

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

IN THE MATTER OF:



Reg. No.: 14-005261 RECON
14-005261
Issue No.: 2008
Case No.: [REDACTED]
Hearing Date: September 3, 2014
County: Allegan

DECISION AND ORDER OF RECONSIDERATION

This matter is before the undersigned Administrative Law Judge pursuant to the Department of Health and Human Services ("Department's") Request for Rehearing and/or Reconsideration of the Hearing Decision generated by the assigned Administrative Law Judge (ALJ) at the conclusion of the hearing conducted on September 3, 2014 and mailed on October 7, 2014 in the above-captioned matter.

The Rehearing and Reconsideration process is governed by the Michigan Administrative Code, Rule 792.11015 and applicable policy provisions articulated in the Bridges Administrative Manual (BAM), specifically BAM 600, which provide that a rehearing or reconsideration must be filed in a timely manner consistent with the statutory requirements of the particular program or programs that is the basis for the claimant's benefits application, and **may** be granted so long as the reasons for which the request is made comply with the policy and statutory requirements.

This matter having been reviewed, an Order Granting Reconsideration was mailed on January 14, 2015.

ISSUE

Whether the ALJ erred in reversing the Department's determination of Appellant's divestment penalty for purposes of the Medical Assistance (MA) or "Medicaid" program?

FINDINGS OF FACT

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

1. The Findings of Fact Numbers 1 through 10 under Registration Number 14-008049 are incorporated by reference.

2. On September 3, 2014, a hearing was held resulting in a Hearing Decision mailed on October 7, 2014.
3. On November 6, 2014, the Michigan Administrative Hearing System (MAHS) received the Department's Request for Rehearing and/or Reconsideration.
4. On January 14, 2015, the MAHS issued an Order Granting Reconsideration.

CONCLUSIONS OF LAW

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

The facts giving rise to the instant appeal are fairly convoluted. Broken down to its main essence, Appellant applied for long-term care Medicaid and divested assets prior to application. The Department determined that Appellant's MA application was approved but with a divestment penalty from July 1, 2013 through August 13, 2016. Then, Appellant purportedly returned the assets but some were still divested. Appellant later reapplied for MA, despite being found eligible for MA previously and without notifying the Department that she exceeded the asset test. The ALJ found that Appellant was within the penalty period when the assets were returned, but that the penalty period had expired. The ALJ further found that when Appellant reapplied, she was subject to a new penalty period based on some assets that were returned and some that were divested. The ALJ then determined that if the return of the assets made Appellant ineligible, there is no point in recalculating the divestment penalty. The ALJ reversed the Department's determination of Appellant's divestment penalty and ALJ ordered the Department redetermine Appellant's MA divestment penalty based upon returned assets she divested prior to the second application dated March 31, 2013.

The Department requests reconsideration of the ALJ's October 7, 2014 Hearing Decision and argues that the Department is not required to recalculate the divestment penalty under the second application because BEM 405, p 15 provides that recalculation is required only when the full amount of divestment is returned. According to the Department, Appellant never received a return of the full amount (\$285,785.29). The Department also contends that Appellant failed to show at the time that she properly informed the Department of the return of assets which was required by policy. The Department alleges that the ALJ failed to address the policy implications concerning whether Appellant could "surreptitiously" divest funds into and out of her estate before informing the Department.

The divestment policy is contained in BEM 405 (7/1/14). Below is a recitation of the applicable provisions of BEM 405 with regard to divestment.

Divestment results in a penalty period in MA, **not** ineligibility. Divestment policy does **not** apply to Qualified Working Individuals; see BEM 169. 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. See BEM 405 p 1.

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

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

MA will pay for other MA-covered services. See BEM 405 p 1.

Resource means all the client's and his spouse's assets and income. It includes all assets and all income, even countable and/or excluded assets, the individual or spouse receive. BEM 405 p 1.

Transferring a resource means giving up all or partial ownership in (or rights to) a resource. **Not** all transfers are divestment. BEM 405 p 2. Selling an asset for fair market value is not a divestment. Conversely, selling an asset for less than fair market value IS a divestment. BEM 405 p 2.

BEM 405, page 5 and 6 describe the look back period. The first step in determining the period of time that transfers can be looked at for divestment is determining the **baseline date**. Once the baseline date is established, you 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 5.

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. BEM 405 p 5.

A divestment determination is **not** required unless, sometime during the month being tested, the client was in a penalty situation. To be in a penalty situation, the client must be eligible for MA (other than QDWI) and be one of the following:

- In an LTC facility.

- APPROVED FOR THE WAIVER; see BEM 106.
- Eligible for Home Help.
- Eligible for Home Health. BEM 405 pp 5-6.

A person's baseline date is the **first** date that the client was eligible for Medicaid and one of the following:

- In LTC.
- APPROVED FOR THE WAIVER; see BEM 106.
- Eligible for Home Health services.
- Eligible for Home Help services. BEM 405 p 5.

Appellant argued that BEM 405, pages 15-16 allows for recalculation of the divestment penalty when resources are returned. BEM 405, pages 15-16 provide as follows:

Cancel a divestment penalty if **either** of the following occur before the penalty is in effect:

- All the transferred resources are returned and retained by the individual.
- Fair market value is paid for the resources. BEM 405, p 15 (With emphasis added).

Recalculate the penalty period if **either** of the following occurs while the penalty is in effect:

- All the transferred resources are returned.
- Full compensation is paid for the resources. BEM 405, p 15 (With emphasis added).

Use the same per diem rate originally used to calculate the penalty period.

Once a divestment penalty is in effect, return of, or payment for, resources cannot eliminate any portion of the penalty period already past. However, recalculate the penalty period. The divestment penalty ends on the later of the following:

- The end date of the new penalty period.
- The date the client notified you that the resources were returned or paid for. BEM 405, p 16.

Policy cited above indicates that the divestment penalty can only be canceled if the penalty period is not in effect and where **all** of the transferred resources are returned or full compensation is paid for the resources. BEM 405, pp 15-16. Here, the parties did not dispute that Appellant divested \$285,785.29 into irrevocable trust (i.e., the Lugten Irrevocable Family Trust). When the Department approved Appellant for MA benefits, it necessarily included a divestment penalty. In an attempt to correct a mistake, Appellant reapplied for MA on March 31, 2014.

The ALJ, in the Hearing Decision, summarized how payments were made to Appellant and how assets were returned. The Appellant's apparent objective was that Appellant would loan money into the trust in order to avoid a divestment and then use the money to pay for her care during the penalty period. However, the ALJ indicated that Appellant's attorneys did not foresee that the Department would determine the loan was a divestment which yielded a longer than expected penalty period.

The record demonstrated that Appellant had a promissory note that did not prohibit its cancellation upon her death. The record showed that Appellant transferred the promissory note as well as other assets. The ALJ concludes on page 6 of his decision Appellant "demanded return of the assets and, based upon documents provided in *Petitioner's Supplemental Brief* (sub-exhibits C-1 through C-6) it appears all of the assets were returned to Claimant." The ALJ then assumes that the total value was paid back to the Appellant under the terms of the loan and the ALJ concludes that the other assets were also returned in full. The ALJ cites to "*Petitioner's Supplemental Brief* at page 2" (and the exhibits) for the proposition that all of the assets were returned to Appellant. (Hearing Decision, page 6)

The central inquiry is whether the Department violated policy when it failed to process Appellant's March, 2013 application and refused to recalculate the divestment penalty. Appellant, in support of her position, must establish policy to show that the Department is required to process the second application. Appellant has not pointed to any policy that directs the Department to recalculate the divestment penalty pursuant to a new application.

Appellant should have waited until her case closed before submitting a new application under these circumstances. BAM 110 (7-1-2014), page 7 provides that "an application or filing form, with the minimum information, must be registered on Bridges unless the client is already active for that program(s)." (Emphasis added). Policy does allow a client to withdraw an application at any time before it is disposed on Bridges. BAM 110, p. 7. Here, Appellant did not withdraw her application, but asked the Department to process her new application despite the fact that the original application was approved for MA.

The Department is correct that BAM 105 (4-1-2014), page 9, requires clients to report changes in circumstances that potentially affect eligibility or benefit amount. Changes must be reported within 10 days of receiving the first payment reflecting the change. BAM 105, page 9. While Appellant was active for MA, Appellant failed to properly report changes in assets to the Department. (See Exhibit F, pages 14-19). It should be noted that clients who are able but refuse to provide necessary information or take a required action are subject to penalties. BAM 105, p 18. Policy does not direct the Department recalculate divestment penalty periods under these circumstances.

Here, Appellant was clearly an ongoing client as her MA application was approved with a divestment penalty. But Appellant did not comply with BAM 105, page 9 and report changes. Rather, Appellant waited before she informed the Department that she did not qualify for MA and was apparently ineligible. Appellant cannot simply reapply while she

was currently active for benefits and expect the Department to ignore the circumstances surrounding her first application.

BEM 405, pages 15-16, provides that divestment penalty periods may only be canceled if all the transferred resources are returned and retained by the individual and they are returned prior to the penalty period. Once the penalty is in effect, the penalty periods that have already passed cannot be eliminated. When the assets are returned, the policy does permit recalculation of the penalty period; however, this does not negate the client's obligation, under BAM 105, page 9, to timely and properly report to the Department changes in assets. Thus, Appellant


The Department did not have objective documentation, at the time, that Appellant had returned all of the assets as of March 19, 2014. Appellant should have timely demonstrated that all the assets were returned by reporting the change in assets for recalculation of the penalty rather than submitting a new application. The Appellant's submission of the new application on March 31, 2014 was not a substitute for proper reporting that some of the assets may have been returned. The Department is not obligated under BEM 405, page 15, to process Appellant's second application for MA and recalculate the divestment penalty.

The Administrative Law Judge, based on the above Findings of Fact and Conclusions of Law, finds that the Department acted in accordance with Department policy when it refused to reprocess and recalculate Appellant's MA ongoing divestment penalty period pursuant to a new application.

DECISION AND ORDER

This Administrative Law Judge, based on the above findings of fact and conclusions of law, VACATES the ALJ's Hearing Decision under Registration Number 14-005261 and **AFFIRMS** the Department's MA divestment determination.

IT IS SO ORDERED.



C. Adam Purnell
Administrative Law Judge
for Nick Lyon, Director
Department of Health and Human Services

Date Signed: September 15, 2015

Date Mailed: September 15, 2015

NOTICE: The law provides that within 30 days of receipt of the this Decision, the Claimant may appeal it to the circuit court for the county in which he/she lives or the circuit court in Ingham County.

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