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

IN THE MATTER OF:

[redacted]

Reg. No.: 2014-26543
Issue No(s).: 2008
Case No.: [redacted]
Hearing Date: April 24, 2014
County: Chippewa 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 24, 2014, from Sault Ste. Marie, Michigan. Participants on behalf of Claimant included [redacted], Attorney, [redacted], son, and [redacted], daughter in law. Participants on behalf of the Department of Human Services (Department) included [redacted], Assistant Attorney General, 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 August 26, 2013, Claimant applied for Medicaid.

2. On November 21, 2013, a Notice of Case Action was issued to Claimant[1].

3. On December 7, 2013, a Notice of Case Action was issued to Claimant stating Medicaid was approved for January 1, 2014 and ongoing with a monthly patient pay amount of $460.

4. On December 10, 2013, a Notice of Case Action was issued to Claimant stating Medicaid was approved for January 1, 2014 and ongoing with a monthly patient pay amount of $355 and that Medicaid will not pay for long-term care and home and community based waiver services from October 1, 2013 through

[1] The date on one of the hearing request forms indicates a Notice of Case Action was issued to Claimant on November 21, 2013, but it does not appear that a full copy of this notice was included in the hearing exhibits.

January 15, 2014 because assets or income were transferred for less than their fair market value.

5. On January 27, 2014, a request for hearing was filed stating there has been no divestment and the patient pay amount was not correctly calculated.

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

BEM 405 addresses Medicaid Divestment. Divestment means a transfer of a resource by a client or his spouse that are all of the following: is within a specified look back period; is a transfer for less than fair market value; and is not listed in the policy addressing transfers that are not divestment. 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. BEM 405 (7/1/2013) p. 1.

When a client jointly owns a resource with another person(s), any action by the client or by another owner that reduces or eliminates the client's ownership or control is considered a transfer by the client. BEM 405 p. 3.

As of January 30, 1996, Claimant, her son (D.W.) and daughter in law (L.W.) were joint tenants of a condo purchased for $79,900. (Exhibit A, p. 58) There was no dispute that the purchase of the condo was before the applicable look back period.

The Department asserts there was a divestment involving the proceeds from the sale of Claimant's condo in May 2012. In making their determination, the Department considered the sale price of $75,000 as well as the loans Claimant's sons and daughter in law made to Claimant to pay off the purchase of the condo ($20,000) and for the documented taxes and association fees ($30,182), all of which were to be repaid from the sale of the condo. The Department did not consider a portion of the loans that was for Claimant to purchase furniture for the condo ($4,500), because there were no receipts from the purchases of the furnishings. The Eligibility Specialist clarified that she treated the condo as solely Claimant's because she knew only Claimant lived there and the money used to purchase the condo came from Claimant, i.e. Claimant's own

initial investment and the money loaned to Claimant that would be repaid from the sale of the condo. The Department determined there was a divestment of $24,818. ($75,000 - $30,182 - $20,000).

Claimant notes for the sale of the condo, the cash paid to seller was only $69,300.94 per the Final Settlement Statement. (Exhibit A, p. 23) Claimant asserts that as one of three joint owners, Claimant's share of the sale proceeds was only one third, $23,100. Claimant further asserted that the portion of the loan for furnishings should have been considered and that the total loaned for taxes and association fees was actually much greater that the documentation they were able to obtain and submit to the Department. Thus the total of all loans to Claimant was more than $86,500. Claimant asserts there was no divestment because the loans totaled more than Claimant's share of the sale proceeds, and further that if all loans are considered they total more than the entire sale price.

The written loan agreement for the money to pay off the rest of the condo ($20,000) and for the furnishings ($4,500) specified the amount of the loan ($24,500). (Exhibit A, p. 54-55) The Department did not provide sufficient support in the Department's policy for requiring additional verifications (receipts) for the furniture purchases in order for that portion of the loan to be considered.

The written loan agreement for the taxes and association fees did not specify the amount of the loan. (Exhibit A, p. 49) Accordingly, it was appropriate for the Department to request verifications to determine the amount of this loan. However, this ALJ must review the Department's determination based on the information that was available at the time the action was taken. Therefore, the amount of the loans for taxes and association fees that can be considered in this case is the amount that was verified at the time the application was processed, $32,182.

Following the way the Department determined that there was a divestment in this case, and including the portion of the loan for furnishing the condo, there would still be a divestment of $20,318. ($75,000 - $30,182 - $24,500) Even if the cash paid to seller is used instead of the full sale price, there would still be a divestment of $14,618. ($69,300 - $30,182 - $24,500)

If the joint tenancy of the condo is considered instead of treating the condo as solely Claimant's asset, it appears there may still be a divestment. While Claimant would only be entitled to her share of the sale proceeds, not all of the loans could be considered. For example, Claimant's son and daughter in law were also responsible for paying the taxes and association fees as joint tenants. Further, BEM 405 specifies that a contract/agreement that pays prospectively for expenses such as repairs, maintenance, property taxes, and homeowner's insurance for real property/homestead would be considered a divestment. This policy specifies the referenced list provided examples of expenses and should not be considered all inclusive or exhaustive. BEM 405 p. 7. Additionally, BEM 405 states 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. Such 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**

- 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.

Thus, there is a basis in policy for the Department's assertion in the post hearing briefs that the loans to Claimant lacked independent consideration if they could only be repaid from Claimant's portion of the sale proceeds. The Department also noted that the loan agreements themselves do not meet all the requirements set forth in the BEM 405 policy, such as having notarized signatures.

It appears that there will still be a divestment of some amount no matter how the sale is of the condo is considered.

<u>Baseline Date and Penalty Period</u>

It appears the Department also erred in setting the baseline date and calculating the divestment penalty period.

A person's baseline date is the first date that the client was eligible for Medicaid and one of the following: in long term care; approved for the waiver; eligible for home health services' eligible for home help services. BEM 405 p.6.

The Department is to divide the total Uncompensated Value by the average monthly private long term care (LTC) Cost in Michigan for the client's Baseline Date. This gives the number of full months for the penalty period. Multiply the fraction remaining by 30 to determine the number of days for the penalty period in the remaining partial month. BEM 405 p. 12. For a baseline date in 2012 the LTC cost was $7,302. For a baseline date in 2013 the LTC cost is $7,631. BEM 405 p. 13.

Determining the accurate year for the baseline date is important because this determines the figure used for the LTC cost in computing the penalty period.

Claimant's daughter in law testified Claimant entered the nursing home in January 2013, after having lived with her son and daughter in law for about two years. Assuming this is correct, Claimant's baseline date would be in January 2013, and the LTC cost of $7,631 should have been used for calculating the penalty period.

The Department's documentation indicates they used 2012 for the year of the baseline date, and thus $7,032 as the LTC cost for calculating the penalty period. (Exhibit A, pp. 14-15) However, it does not appear that anything in the Department's evidence packet established the date Claimant entered the nursing home in 2012. Accordingly, the Department has not presented sufficient evidence to support a baseline date in the year 2012, and thus the LTC cost used in calculating Claimant's penalty period.

In summary, the Department has not presented sufficient evidence to establish that they determined the divestment amount and calculated the resulting divestment penalty period in accordance with Department policies in Claimant's 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 failed to provide sufficient evidence that it acted in accordance with Department policy when it 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 the August 26, 2013 application in accordance with Department policy.

2. Notify the Claimant/Claimant's Authorized Representative of the determination in accordance with Department policy.

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

Date Signed: August 29, 2014

Date Mailed: August 29, 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

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: