

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

IN THE MATTER OF:

██████████
████████████████████
████████████████████
████████████████████

Reg. No.: 15-014294
Issue No.: 2001
Case No.: ██████████
Hearing Date: October 07, 2015
County: Wayne-District 82

ADMINISTRATIVE LAW JUDGE: Alice C. Elkin

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; and Mich Admin Code, R 792.11002. After due notice, an in-person hearing was held on October 7, 2015, from Detroit, Michigan. Participants on behalf of Claimant included ██████████ ██████████ Claimant's daughter and authorized hearing representative (AHR); ██████████ ██████████, Medicaid representative at ██████████, the long-term care (LTC) facility in which Claimant resided; and ██████████ ██████████, Medicaid representative at ██████████ ██████████. Participants on behalf of the Department of Health and Human Services (Department) included ██████████ ██████████, Eligibility Specialist, and ██████████ ██████████, Assistance Payment Specialist.

ISSUE

Did the Department properly conclude that Claimant divested ██████████ and apply a divestment penalty to her receipt of LTC benefits under the Medical Assistance (MA) program?

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 granted the AHR power of attorney on August 1, 2013.
2. On December 11, 2014, Claimant began residing at ██████████, an LTC facility.
3. On May 28, 2015, the AHR applied for MA and LTC benefits on Claimant's behalf (Exhibit A).

4. On June 5, 2015, the Department sent Claimant a Verification Checklist (VCL) requesting, in part, a detailed transaction history for Claimant's two bank accounts for the period December 1, 2014 to May 31, 2015, including receipts and/or cancelled checks for all expenditures/withdrawals over \$200 (Exhibit B).
5. The AHR timely responded to the Department's request (Exhibits C and D).
6. On July 13, 2015, the Department sent the AHR a Health Care Coverage Determination Notice notifying her that Claimant was approved for MA coverage for May 1, 2015 ongoing but a divestment penalty applied precluding any LTC benefits from May 1, 2015 to June 2, 2015 (Exhibit E).
7. On July 17, 2015, the AHR requested a hearing disputing the Department's actions.

CONCLUSIONS OF LAW

Department policies are contained in the Department of Health and Human Services Bridges Administrative Manual (BAM), Department of Health and 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 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 Department of Human Services) administers the MA program pursuant to 42 CFR 435, MCL 400.10, and MCL 400.105-.112k.

As a preliminary matter, it is noted that the AHR established that on August 1, 2013 Claimant granted her power of attorney, which included the right to engage in any administrative proceedings in connection with any matter concerning government benefits. Accordingly, the AHR established that she had authority to submit, on Claimant's behalf, the July 17, 2015 request for hearing concerning the divestment penalty. Therefore, this Hearing Decision addresses whether the Department properly applied a divestment penalty to Claimant's MA case.

In the July 13, 2015 Health Care Coverage Determination Notice, the Department concluded that Claimant was eligible for MA with a [REDACTED] monthly patient pay amount effective May 1, 2015 but precluded from LTC benefits from May 1, 2015 to June 2, 2015 because of [REDACTED] from home health care payments and [REDACTED] from funds withdrawn from Claimant's bank account and unaccounted for.

A divestment is the transfer of a resource by a client that is (i) within a specified time (the “look-back period”), (ii) for less than fair market value, and (iii) is not an excluded transfer. BEM 405 (January 2015), p. 1. If an applicant for LTC MA benefits has divested assets, the client may be eligible for MA but a divestment penalty will apply to the client’s case during which time MA will not pay the client’s cost for LTC services but will pay for other MA-covered services. BEM 405, p. 1.

At the hearing, the Department testified that it concluded that the following transactions from Claimant's checking and savings accounts were divestments:

- [illegible]

It is noted that the sum of the amounts identified by the Department on the record exceeded the [REDACTED] it used to calculate the divestment penalty. Thus, the Department did not base the divestment calculation on all of the same amounts it identified at the hearing. Nevertheless, each of the explanations for withdrawals and payments made to cash are considered and addressed in this Hearing Decision.

At the hearing, the AHR and her representative acknowledged that the [REDACTED] check made out to “cash” and paid on December 23, 2014 (Exhibit C, p. 38) was used by Claimant for Christmas gifts to various family members. Cash is an asset. BEM 400 (July 2015), p. 14. While the transfer exclusively for a purpose other than to qualify or

remain eligible for MA is not divestment, the Department assumes that transfers for less than fair market value were for eligibility purposes unless the client provides convincing evidence that he or she had no reason to believe LTC services might be needed. BEM 405, p. 11. Giving an asset away is a divestment. BEM 405, p. 2.

In this case, Claimant was hospitalized on December 11, 2014 and subsequently transferred to the LTC facility. Under these facts, Claimant failed to establish by convincing evidence that she had no reason to believe LTC services might be needed at the time of her December 23, 2014 withdrawal of [REDACTED] and subsequent gifting of those funds. As such, the Department acted in accordance with policy when it included the [REDACTED] in gifts was a divestment.

The AHR and her representative testified that many of the payments made out to cash were to pay home health aides who assisted Claimant in her home and to reserve their employment as aides after Claimant was hospitalized and there remained the possibility that she could return to the home.

Department policy provides that a contract/agreement that pays prospectively for expenses such as repairs, maintenance, property taxes, homeowner's insurance, heat and utilities for real property/homestead or that provides for monitoring health care, securing hospitalization, medical treatment, visitation, entertainment, travel and/or transportation, financial management or shopping, etc. and would be considered a divestment and that all payments for care and services which the client made during the look back period should be considered as divestment. BEM 405 (July 2015), p. 7. The policy expressly provides that relatives who provide assistance or service are presumed to do so for love and affection, and compensation for past assistance or services creates a rebuttable presumption of a transfer for less than fair market value. BEM 405, p. 7. Such contracts/agreements are considered a transfer for less than fair market value unless the (i) the services are performed after a written legal contract/agreement has been executed between the client and provider, (ii) at the time of the receipt of services, the client is not residing in a nursing facility or inpatient hospital, (iii) at the time services are received, the services were 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; and (iv) 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 is identified so that it can be determined whether the amount for services was for fair market value; and (v) the contract/agreement is signed by the client or legally authorized representative. BEM 405, p. 8.

While the policy requires the Department to consider for divestment all payments made by the client for home caretaker and personal care services, the manner in which the policy is written requires that the presumption of divestment apply in circumstances where the services are provided by a relative, which presumption is rebutted only when there exists a written contract that satisfies the criteria outlined above. In this case, services were provided to Claimant by unrelated parties. Therefore, the Department did not act in accordance with Department policy when it concluded that all payments identified by the AHR as made to home care providers were divestments. However, those payments made

to the providers after Claimant was hospitalized on December 11, 2014 and subsequently transferred to the LTC facility and made with the intent to maintain the providers' employment in the event Claimant was released back to her home are problematic since no services were provided in return for those payments. Because those payment were made after Claimant was in the hospital or LTC facility, those payments were properly considered divested by the Department.

A review of the evidence shows that the withdrawals Claimant made for [REDACTED]; [REDACTED]; \$[REDACTED]; and [REDACTED] were for expenses incurred in maintaining Claimant's home. In a letter submitted with the verifications, the AHR explained that the \$[REDACTED] withdrawal made on May 22, 2015 (Exhibit C, p. 28) was to pay for the lawn man to pay for the winter's snow removal and first month of summer grass cutting (Exhibit D). In the July 31, 2015 letter submitted to the Department, the LTC Medicaid representative explained that the [REDACTED] withdrawal on May 22, 2015 was to purchase cashier's checks on May 22, 2015 to pay [REDACTED]0 towards homeowner's insurance policy and \$[REDACTED] in property taxes (Exhibit D). Copies of the cashier's checks made payable to the [REDACTED] and [REDACTED] were submitted to the Department (Exhibit D). In the same letter, the LTC Medicaid representative explained that a check in the amount of [REDACTED] paid March 12, 2015 (Exhibit C, p. 18) was made to pay [REDACTED] for electrical services to Claimant's home as shown on the check register for Claimant's bank account. The evidence also shows that the [REDACTED] paid on June 9, 2013 tied to check [REDACTED] was for a check made to payable to [REDACTED]; a copy of the cancelled check is included in the verifications the AHR provided the Department (Exhibit C, p. 31). Department policy provides that a contract/agreement that pays **prospectively** for expenses such as repairs, maintenance, property taxes, homeowner's insurance, heat and utilities for real property/homestead would be considered a divestment. BEM 405, p. 7. Because the payments for home services in this case were all for past provided services or currently incurred expenses and did not involve an agreement providing for prospective payment for homestead expenses, they did not involve a divestment. Therefore, the Department did not act in accordance with Department policy to the extent it included these funds in the divestment penalty calculation.

The AHR and her representative argued that withdrawals in the amount of [REDACTED] on May 29, 2015 (Exhibit C, p. 28), [REDACTED] on May 22, 2015 (Exhibit C, p. 29), and [REDACTED] on May 29, 2015 were applied towards a [REDACTED] cashier's check used to pay the LTC facility (Exhibit 1). The verifications submitted on Claimant's behalf included a July 31, 2015 letter from the LTC Medicaid representative that showed that a payment of [REDACTED] was made to the LTC facility on May 29, 2015. A copy of a statement from the LTC facility dated June 30, 2015 shows that a payment of [REDACTED] was made May 29, 2015 (Exhibit D). Because it is fair to assume that the payment to the LTC facility came from funds retrieved from Claimant's bank accounts, the [REDACTED] withdrawn from Claimant's accounts was not a divestment. Therefore, to the extent the Department included [REDACTED] in the calculation of the divestment penalty; it did not act in accordance with Department policy.

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 it included any funds other than the \$4,000 withdrawal for gifts and payment made to the home aide providers after Claimant was hospitalized and in LTC in the calculation of the divestment.

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. Recalculate the divestment penalty in Claimant's case;
2. Supplement Claimant for any MA benefits she was eligible to receive but did not from May 1, 2015 ongoing; and
3. Notify Claimant and her representative in writing of its decision.



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

Date Signed: **10/13/2015**

Date Mailed: **10/13/2015**

ACE / tlf

NOTICE OF APPEAL: A party may appeal this Hearing Decision in the circuit court in the county in which he/she resides, or the circuit court in Ingham County, within 30 days of the receipt date. A copy of the claim or application for appeal must be filed with the Michigan Administrative Hearing System (MAHS).

A party may request a rehearing or reconsideration of this Hearing Decision from 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 48909-8139

cc:

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]