

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

IN THE MATTER OF:

[REDACTED]

Reg. No.: 2014-22332
Issue No.: 2001
Case No.: [REDACTED]
Hearing Date: March 4, 2014
County: Washtenaw #20

ADMINISTRATIVE LAW JUDGE: Landis Y. Lain

HEARING DECISION

Following Claimant's request for a hearing, this matter is before the undersigned Administrative Law Judge pursuant to MCL 400.9 and 400.37; 7 CFR 273.15 to 273.18; 42 CFR 431.200 to 431.250; 45 CFR 99.1 to 99.33; and 45 CFR 205.10. After due notice, an in person hearing was held on March 4, 2014, from Ypsilanti, Michigan. Claimant was represented at the hearing by [REDACTED]. Participants on behalf of Claimant included Claimant's [REDACTED]. The Department of Human Services was represented by Assistant Attorney [REDACTED]. Participants on behalf of the Department of Human Services (Department) included [REDACTED], Eligibility Specialist and [REDACTED], Family Independence Manager.

ISSUE

Did the Department of Human Services (DHS or the Department) properly deny Claimant's application for Medical Assistance (MA) based upon its determination that Claimant had excess assets?

FINDINGS OF FACT

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

1. On January 28, 2013, Claimant entered long-term care at [REDACTED].
2. On March 18, 2013, the [REDACTED] was established by Claimant's spouse for the benefit of Claimant's spouse.
3. On September 30, 2013, Claimant's attorney applied for Medical Assistance benefits for Claimant.

4. On December 13, 2013 an initial asset assessment was conducted with a begin date of January 28, 2013 (the date Claimant entered long term care).
5. It was determined in the initial asset assessment that on January 28, 2013 Claimant and his [REDACTED] had combined resources in the amount of \$ [REDACTED].
6. It was determined that the spousal share was \$ [REDACTED] which was protected from being counted as Claimant's asset.
7. It was determined that Claimant had countable assets in the amount of \$ [REDACTED].
8. The Claimant and his spouse have several assets including a [REDACTED] that was funded from asset [REDACTED] and the [REDACTED].
9. On October 22, 2013 the [REDACTED] document was sent to the [REDACTED].
10. On October 31, 2013 the trust was evaluated as follows: the [REDACTED] [REDACTED] is an [REDACTED] and there are circumstances under which payment of principal income can be made to or on behalf of [REDACTED] from the [REDACTED]. Therefore the assets in this trust are countable.
11. On December 13, 2013 the Medicaid application was processed in bridges resulting in a Medicaid (MA) denial.
12. The Department determined that the Claimant's total initial asset assessment as of January 28, 2013 was \$ [REDACTED] with a protected spousal amount of \$ [REDACTED].
13. The Department determined that the Claimant's total assets in the application month of September 2013 was \$ [REDACTED] due to the [REDACTED] being countable at application for trust evaluation.
14. On December 13, 2013, the Department caseworker sent Claimant's representative notice of case action that the application for Medical Assistance was denied.
15. On December 23, 2013, Claimant's representative filed a request for a hearing to contest the Department's action stating that the Department incorrectly applied BEM Item 400, 401 and 402.

CONCLUSIONS OF LAW

Department policies are contained in the Department of Human Services Bridges Administrative Manual (BAM), Department of Human Services Bridges Eligibility Manual (BEM), Department of Human Services Reference Tables Manual (RFT), and Department of Human Services Emergency Relief Manual (ERM).

The regulations governing the hearing and appeal process for applicants and recipients of public assistance in Michigan are found in the Michigan Administrative Code, MAC R 400.901-400.951. An opportunity for a hearing shall be granted to an applicant who requests a hearing because his or her claim for assistance has been denied. MAC R 400.903(1). Claimants 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. BAM 600.

The Medical Assistance (MA) program is established by the Title XIX of the Social Security Act, 42 USC 1396-1396w-5, and is implemented by 42 CFR 400.200 to 1008.59. The Department of Human Services (formerly known as the Family Independence Agency) administers the MA program pursuant to MCL 400.10 and MCL 400.105.

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 Program Administrative Manual (BAM), the Program Eligibility Manual (BEM) and the Program Reference Manual (PRM).

Title XIX of the Social Security Act, commonly referred to as “The Medicaid Act,” provides for Medical Assistance services to individuals **who lack the financial means to obtain needed health care**. 42 U.S.C. §1396. (Emphasis added)

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).

For Medical Assistance eligibility, the Department has defined an asset as “any kind of property or property interest, whether real, personal, or mixed, whether liquid or illiquid, and whether or not presently vested with possessory rights.” NDAC 75-02-02.1-01(3). Under both federal and state law, an asset must be “actually available” to an applicant to be considered a countable asset for determining Medical Assistance eligibility. Hecker, 527 N.W.2d at 237 (On Petition for Rehearing); Hirschberger v. Griggs County

Social Serv., 499 N.W.2d 876, 882 (N.D.1993); 42 U.S.C. § 1396a(a)(17)(B); 1 J. Krauskopf, R. Brown, K. Tokarz, and A. Bogutz, *Elderlaw: Advocacy for the Aging* § 11.25 (2d ed. 1993). Yet, “actually available” resources “are different from those *in hand*.” Schweiker v. Gray Panthers, 453 U.S. 34, 48, 101 S.Ct. 2633, 2642, 69 L.Ed.2d 460 (1981) (emphasis in original). NDAC 75-02-02.1-25(2) explains: Only such assets as are actually available will be considered. Assets are actually available when at the disposal of an applicant, recipient, or responsible relative; when the applicant, recipient, or responsible relative has a legal interest in a liquidated sum and has the legal ability to make the sum available for support, maintenance, or medical care; or when the applicant, recipient, or responsible relative has the lawful power to make the asset available, or to cause the asset to be made available. Assets will be reasonably evaluated.... See also 45 C.F.R. § 233.20(a)(3)(ii)(D).

As noted in *Hecker*, if an applicant has a legal ability to obtain an asset, it is considered an “actually available” resource. The actual-availability principle primarily serves “to prevent the States from conjuring fictional sources of income and resources by imputing financial support from persons who have no obligation to furnish it or by overvaluing assets in a manner that attributes non-existent resources to recipients.” Heckler v. Turner, 470 U.S. 184, 200, 105 S.Ct. 1138, 1147, 84 L.Ed.2d 138 (1985).

The focus is on an applicant's actual and practical ability to make an asset available as a matter of fact, not legal fiction. See Schrader v. Idaho Dept. of Health and Welfare, 768 F.2d 1107, 1112 (9th Cir.1985). See also Lewis v. Martin, 397 U.S. 552, 90 S.Ct. 1282, 25 L.Ed.2d 561 (1970) (invalidating California state regulation that presumed contribution of non-AFDC resources by a non-legally responsible and non-adoptive stepfather or common law husband of an AFDC recipient's mother).

Determining whether an asset is “actually available” for purposes of Medical Assistance eligibility is largely a fact-specific inquiry depending on the circumstances of each case. See, e.g., Intermountain Health Care v. Bd. of Cty. Com'rs, 107 Idaho 248, 688 P.2d 260, 264 (Ct.App.1984); Radano v. Blum, 89 A.D.2d 858, 453 N.Y.S.2d 38, 39 (1982); Haynes v. Dept. of Human Resources, 121 N.C.App. 513, 470 S.E.2d 56, 58 (1996). Interpretation of the “actually available” requirement must be “reasonable and humane in accordance with its manifest intent and purpose....” Moffett v. Blum, 74 A.D.2d 625, 424 N.Y.S.2d 923, 925 (1980).

That an applicant must sue to collect an asset the applicant has a legal entitlement to usually does not mean the asset is actually unavailable. See, e.g., Wagner v. Sheridan County S.S. Bd., 518 N.W.2d 724, 728 (N.D.1994); Frerks v. Shalala, 52 F.3d 412, 414 (2d Cir.1995); Probate of Marcus, 199 Conn. 524, 509 A.2d 1, 5 (1986); Herman v. Ramsey Cty. Community Human Serv., 373 N.W.2d 345, 348 (Minn.Ct.App.1985). See also Ziegler v. Dept. of Health & Rehab. Serv., 601 So.2d 1280, 1284 (Fla.Ct.App.1992) At issue here is the methodology utilized in determining the availability of an individual's “resources” for purposes of evaluating his or her eligibility. SSI recipients, and thus SSI-related “medically needy” recipients, may not retain resources having a value in excess of \$2,000. 42 U.S.C. § 1382(a)(1)(B).

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. 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 Medicare Savings Programs (BEM 165) and QDWI (BEM 169) the asset limit is:

- . \$ [REDACTED] for an asset group of one.
- . \$ [REDACTED] for an asset group of two.

For all other SSI-related MA categories, the asset limit is:

- . \$ [REDACTED] for an asset group of one.
- . \$ [REDACTED] for an asset group of two. BEM, Item 400, page 5.

BEM, Item 401, controls Medical Assistance Trust. Policy defines trust as a right of property created by one person for the benefit of himself or another. It includes any legal instrument or device that exhibits the general characteristics of a trust but is not called a trust or does not qualify as a trust under state law. Examples of such devices might be annuities, escrow accounts, pension funds and investment accounts managed by someone with fiduciary obligations. A trustee is defined by policy as the person who has the legal title to the assets and income of a trust and the duty to manage the trust with the benefit of the beneficiary. BEM, Item 401, p. 1.

The Department caseworker is to refer a copy of the trust to the Medicaid eligibility policy section for evaluation. An evaluation of the trust advises local offices on whether the trust is revocable or irrevocable and whether any trust income or principle is available. Advice is only available to local offices for purposes of determining eligibility or for an initial assessment when a trust actually exists. Advice is not available for purposes of estate planning including advice on proposed trust or proposed trust limits. BEM, Item 401, p. 2.

The Medicaid Trust Unit/eligibility policy section must determine if a trust established on or after August 11, 1993, is a Medicaid trust using Medicaid trust definitions and Medicaid trust criteria. The policy unit also has to determine if the trust is a Medicaid trust and whether there are countable assets for Medicaid trusts; whether there is countable income for Medicaid trusts; and whether there is transfers of assets for less than fair market value. BEM, Item 401, p. 3.

A Medicaid trust is a trust that meets conditions 1 through 5 below:

1. The person whose resources were transferred to the trust is someone whose assets or income must be counted to determine MA eligibility, an MA post-eligibility patient-pay amount, a divestment penalty or an initial assessment amount. A person's resources include his spouse's resources (see definition).
2. The trust was established by:
 - The person.
 - The person's spouse.
 - Someone else (including a court or administrative body) with legal authority to act in place of or on behalf of the person or the person's spouse, or an attorney, or adult child.
 - Someone else (including a court or administrative body) acting at the direction or upon the request of the person or the person's spouse or an attorney ordered by the court.
3. The trust was established on or after August 11, 1993.
4. The trust was not established by a will.
5. The trust is **not** described in Exception A, Special Needs Trust, or Exception B, Pooled Trust in this item. BEM, Item 401, pages 5-6.

In this case, the [REDACTED] meets all of the criteria of a Medicaid trust. The person whose resources were transferred to the trust to someone whose assets or income must be counted to determine MA eligibility, and MA post-eligibility patient pay amount, a divestment penalty or an initial asset amount. The trust was established by the Claimant's spouse. The trust was established/amended on or after August 11, 1993. The trust was not established by will. The trust is not meet the condition of an exception A, special needs trust; or exception B, pooled trust as described in BEM, Item 401.

An initial asset assessment is needed to determine how much of a couple's assets are protected for the community spouse.

An initial asset assessment means determining the couple's (his, her, their) total countable assets as of the first day of the **first** continuous period of care that began on or after September 30, 1989.

Example: A married man entered a nursing home on 12/6/89. He was released on 6/10/90 and returned home.

On 3/16/91 he re-entered the nursing home and has been there continuously ever since.

He applied for MA on 10/2/91. To determine his asset eligibility, do an initial asset assessment for 12/6/89 - the first day of the first continuous period of care that began on or after September 30, 1989. BEM Item 402, page 7

In conducting the initial asset assessment the Department must count both Claimant's and his spouse's total combined assets which were in existence as of January 28, 2013, when Claimant entered long-term care. Claimant's spouse did not place her assets into an [REDACTED] until March 18, 2013. The [REDACTED] transfer of [REDACTED] to an [REDACTED] does not undo the initial asset assessment amount. The initial amount of combined assets was \$ [REDACTED]. The protected spousal amount was \$ [REDACTED] leaving Claimant with total countable assets as of long-term care entry date of \$ [REDACTED]. Thus, the entire amount must be counted for purposes of Medicaid eligibility determination.

BEM, item 401, page 10 states that the following are countable assets:

Assets that are countable using SSI – related MA policy in BEM 400. Do not consider an asset unavailable because it is owned by the trust rather than the person.

The Department is to count as the person's countable asset the value of the trust's countable income if there is any condition under which the income could be paid to or on behalf of the person. Individuals can keep income made off of property and the money goes to the individual not the trust. Property cannot be taken out of the trust. BEM Item 401, page 11.

Section 2.2 of the trust document states:

Distribution of Resources. During each calendar year, beginning with the year 2013, trustee shall from time to time during the year pay or distribute to me, or for muscle benefit, during my lifetime such part or all of the net income and principal of this trust as trustee determines is necessary in order to spend the resources and actuarially sound basis. However, the trustee will not make a distribution of income or principal of the trust, nor make any loans before September 2013.

In addition, the trust permits Claimant's spouse to take distributions beginning September 2013. The [REDACTED] was advised to distribute all the assets on an actuarially sound basis, which for Medicaid purposes means that it must be returned to her over her lifetime. BEM, Item 405 pages 11 – 12. The "available" standard used for assets does not apply to trusts. BEM, Item 400, page 12. Thus, even if the trusted limitations on the yearly amounts, all assets are expected to be paid to Claimant's spouse so there are conditions under which the principal could be paid to or on behalf of the person and all assets are countable. BEM, Item 401, page 11.

The Administrative Law Judge, based on the above Findings of Fact and Conclusions of Law, and for the reasons stated on the record, finds that the Department has established by the necessary competent, material and substantial evidence on the record that it acted in accordance with Department policy when it determined that the assets in the [REDACTED] were countable assets for purposes of Medical Assistance benefit eligibility determination.

DECISION AND ORDER

Accordingly, the Department's decision is **AFFIRMED**.



Landis Y. Lain
Administrative Law Judge
for Maura Corrigan, Director
Department of Human Services

Date Signed: 3/10/14

Date Mailed: 3/10/14

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 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).

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

- Newly discovered evidence that existed 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 Claimant;
- Failure of the ALJ to address 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

LYL/tb

cc:

