

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

IN THE MATTER OF:

[REDACTED]

Reg. No.: 2014-15051
Issue No(s): 2008
Case No.: [REDACTED]
Hearing Date: April 22, 2014
County: Dickinson County DHS

ADMINISTRATIVE LAW JUDGE: Colleen Lack

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 April 22, 2014, from Iron Mountain, Michigan. Participants on behalf of Claimant included [REDACTED], Attorney, [REDACTED], Paralegal, [REDACTED], Daughter and Power of Attorney, and [REDACTED], Son. Participants on behalf of the Department of Human Services (Department) included [REDACTED] Assistant Attorney General, [REDACTED], Medicaid Eligibility Specialist, [REDACTED], Assistance Payments Supervisor, and [REDACTED], Eligibility Specialist.

ISSUE

Did the Department properly determine Claimant's Medicaid eligibility?

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 September 30, 2013, a Medicaid Application Patient of Nursing Facility was filed on Claimant's behalf disclosing that large amounts of assets had been divested.
2. On October 31, 2013, a Notice of Case Action was issued stating Claimant was approved for Medicaid effective September 1, 2013, with a monthly patient pay amount of \$ [REDACTED]
3. Claimant's attorney's office called the Department noting an error was made regarding Claimant's Medicaid eligibility.

4. On or about November 20, 2013, a hearing request was filed on Claimant's behalf noting that a divestment penalty should have been applied from September 1, 2013, through August 19, 2014.
5. On January 30, 2014, a Benefit Notice was issued to Claimant indicating a divestment penalty would be applied from January 1, 2014, through December 18, 2014.

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 Title XIX of the Social Security Act, 42 USC 1396-1396w-5; 42 USC 1315; the Affordable Care Act of 2010, the collective term for the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152; and 42 CFR 430.10-.25. The Department (formerly known as the Family Independence Agency) administers the MA program pursuant to 42 CFR 435, MCL 400.10, and MCL 400.105-.112k.

Divestment is a type of transfer of a resource and not an amount of resources transferred.

Divestment means a transfer of a resource (see RESOURCE DEFINED below and in glossary) by a client or his spouse that are all of the following:

- Is within a specified time; see LOOK-BACK PERIOD in this item.
- Is a transfer for LESS THAN FAIR MARKET VALUE; see definition in glossary.
- Is not listed below under TRANSFERS THAT ARE NOT DIVESTMENT

Note: See Annuity Not Actuarially Sound and Joint Owners and Transfers below and BEM 401 about special transactions considered transfers for less than fair market value.

During the penalty period, MA will **not** pay the client's cost for:

- LTC services.
- Home and community-based services.

- Home Help.
- Home Health.

Department of Human Services
Bridges Eligibility Manual (BEM) 405, 7-1-2013, p. 1.

On September 30, 2013, a Medicaid Application Patient of Nursing Facility was filed on Claimant's behalf disclosing that large amounts of assets had been divested. On October 31, 2013, a Notice of Case Action was issued stating Claimant was approved for Medicaid effective September 1, 2013, with a monthly patient pay amount of \$7,196. It was uncontested that Claimant's attorney's office called the Department noting an error was made regarding Claimant's Medicaid eligibility. Further, on or about November 20, 2013, a hearing request was filed on Claimant's behalf noting that a divestment penalty should have been applied from September 1, 2013, through August 19, 2014.

In this case it was uncontested that the Department erred in making the initial Medicaid eligibility determination. Specifically, the Department erred by failing to include the divestment amount when entering the assets. It is uncontested that Claimant should have an 11.6 month divestment penalty. The only contested issue in this case is when the divestment penalty period should be applied.

The penalty period starts on the date which the individual is eligible for Medicaid and would otherwise be receiving institutional level care (LTC, MIChoice waiver, or home help or home health services), and is not already part of a penalty period.

...

Note: If a past unreported divestment is discovered or an agency error is made which should result in a penalty, a penalty must be determined under the policy in place at the time of discovery. If a penalty is determined for an unreported transfer in the past, apply the penalty from the first day after timely notice is given; see Recipient Exception in this item.

Recipient Exception

Timely notice must be given to LTC recipients and (BEM 106) waiver recipients before actually applying the penalty. Adequate notice must be given to new applicants.

BEM 405, 10-1-2013, p. 14.

**Timely Notice
All Programs**

Timely notice is given for a **negative action** unless policy specifies adequate notice or no notice. See Adequate Notice and for, CDC and FAP only, Actions Not Requiring Notice, in this item. A timely notice is mailed at least 11 days before the intended negative action takes effect. The action is pending to provide the client a chance to react to the proposed action.

Department of Human Services
Bridges Administrative Manual (BAM) 220, 7-1-2013, p. 4.

Additionally, the Code of Federal Regulations, Chapter 42 addresses the Appellant's rights with respect to Advance Negative Notice of a Department action:

§ 431.211 Advance notice.

The State or local agency must send a notice at least 10 days before the date of action, except as permitted under §§ 431.213 and 431.214.

§ 431.213 Exceptions from advance notice.

The agency may send a notice not later than the date of action if—

- (a) The agency has factual information confirming the death of a beneficiary;
- (b) The agency receives a clear written statement signed by a beneficiary that—
 - (1) He no longer wishes services; or
 - (2) Gives information that requires termination or reduction of services and indicates that he understands that this must be the result of supplying that information;
- (c) The beneficiary has been admitted to an institution where he is ineligible under the plan for further services;
- (d) The beneficiary's whereabouts are unknown and the post office returns agency mail directed to him indicating no forwarding address (See § 431.231 (d) of this subpart for procedure if the beneficiary's whereabouts become known);
- (e) The agency establishes the fact that the beneficiary has been accepted for Medicaid services by another local jurisdiction, State, territory, or commonwealth;
- (f) A change in the level of medical care is prescribed by the beneficiary's physician;
- (g) The notice involves an adverse determination made with regard to the preadmission screening requirements of section 1919(e)(7) of the Act; or

(h) The date of action will occur in less than 10 days, in accordance with § 483.12(a)(5)(ii), which provides exceptions to the 30 days notice requirements of § 483.12(a)(5)(i)

§ 431.214 Notice in cases of probable fraud.

The agency may shorten the period of advance notice to 5 days before the date of action if—

- (a) The agency has facts indicating that action should be taken because of probable fraud by the beneficiary; and
- (b) The facts have been verified, if possible, through secondary sources.

If the Department had properly determined Claimant's eligibility when the application was processed, the divestment penalty period would have started on the date Claimant became eligible for Medicaid, September 1, 2013. However, an agency error occurred when Department made the initial eligibility determination in this case. Claimant's attorney's office notified the Department of this error by phone call and in writing on the hearing request.

Upon discovering the error, the Department made a divestment penalty determination under the policy in place at the time of the discovery in accordance with the cited BEM 405 policy provision. However, the penalty period could not be applied retroactively because the Claimant had already been approved for Medicaid and was a long term care (LTC) recipient. Rather, the Department was required to issue advance notice of the implementation of the divestment penalty because this is a negative case action. None of the exceptions to the advance notice requirements found in the 42 CFR §§ 431.213 and 431.214 applied in this case.

The assertion that the Department has extended the penalty period because of the delay in implementation the penalty is found to be without merit. The Department is still applying only an 11.6 month divestment penalty period. Medicaid was approved for the initial months with a patient pay amount.

However, the January 30, 2014 Benefit Notice failed to actually provide Claimant advance notice of the negative action because it states the divestment penalty period began January 1, 2014. The Department indicated this may have been due to a computer system error that failed to generate a notice when the divestment penalty determination was made. However, the Department was still required to give "timely notice" under the BEM and BAM policies, which is in accordance with the "advance notice" requirements found in 42 CFR § 431.211. Again, none of the exceptions to the advance notice requirements found in the 42 CFR §§ 431.213 and 431.214 applied in this case.

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 did not act in accordance with Department policy when determined Claimant's Medicaid eligibility.

DECISION AND ORDER

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

THE DEPARTMENT IS ORDERED TO BEGIN DOING THE FOLLOWING, IN ACCORDANCE WITH DEPARTMENT POLICY AND CONSISTENT WITH THIS HEARING DECISION, WITHIN 10 DAYS OF THE DATE OF MAILING OF THIS DECISION AND ORDER:

1. Re-determine Claimant's Medicaid eligibility retroactive to January 1, 2014 in accordance with Department policy.
2. Issue written notice of any case action in accordance with Department policy.



Colleen Lack
Administrative Law Judge
for Maura Corrigan, Director
Department of Human Services

Date Signed: May 23, 2014

Date Mailed: May 23, 2014

NOTICE OF APPEAL: A party may appeal this Hearing Decision in the circuit court in the county in which he/she resides or has its principal place of business in the State, or the circuit court in Ingham County, within 30 days of the receipt date.

A party may request a rehearing or reconsideration of this Hearing Decision from the Michigan Administrative Hearing System (MAHS) within 30 days of the mailing date of this Hearing Decision, or MAHS may order a rehearing or reconsideration on its own motion.

MAHS may grant a party's Request for Rehearing or Reconsideration 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 party requesting a rehearing or reconsideration 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 this Hearing Decision is mailed.

A written request may be faxed or mailed to MAHS. If submitted by fax, the written request must be faxed to (517) 335-6088 and be labeled as follows:

Attention: MAHS Rehearing/Reconsideration Request

201415051/CL

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

CL/hj

cc:

