



RICK SNYDER
GOVERNOR

STATE OF MICHIGAN
DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
Christopher Seppanen
Executive Director

MIKE ZIMMER
DIRECTOR

[REDACTED]
[REDACTED]
[REDACTED]

Date Mailed: April 29, 2016
MAHS Docket No.: 16-000482
Agency No.: [REDACTED]
Petitioner: [REDACTED]

ADMINISTRATIVE LAW JUDGE: Alice C. Elkin

HEARING DECISION

Following Petitioner'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, a telephone hearing was held on April 11, 2016, from Detroit, Michigan. Petitioner was represented by attorney [REDACTED]. [REDACTED], Petitioner's wife, testified on Petitioner's behalf. Petitioner's daughter [REDACTED], was present at the hearing but did not testify. The Department of Health and Human Services (Department) was represented by [REDACTED], Assistance Payment Worker, and [REDACTED], Family Independence Manager.

ISSUE

Did the Department properly process Petitioner's July 21, 2015 application for long-term care (LTC) benefits under the Medicaid (MA) program and conclude that Petitioner's annuity was a divestment of assets resulting in a divestment penalty?

FINDINGS OF FACT

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

1. Petitioner was born on June 16, 1920 and died on September 1, 2015.
2. Prior to his death, Petitioner resided in a LTC facility.
3. On November 12, 2004, Petitioner purchased a \$10,000 annuity with [REDACTED] [REDACTED] under contract number [REDACTED] naming himself the annuitant and

his wife the beneficiary. The annuity provided that it would mature on the certificate anniversary nearest the annuitant's 95th birthday. (Exhibit E.)

4. On July 21, 2015, the Department received an MA application for Petitioner.
5. In processing Petitioner's application, the Department worker submitted the following documents concerning the [REDACTED] annuity to its Office of Legal Services, Trust and Annuities Unit: (i) the annuity application signed by Petitioner on November 12, 2004; (ii) the annuity disclosure statement signed by Petitioner on November 12, 2004; and (iii) a typewritten summary of the annuity identifying Petitioner as the payee of \$12,893.10 under policy number [REDACTED] with a May 28, 2015 "date applied," indicating monthly payments of \$93.73 to Petitioner beginning May 28, 2015 and listing Petitioner's wife as beneficiary (Exhibits D and E).
6. In a September 30, 2015 memo, the Trust and Annuities Unit concluded that Petitioner purchased the annuity for \$12,893.10 on May 28, 2015 and, because the annuity did not name the State of Michigan as a remainder beneficiary, the purchase of the annuity was the transfer of assets for less than fair market value and resulted in a divestment (Exhibit A).
7. On October 8, 2015, the Department issued a Health Care Coverage Determination Notice notifying Petitioner that he was eligible for MA with a \$671 monthly patient pay amount effective July 1, 2015 through August 31, 2015 and for full coverage MA for September 1, 2015 to September 30, 2015 but that a divestment penalty applied to his case. (Exhibit B).
8. The Department applied a divestment penalty for the period July 1, 2015 to August 17, 2015, during which time Petitioner was not eligible for LTC benefits (Exhibit C).
9. On January 5, 2016, the Department received counsel's written hearing request, disputing the Department's actions (Exhibit A).

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 Petitioner was deceased at the time the January 5, 2016 hearing request concerning his MA application was filed. For MA purposes, a client's spouse may request a hearing on behalf of the client. BAM 600 (October 2015), p. 2. The record established that Petitioner's wife appointed counsel to represent Petitioner's interests concerning his cases with the Department (Exhibit 2). Therefore, counsel had authority to request the hearing concerning the Department's application of a divestment penalty to Petitioner's receipt of LTC benefits.

In this case, the Department concluded that Petitioner's annuity with [REDACTED], policy number [REDACTED], resulted in a divestment and applied a penalty period from July 1, 2015 to August 17, 2015 during which time Petitioner was ineligible for LTC benefits. A non-employer-sponsored annuity is a written contract with a commercial insurance company establishing a right to receive specified, periodic payments for life or for a term of years. BEM 400 (July 2015), p. 25; BEM 401 (July 2015), p. 5. The payments an individual receives from the annuity are unearned income unless the annuity results in a divestment of assets. BEM 503 (July 2015), p. 4; BEM 401, pp. 5-6. A divestment exists when (i) a client transfers a resource within a specified time (the "look-back period"), (ii) the transfer is for less than fair market value, and (iii) the transfer is not an excluded transfer. BEM 405 (July 2015), p. 1. A divestment does not result in MA ineligibility; rather, it results in a penalty period during which time MA will not pay the client's LTC expenses. BEM 405, p. 1.

At issue in this case is whether Petitioner's [REDACTED] annuity resulted in a transfer for less than fair market value, the second prong of the divestment analysis. Department policy expressly provides that there is a transfer for less than fair market value when a client purchases an annuity, or amends an existing annuity, on or after September 1, 2005 unless the annuity meets enumerated criteria. These criteria include, for annuities purchased or amended by, or for the benefit of, the applicant or recipient on or after February 8, 2006, that the State of Michigan be named the remainder beneficiary, or the second remainder beneficiary after the community spouse or minor or disabled child, for an amount at least equal to the amount of the Medicaid benefits provided to the institutionalized individual. BEM 401, p. 5; BEM 405, pp. 2, 6.

In this case, the Department concluded that Petitioner's annuity was purchased on March 28, 2015, a date after February 8, 2006, and, because it listed Petitioner's wife as the beneficiary but did not list the State of Michigan as a remainder beneficiary, the purchase of the annuity resulted in a transfer for less than fair market value. Petitioner's counsel does not dispute the Department's finding that the State was not listed as a remainder beneficiary to the annuity but argues that, because the annuity was purchased on November 12, 2004, not on March 28, 2015, and was not amended after February 8,

2006, it is not subject to the requirement that it name the State as a remainder beneficiary.

In support of his position that the annuity was not purchased after February 8, 2006, Petitioner's counsel pointed to the annuity application (Exhibit E). The annuity application references contract number [REDACTED], the annuity at issue. It has a November 12, 2004 effective date. The application is signed by Petitioner and the insurance agent on November 12, 2004, and an associated disclosure statement referencing the same annuity contract number was signed by Petitioner on November 12, 2004. This evidence is sufficient to establish that the annuity under contract number [REDACTED] was purchased on November 12, 2004.

The Department contends that it relied on a document submitted by Petitioner summarizing the details of the [REDACTED] annuity in finding that the annuity was purchased May 28, 2015. The document referenced is untitled and unsigned. It does create some confusion by identifying May 28, 2015 as the "date applied." However, because the evidence at the hearing showed that the first *payment* from the annuity was May 28, 2015, the "date applied" on the document is a reference to the date the first payments from the annuity were issued. The fact that the same contract number is referenced in the untitled, unsigned summary as in the November 12, 2004 application supports the conclusion that there was no new application purchased on May 28, 2015. Therefore, the evidence presented establishes that the [REDACTED] annuity was purchased November 12, 2004, and the Department erred when it concluded that the annuity at issue was purchased on May 28, 2015.

Petitioner's counsel also argued that the annuity was not amended after its November 2004 purchase. While Department policy does not specify the circumstances resulting in an "amendment" of an annuity, the Centers for Medicare and Medicaid Services (CMS) issued a guideline clarifying the treatment of annuities following the passage of the Deficit Reduction Act of 2005 (DRA).¹ The CMS guidelines explain that routine changes, such as changes in beneficiary, and automatic events, such as changes that occur based on terms of the annuity existing prior to February 8, 2006 and that do not require a decision, election or action to take effect, are **not** subject to the DRA, including the requirement that the State be named a remainder beneficiary. This means that an annuity purchased prior to February 8, 2006 that, pursuant to its terms, requires distribution after February 8, 2006, would not be amended when distributions began because no action was required, post-enactment, to initiate the change. In contrast, an election to annuitize an annuity contract taken by the individual on or after February 8, 2006 **is** an amendment to the annuity and would result in all provisions concerning the DRA being applicable to the annuity.

¹ CMS Enclosure Section 6012, "Changes in Medicaid Annuity Rules Under the Deficit Reduction Act of 2005" available at <https://downloads.cms.gov/cmsgov/archived-downloads/SMDL/downloads/TOAEnclosure.pdf>.

In this case, the application identifies Petitioner, with a June 16, 1920 birthdate, as the annuitant. It provides that the annuity would mature on the certificate anniversary nearest the annuitant's 95th birthday. Based on a June 16, 1920 birthdate, Petitioner turned 95 years old on June 16, 2015. Therefore, the first payment from the annuity, which was made on May 28, 2015, was made within 18 days of Petitioner's 95th birthday, consistent with the date of maturity identified on the annuity application. This evidence is sufficient to establish that annuity matured automatically under the terms of the annuity contract, as provided in the application, based on Petitioner's 95th birthday. There was no evidence presented to suggest that Petitioner took any action after February 8, 2006 to initiate payments from the annuity. Rather, the annuity began paying out monthly payments per the terms of the contract entered into on November 12, 2004. Because there was no action, decision, or election taken by Petitioner with respect to the annuity after February 8, 2006, the annuity was not amended after February 8, 2006. As such, it was not subject to the requirement that it name the State as a remainder beneficiary. Therefore, the fact that Petitioner's [REDACTED] annuity did not identify the State as a remainder beneficiary did not render the purchase of the annuity a transfer for less than fair market value. Because the annuity does not meet one of the conditions for a divestment, the Department did not act in accordance with Department policy when it concluded that a divestment resulted from Petitioner's annuity.

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 applied a divestment penalty to Department's receipt of LTC benefits.

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. Remove the divestment penalty applied to Petitioner's receipt of LTC benefits for the period July 1, 2015 through August 17, 2015;
2. Reprocess Petitioner's July 21, 2015 MA application;

3. Issue supplements to Petitioner's provider for LTC benefits it was eligible to receive but did not for the period July 1, 2015 through August 17, 2015; and
4. Notify Petitioner's wife and counsel of its decision in writing.



ACE/tlf

Alice C. Elkin

Administrative Law Judge

for Nick Lyon, Director

Department of Health and Human Services

NOTICE OF APPEAL: A party may appeal this Order in circuit court within 30 days of the receipt date. A copy of the circuit court appeal must be filed with the Michigan Administrative Hearing System (MAHS).

A party may request a rehearing or reconsideration of this Order if the request is received by MAHS within 30 days of the date the Order was issued. The party requesting a rehearing or reconsideration must provide the specific reasons for the request. MAHS will not review any response to a request for rehearing/reconsideration.

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

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