2013-49530
REHD/RECON
Issue No.: 2010
Case No.: [REDACTED]
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 conclusion of a hearing conducted on September 25, 2013, and mailed on October 4, 2012, in the above-captioned matter. The date for a new hearing 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 Attorney [REDACTED] [REDACTED]. Participants on behalf of the Department of Human Services (Department) included Family Independence Manager [REDACTED] [REDACTED] Long Term Care Worker [REDACTED] [REDACTED] and Assistant Attorney General [REDACTED] [REDACTED].

PROCEDURAL HISTORY

1. 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 issue of whether the Department of Human Services (Department) properly determined a divestment period for Medical Assistance (MA-Long Term Care).
2. A Hearing Decision 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, through her attorney, filed a Request for Rehearing/Reconsideration of the Administrative Law Judge's Decision.
4. On November 7, 2012, Administrative Law Judge Lain issued an Amended Hearing Decision in response to the reconsideration of her earlier Hearing Decision.

Decision dated October 4, 2012. This 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 that Administrative Law Judge Lain had generated an Amended Hearing Decision, granted the request and issued an Order Granting Request for Rehearing and Vacating Hearing Decision and Order, specifically the October 4, 2012, Hearing Decision generated by Administrative Law Judge Lain.
6. On April 8, 2013, a Stipulated Request for Clarification of the March 15, 2013 Order was filed with the Michigan Administrative Hearing System, seeking clarification of the Order Granting request for Rehearing and Vacating Hearing Decision and Order as it did not reference the November 7, 2013, Amended Hearing Decision.
7. Pursuant to the Stipulated Request for Clarification, 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 Notice of Hearing to Claimant notifying her of the scheduled Rehearing on June 25, 2013.

ISSUES

1. Whether the Caregiver Contract provisions of BEM 405 pages 5- 7, apply to non-relative caregivers, in particular, whether payments to an unrelated person for services provided to a Medicaid Claimant lack consideration and are divestment unless there is a preexisting written, notarized contract and a recommendation by a physician 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 physician that the services are necessary to prevent institutionalization?

FINDINGS OF FACT

The Administrative Law Judge, based upon the clear and convincing 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/deductible amount of \$ [REDACTED] beginning April 1, 2012. (Dept Ex 27-28).
4. Subsequent to Claimant's approval for MA effective April 1, 2012, the department explained the approval was based on a divestment total of \$ [REDACTED]. \$ [REDACTED] was a gift to Claimant's grandson, [REDACTED]. \$ [REDACTED] was paid to the non-relative caretaker beginning May, 2011, up until Claimant went into long term care on March 21, 2012. The remaining \$ [REDACTED] was paid to Jason Jensen as reimbursement 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 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 Reference Tables Manual (RFT).

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. 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 receiving 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, entitled 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 incurred 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 allowable medical expenses that equal or exceed the excess income. BEM 545.

Divestment results in a penalty period in MA, not in eligibility. BEM 405. During 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 within 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. Less than FMV

means the compensation received in return for a resource was worth less than the FMV of the resource. BEM 405. When a person 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 determining 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 spouse 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 application of BEM 405 to a non-relative caregiver and mileage reimbursement to Claimant's nephew, [REDACTED]. That [REDACTED] is 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 intrinsic value. Relatives can be paid for providing services; however, the department assumes services were provided for 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 Compensation and Reimbursement was notarized and signed by Claimant on May 17, 2012. The Agreement confirmed that Claimant paid her nephew Jason Jensen, \$ [REDACTED] back in July, 2011, to reimburse him for his time spent taking care of her affairs and for the mileage from the numerous trips from Kalamazoo to Muskegon her nephew made on her behalf between January, 2011 and July, 2011.

Claimant argues that the \$ [REDACTED] paid to her nephew was for mileage reimbursement under a Durable Power of Attorney for Financial 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 expenses incurred while acting as Agent and may receive reasonable compensation for acting as Agent."

Policy clearly states that relatives can be paid for providing services. However, 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, Claimant's nephew drove between Kalamazoo and Muskegon during January, 2011, and July, 2011 to care for Claimant's needs. But the Agreement for Compensation and Reimbursement was not signed until May, 2012. Applying DHS policy, because payment was not made at the time the services were provided in 2011, the department properly found the \$ [REDACTED] paid to Claimant's nephew in May, 2012 was divestment under BEM 405, p 5. Moreover, policy indicates that relatives who provide assistance or services are presumed to do so

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

The second issue is whether the Caregiver Contract provisions of BEM 405 pages 5-7, apply to non-relative caregivers. Home Caretaker and Personal 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 real 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 services are presumed to do so for love and affection, and compensation for past assistance or services shall create a rebuttable presumption of a transfer for less 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 representative contends that strict adherence to BEM 405 is to prevent the unauthorized 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 case 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 services 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 June, 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 admits that Claimant's nephew did not obtain a written statement 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 because 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 clearly indicates that contracts/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 client and provider. The services are not paid for until the services have 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 home, institution for mental diseases, 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 show the type, frequency and duration of such services being provided 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 consultation with an area business which provides such services; **and**
- The contract/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 services were provided. At the time the services were received, Claimant was not in a long term care facility, but residing in her home. However, the services were never recommended in writing and signed by Claimant's physician 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 dated 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 Claimant's physician concerning his hiring a caregiver. However, this does not satisfy the requirement of an actual signed recommendation by Claimant's physician for services to prevent her transfer to a long term care facility.

Furthermore, policy requires that DHS actually verify and review the contract/agreement, which was also not done in this case because there 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 applies to relatives and is the "tangible evidence" described in BEM 405, page 5 that can be provided by relatives as rebuttal proof that payment for past services is allowable.

However, looking at the plain language of the first sentence of the first requirement under the contract/agreement requirements, policy reads the "services must be performed **after** a written legal contract/agreement 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."

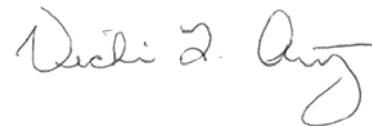
Therefore, looking at the plain language of the policy, because there was never a signed contract before the services were performed, and the in-home services were not recommended in writing by Claimant's physician to prevent her transfer to a long term care facility, and DHS never reviewed the contract 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 Department properly determined divestment 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

2013-70163/VLA
2013-49530/REHD/RECON

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

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