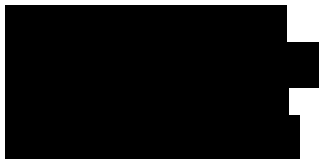


STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
ADMINISTRATIVE HEARINGS FOR THE
DEPARTMENT OF HUMAN SERVICES

IN THE MATTER OF:



Reg. No: 20142514
Issue No: 2008
Case No: [REDACTED]
Hearing Date: December 4, 2013
Clinton County DHS

ADMINISTRATIVE LAW JUDGE: Suzanne D. Sonneborn

HEARING DECISION

This matter is before the undersigned Administrative Law Judge pursuant to MCL 400.9 and MCL 400.37 upon Claimant's request for a hearing received by the Department of Human Services (department) on September 24, 2013. After due notice, a telephone hearing was held on December 4, 2013. Claimant's daughter and authorized representative, [REDACTED] [REDACTED] appeared and provided testimony on Claimant's behalf. The department was represented by [REDACTED] [REDACTED] a lead worker with the department's Clinton County office.

ISSUE

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:

1. In June 2013, Claimant's daughter and authorized representative applied for MA Ad-Care benefits on Claimant's behalf. In the application, Claimant reported her ownership of three life insurance policies valued at \$ [REDACTED] \$ [REDACTED] and \$ [REDACTED] respectively.
2. In July 2013, Claimant's DHS case specialist erroneously advised Claimant's authorized representative that if Claimant transferred ownership of the life insurance policies, she could avoid having to cash them out.

3. On July 11, 2013 and July 13, 2013, Claimant 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 representative 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 notified Claimant that her transfer 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. (Department Exhibits 7, 8)
6. On September 24, 2013, Claimant's authorized representative filed a request for a hearing challenging the department's application of a divestment penalty to Claimant's Medicaid Care benefits. (Request for Hearing)
7. On October 3, 2013, the department held a prehearing conference with Claimant's authorized representative and advised her that the department would cancel the divestment penalty upon receipt of verification that the three insurance policies had been canceled 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 balance owed at her nursing home facility, lowering Claimant's assets to below \$2,000.00.

CONCLUSIONS OF LAW

Clients 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. Department of Human Services Bridges Administrative Manual (BAM) 600 (2011), p. 1. The regulations governing 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 Medical Assistance (MA) program was 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 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 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).

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 applicable 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 further provides that a divestment will result in a penalty period in MA, not ineligibility. BEM 405 (July 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 resource 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 income 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 first date that the client was eligible for Medicaid and the client is one of the following: (i) in a long-term care (LTC) facility; (ii) approved for a waiver under BEM 106; (iii) eligible for Home Health services; or (iv) eligible for Home Help services. BEM 405, p. 5. A person'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 determination 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 resource 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 resource was offered in the open market. BEM 405, p. 5. Moreover, the compensation must have tangible form and intrinsic value. 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 than fair market 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 divestment. 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 and retained by the individual; or (ii) fair market value is paid for the resources. BEM 405, p. 12. Likewise, the department shall recalculate the penalty period if either of the following occurs while the penalty is in effect: (i) 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 since 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 hardship. BEM 405, p. 13. The department must assume that there is no undue hardship unless evidence is provided to the contrary. Specifically, undue hardship exists when the client's physician (M.D. or D.O.) has indicated that necessary 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.

However, at the December 4, 2013 hearing, the department's representative, [REDACTED] did not dispute the testimony of Claimant's authorized representative, [REDACTED] that department case worker, [REDACTED] provided erroneous instructions regarding department policy by incorrectly advising Mrs. [REDACTED] during the processing of Claimant's MA application that Claimant could avoid an excess asset and/or divestment determination if Claimant transferred ownership of her life insurance policies. It is further undisputed that, had Claimant's case worker *not* erroneously advised Claimant to transfer ownership of her life insurance policies, Claimant would have instead cashed out the policies and applied the total amount from the cash surrender to the outstanding balance owed at Claimant's nursing home facility, and lowering her assets to below \$2,000.00. Indeed, Mrs. [REDACTED] ultimately cashed out the life insurance policies that had been transferred to her name – but took steps to do so (on September 15, 2013) only after finally receiving sound advice from Ms. [REDACTED] regarding department policy. And, despite Mrs. [REDACTED] having subsequently provided Ms. [REDACTED] with verification of the

cash surrender total of the three policies 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 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). Moreover, 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).

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 Judge finds, based on the competent, material and substantial 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 authority 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 insurance policies was indeed a divestment under department policy. However, this Administrative Law Judge further finds that, had Claimant not transferred ownership of the three life insurance policies, valued in total at \$ [REDACTED] Claimant would not have been eligible for MA benefits due to her assets exceeding the \$ [REDACTED] limit until Claimant provided the Department with verification of the reduction in her asset amount to below \$ [REDACTED] through payment of her outstanding balance at her nursing home, which Claimant ultimately did on October 22, 2013. Accordingly, the Department's divestment determination, albeit the result of erroneous advice to Claimant of department policy, was harmless error in this instance, where the Department would have alternatively found Claimant to have been ineligible 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 conclusions of 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. Accordingly, the department's decision in this regard is **AFFIRMED**.

It is **SO ORDERED**.

/s/ _____

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

Date Signed: December 11, 2013

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 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

SDS/hj
cc:

