

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

IN THE MATTER OF:

[REDACTED]

Reg. No.: 2014-30765
Issue No.: 2008
Case No.: [REDACTED]
Hearing Date: April 15, 2014
County: Allegan

ADMINISTRATIVE LAW JUDGE: C. Adam Purnell

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, a three-way telephone hearing was held on April 15, 2014 from Lansing, Michigan. Claimant's Authorized Hearing Representative (AHR), [REDACTED], appeared on behalf of Claimant. Participants on behalf of the Department of Human Services (Department) included [REDACTED] (Lead Worker) and [REDACTED] (Long Term Care Specialist).

ISSUE

Did the Department properly determine that Claimant had divested herself of assets to warrant the imposition of a penalty for purposes of Medical Assistance (MA) or "Medicaid"?

FINDINGS OF FACT

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

1. Claimant was admitted to a nursing home on July 18, 2013.
2. Claimant applied for MA on July 22, 2013.
3. On August 23, 2013, the Department mailed Claimant a Verification Checklist (DHS-1605) which requested several items including verification of assets to rule out divestment for purposes Medicaid eligibility. The proofs were due by September 3, 2013.
4. On September 20, 2013, the Department mailed Claimant a Notice of Case Action (DHS-1605) which indicated that the Department was unable to make a determination because Claimant failed to provide verifications of the following: (1) face value, cash surrender value or type of policy of [REDACTED] and

██; and (2) title to or value of burial plot. The DHS-1605 also indicates, "When you reapply, please submit the verifications requested along with the new application."

5. Claimant reapplied for MA on October 3, 2013.
6. The Department obtained Claimant's responses to the requests for verification.
7. On October 16, 2013, Claimant executed a Durable Power of Attorney that appointed Claimant's daughter (Renee Hibma) as attorney-in-fact.
8. Claimant's attorney-in-fact purchased a life insurance policy (██████████) on Claimant, but the premiums were deducted from Claimant's bank account in the amount of \$██████████ per month for 5 months for a total of \$██████████.
9. From April, 2013 through July, 2013, there were several cash and gasoline purchase withdrawals from Claimant's bank account which consisted of the following:
 - a. ██████ ██████ for \$██████████ (gas);
 - b. ██████ ██████ for \$██████████ (cash);
 - c. ██████ ██████ for \$██████████ (gas);
 - d. ██████ ██████ for \$██████████ (gas);
 - e. ██████ ██████ for \$██████████ (gas);
 - f. ██████ ██████ for \$██████████ (gas);
 - g. ██████ ██████ for \$██████████ (gas);
 - h. ██████ ██████ for \$██████████ (gas);
 - i. ██████ ██████ for \$██████████ (gas);
 - j. ██████ ██████ for \$██████████ (gas);
 - k. ██████ ██████ for \$██████████ (cash);
 - l. ██████ ██████ for \$██████████ (cash);
 - m. ██████ ██████ for \$██████████ (cash);
 - n. ██████ ██████ for \$██████████ (cash);
 - o. ██████ ██████ for \$██████████ (cash)

The total withdrawals were \$██████████

10. For at least 5 years prior to the date of application, Claimant had donated \$ [REDACTED] per month to a charitable organization that provides assistance to orphans in [REDACTED]. The total amount of Claimant's donations was approximately \$ [REDACTED].
11. Claimant did not belong to a church.
12. On February 21, 2014, the Department mailed Claimant a Notice of Case Action (DHS-1605) which indicated that Claimant's MA application was approved with a divestment penalty of 1 month and 24 days will be imposed effective September 1, 2013 and ending on October 24, 2013 due to a divestment of \$ [REDACTED] (\$ [REDACTED] for charity donations, \$ [REDACTED] for miscellaneous cash and gas withdrawals from May through July, 2013 and \$ [REDACTED] for life insurance policy premium payments). The DHS-1605 indicated that Claimant's patient pay amount is \$ [REDACTED] for September 1, 2013 through December 31, 2013 and her patient pay amount is \$ [REDACTED] for January 1, 2014 ongoing.
13. The Department received Claimant's AHR request for hearing on March 5, 2014 to dispute the Department's determination that the \$ [REDACTED] charitable contributions constituted a divestment.

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 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 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).

A “divestment” is a transfer of assets that would create a penalty period. BEM 405, p 1 (10-1-2013). The “penalty period” is a period of disqualification from Medicaid assistance for Long Term Care (LTC). BEM 405, p 1. In other words, the penalty period is the number of months of long term care that will not be covered by Medicaid. BEM 405, p 1. Divestment is a type of transfer of a resource and not an amount of resources transferred. BEM 405, p 1. Divestment results in a penalty period in Medicaid, not ineligibility. BEM 405, p 1. The divestment policy does not apply to “Qualified Working Individuals.”¹ BEM 405, p 1.

Divestment means a transfer of a “resource” by a client or his spouse that are all of the following: (1) is within a specified time (look-back period); (2) is a transfer for less than fair market value; (3) is not considered by policy as a “transfer that is not divestment.” BEM 405, p 1. Resource is defined as all of the client’s and his/her spouse’s assets and income. BEM 405, pp 1-2. It includes all assets and all income, even countable and/or excluded assets, the individual or spouse receive. BEM 405, pp 1-2. It also includes all assets and income that the individual (or their spouse) were entitled to but did **not** receive because of action by one of the following: (1) the client or spouse; (2) a person (including a court or administrative body) with legal authority to act in place of or on behalf of the client or the client’s spouse; (3) any person (including a court or administrative body) acting at the direction or upon the request of the client or his spouse. BEM 405, pp 1-2.

During the penalty period, Medicaid (or MA) will not pay the client’s cost for: (1) LTC services; (2) home and community-based services; (3) home help; and (4) home health. BEM 405, p 1. However, Medicaid will pay for other MA-covered services. BEM 405, p 1.

Transferring a resource means giving up all or partial ownership in (or rights to) a resource. BEM 405, pp 1-2. Not all transfers are divestment. BEM 405, p 1-2. Examples of transfers include: (1) selling an asset for fair market value (not divestment); (2) giving an asset away (divestment); (3) refusing an inheritance (divestment); (4) payments from a Medicaid Trust that are not to, or for the benefit of, the person or his spouse; see BEM 401 (divestment); (5) putting assets or income in a trust²; (6) giving up the right to receive income such as having pension payments made to someone else (divestment); (7) giving away a lump sum or accumulated benefit (divestment); (8) buying an annuity that is not actuarially sound (divestment); (9) giving away a vehicle (divestment); and (10) putting assets or income into a Limited Liability Company (LLC). BEM 405.

The first step in determining the period of time that transfers can be looked at for divestment is determining the baseline date. BEM 405, p 5. A person’s baseline date is the first date that the client was eligible for Medicaid and one of the following: (1) in LTC; (2) approved for the waiver under BEM 106; (3) eligible for Home Health services; or (4) eligible for Home Help services. BEM 405, p 5.

¹ See BEM 169.

² See BEM 401.

A client's baseline date does not change even if one of the following happens: (1) the client leaves LTC; (2) the client is no longer "approved for the waiver" under BEM 106; (3) the client no longer needs Home Help; or (4) the client no longer needs Home Health. BEM 405, p 5. Once the baseline date is established, the Department determines the look-back period. BEM 405, p 5. The look back period is 60 months prior to the baseline date for all transfers made after February 8, 2006. BEM 405, p 5.

Transfers that occur on or after a client's baseline date must be considered for divestment. BEM 405, p 4-6. In addition, transfers that occurred within the 60 month look-back period must be considered for divestment. BEM 405, pp 4-6. A divestment determination is not required unless, sometime during the month being tested, the client was in a penalty situation. BEM 405, pp 4-6. To be in a penalty situation, the client must be eligible for MA (other than QDWI) and be one of the following: (1) in an LTC facility; (2) "approved for the waiver" under BEM 106; (3) eligible for Home Help; (4) eligible for Home Health. BEM 405, pp 4-6. **However, transfers exclusively for a purpose other than to qualify or remain eligible for MA are not divestment. BEM 405, p 11.**

In the instant matter, Claimant, through her AHR, contends that the payments to the charitable organization constitutes a tithe and should not be considered a divestment. Claimant's AHR does not challenge the Department's determinations regarding the account withdrawals, the life insurance payments or the accuracy of the disqualification period. The Department representatives who attended the hearing indicated that sometimes the Department had a practice where it would consider payments made over a course of time in relatively equal amounts during and before the 60 month look-back period as "a transfer for purposes other than to qualify for or remain eligible for MA" and would not consider a penalty under BEM 405, p 11. This "practice" was not included in the department's policies. The Department takes the position that Claimant's payments were not a tithe because the payments were not given to a church, but were given to a charitable organization. Claimant's AHR, in response, concedes that Claimant's payments were not given to a church, but she argues that Claimant's subjective intent were to give these payments to god. According to Claimant's AHR, Claimant had always made payments to god. When Claimant was attending church, she gave money to the church, after Claimant stopped attending church; she continued to give to god in the form of payments to a charitable organization.

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). 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). Moreover, it is for the fact-finder to gauge the demeanor and veracity of the witnesses who appear before him, as best he is able. See, e.g., *Caldwell v Fox*, 394 Mich 401, 407; 231 NW2d 46 (1975); *Zeeland Farm Services, Inc v JBL Enterprises, Inc*, 219 Mich App 190, 195; 555 NW2d 733 (1996).

This Administrative Law Judge has carefully considered and weighed the testimony and other evidence in the record. The record does not show that Claimant's payments for Haitian orphans were designed to circumvent the MA eligibility rules. However, this

Administrative Law Judge finds that payments to a charitable organization cannot be considered as “transfers exclusively for a purpose other than to qualify for MA” as defined by BEM 405, p 11. Even if the Department adopts a “practice” which permits payments to a church under certain circumstances to be transfers for other purposes, this Administrative Law Judge lacks the authority to determine that Claimant’s payments fit within the definition of BEM 405, p 11. Administrative law judges have no authority to make decisions on constitutional grounds, overrule statutes, overrule promulgated regulations or overrule or make exceptions to the department policy set out in the program manuals. See Delegation of Hearing Authority, August 9, 2002, per PA 1939, Section 9, Act 280. Rather, the ALJ determines the facts based only on evidence introduced at the hearing, draws a conclusion of law, and determines whether DHS **policy** was appropriately applied. The undersigned may only determine policy and cannot determine whether the Department’s *practice* is permissible.

Accordingly, this Administrative Law Judge concludes that the Department correctly applied policy when it determined that Claimant’s \$ [REDACTED] charitable contributions were considered a divestment. BEM 405, p 1 clearly provides that a transfer of assets which would otherwise be available to pay long-term care costs within the look-back period must be considered when determining MA long-term care eligibility. The nature of Claimant’s payments to charity is a transfer of an asset as defined by BEM 405, pp 1-2. The Department also properly included the miscellaneous withdrawals and the insurance premium payments when it calculated the total amount of the divestment is \$ [REDACTED]. The Department also properly imposed the 1 month, 24 day penalty period due to divestment.

The Administrative Law Judge, based on the above Findings of Fact and Conclusions of Law, and for the reasons stated on the record, if any, finds that the Department acted in accordance with Department policy.

DECISION AND ORDER

The Department properly determined that Claimant had divested herself of assets and imposed a penalty period of 1 month and 24 days. Therefore, the Department’s decision is **AFFIRMED**.

IT IS SO ORDERED.



C. Adam Purnell
Administrative Law Judge
for Maura Corrigan, Director
Department of Human Services

Date Signed: April 30, 2014

Date Mailed: April 30, 2014

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 client;
- 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

CAP/las

cc:

