



RICK SNYDER
GOVERNOR

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

SHELLY EDGERTON
DIRECTOR

[REDACTED]

Date Mailed: March 30, 2017
MAHS Docket No.: 17-001045
Agency No.: [REDACTED]
Petitioner: [REDACTED]

ADMINISTRATIVE LAW JUDGE: Colleen Lack

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, an in-person hearing was held on [REDACTED], from [REDACTED], Michigan. Petitioner was represented by [REDACTED], Attorney. [REDACTED] and [REDACTED], sons of Petitioner, appeared as witnesses for Petitioner. The Department of Health and Human Services (Department) was represented by [REDACTED], and [REDACTED], Assistant Attorney Generals (AAGs), [REDACTED], Assistance Payments Supervisor, and [REDACTED], Long Term Care Eligibility Specialist (LTC ES).

During the hearing proceeding, the Department's Hearing Summary packet was admitted as Exhibit A, pp. 1-28, and an Affidavit from Petitioner was admitted as Exhibit 1. Objections were made to Exhibit A, pp. 26-28, because these emails are dated after the [REDACTED], written case action notice; therefore, they contain information that was not available to the Department at the time the determination was made. In determining the relevancy and weight of this evidence, this Administrative Law Judge will consider that the information contained on those documents was not available to the Department at the time of the contested case action. Objections were also made to Exhibit 1, an Affidavit from Petitioner dated [REDACTED]. This information was not available to the Department at the time of the [REDACTED], determination; Petitioner was not available to be cross examined; and it was asserted that the Affidavit was hearsay because the statements were offered to prove the truth of the matter asserted. Similarly, these objections were noted for the record and will be considered in determining the relevancy and weight of this evidence.

ISSUE

Did the Department properly determine Petitioner's eligibility for Medical Assistance (MA)?

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 [REDACTED], an Application for Health Care Coverage Patient of Nursing Facility, was filed on Petitioner's behalf. (Exhibit A, pp. 3-15)
2. Petitioner was admitted to the nursing facility on [REDACTED]. (Exhibit A, p. 5)
3. The Attachment for Medicaid Application, in part, disclosed that on [REDACTED], Petitioner transferred her car to her son, [REDACTED]. It was explained that, at Petitioner's request, [REDACTED] used the car to run errands for Petitioner and to take Petitioner to appointments. Petitioner felt it would be better if the car was titled in the name of her son, who was driving it for Petitioner. It was asserted that the transfer was done exclusively for a purpose other than to qualify, or remain qualified, for Medicaid, and as a result was not a divestment pursuant to Bridges Eligibility Manual (BEM) 405, p. 11. It was also noted that the car would be exempt if Petitioner still owned it. (Exhibit A, p. 10)
4. An Affidavit from [REDACTED] was also provided with the Medicaid application. In part, it was stated that [REDACTED] was Petitioner's son and he had been helping Petitioner with transportation to shopping, appointments, etc. for several years. It was explained that on [REDACTED], Petitioner transferred the car to him because: Petitioner was no longer driving the car; at Petitioner's request, he was using the car to run errands for her and take her to appointments; and Petitioner felt it would be better if the car was titled in [REDACTED] name because he was the one that was driving it for her. It was stated that at that time, there were absolutely no discussion with Petitioner regarding even the possibility of Medicaid qualification. It was asserted that the transfer was done exclusively for a purpose other than to qualify, or remain qualified, for Medicaid; the transfer had nothing to do with qualifying for Medicaid, or remaining qualified for Medicaid; and that Medicaid was not a consideration at all. (Exhibit A, p. 13)
5. The Department considered the transfer a divestment, determined that the value of the car was \$ [REDACTED], and calculated a divestment penalty of 7 days. (Exhibit A, p. 16-21; LTC ES Testimony)
6. On [REDACTED], a Health Care Coverage Determination Notice was issued to Petitioner stating MA was approved for [REDACTED], and ongoing with a \$ [REDACTED] monthly patient pay, but indicating there would be a divestment penalty

from [REDACTED], through [REDACTED], based on assets or income being transferred for less than their fair market value. (Exhibit A, pp. 23-25)

7. On [REDACTED], a hearing request was filed on Petitioner's behalf contesting the Department's determination. (Exhibit A, p. 2)

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.

BEM 405 addressed MA Divestment. In part, this policy states:

Divestment results in a penalty period in MA, **not** ineligibility.

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

BEM 405, April 1, 2016, p. 1.

In this case, it was uncontested that the [REDACTED], transfer of Petitioner's car to her son was within the lookback period and was for less than fair market value. Further, Petitioner's Attorney stated that they are not contesting the Department's calculation of

the value of the car. Rather, the contested issue is whether the transfer of the car met the criteria for transfers that are not divestment, specifically transfers exclusively for a purpose other than to qualify or remain eligible for MA.

The BEM 405 policy regarding transfers that are not divestment, transfers for another purpose states:

Transfers for Another Purpose

As explained below, transfers exclusively for a purpose other than to qualify or remain eligible for MA are **not** divestment.

Assume transfers for less than fair market value were for eligibility purposes until the client or spouse provides convincing evidence that they had no reason to believe LTC or waiver services might be needed.

Example: Mr. Smith, age 40, was in good health when he gave his vacation cottage to his nephew. The next day Mr. Smith was in an automobile accident. His injuries require long-term care. The transfer was **not** divestment because Mr. Smith could **not** anticipate his need for LTC services.

Exception:

- Preservation of an estate for heirs or to avoid probate court is **not** acceptable as another purpose.
- That the asset or income is **not** counted for Medicaid does **not** make its transfer for another purpose.

BEM 405, April 1, 2016, p. 11.

BEM 405 also addresses verification requirements and verification sources. In part, this policy states:

VERIFICATION REQUIREMENTS

Verification is not required when the client states he and his spouse have not transferred resources **unless:**

- The client's statement is unclear, inconsistent or conflicts with known facts, **or**
- Existing information in the case record indicates divestment may have occurred.

Verify the following to document divestment:

- Date of transfer.
- Fair market value or cash value.
- Uncompensated value.

Obtain a statement from the LTC or waiver client's physician (M.D. or D.O.) to verify:

- Undue hardship, **or**
- The client's non-disabled child age 21 or older provided care that would otherwise have required LTC or waiver services.

Verify the child's length of residence if a homestead was transferred to a nondisabled child age 21 or older.

Verify the sibling's ownership interest and length of residence in the homestead if a homestead was transferred to a sibling.

Verify disability and blindness according to BEM 260.

Verification Sources

Sources to verify transfers and the reasons for them include, but are not limited to, the following:

- Legal documents.
- Payment or tax records.
- Bills of sale.
- Court or attorney records.
- Correspondence regarding the transaction.
- Bank books or statements.

BEM 405, April 1, 2016, p. 17.

In the documents submitted with the [REDACTED], Medicaid application, it was clearly asserted that Petitioner's [REDACTED], transfer of her car to her son, [REDACTED], was done exclusively for a purpose other than to qualify, or remain qualified, for Medicaid, and as a result was not a divestment pursuant to Bridges eligibility Manual (BEM) 405, p. 11. It was explained Petitioner transferred the car to him because: Petitioner was no longer driving the car; at Petitioner's request, he was using the car to run errands for her and take her to appointments; and Petitioner felt it would be better if the car was titled in [REDACTED] name because he was the one that was

driving it for her. It was stated that at that time, there were absolutely no discussion with Petitioner regarding even the possibility of Medicaid qualification. (Exhibit A, pp. 10 and 13)

The testimony of the LTC ES was inconsistent regarding whether she considered the BEM 405 policy provision that transfers exclusively for a purpose other than to qualify, or remain eligible, for MA are not divestment at the time of the [REDACTED], determination. In the beginning of her testimony, the LTC ES indicated that Petitioner had not provided any evidence that the transfer was exclusively for any reason other than to qualify for Medicaid. However, the LTC ES then acknowledged receiving the Affidavit from Petitioner's son with the application materials. When asked why this was not considered evidence of a purpose other than to qualify for MA, the LTC ES responded that the Affidavit showed that Petitioner was no longer able to drive. The LTC ES also indicated that Petitioner may have anticipated a need for LTC MA at the time of the transfer because she was [REDACTED] years old and she did need assistance with errands/appointments. It was not clear if this was the reasoning at the time of the [REDACTED], determination, or if this also reasoning also considered further review of this case including the clarification sought from the Department's LTC Support section after the hearing request was filed. Additionally, at two subsequent points during the hearing, the LTC ES was specifically asked if she considered the BEM 405 policy provision that transfers exclusively for a purpose other than to qualify, or remain eligible, for MA when making the eligibility determination for Petitioner's case. The first time the LTC ES responded that yes, she had, and the second time the LTC ES responded that no, she did not. Overall, it is not clear whether at the time of the [REDACTED], determination the Department actually considered the BEM 405 policy that transfers exclusively for a purpose other than to qualify, or remain eligible, for MA are not divestment.

The [REDACTED], and [REDACTED], emails between the LTC ES and the Department's LTC Support section only document that the LTC ES sought clarification of what constitutes convincing evidence after Petitioner's hearing request was filed. (Exhibit A, pp. 26-29) This does not establish whether the LTC ES considered the BEM 405 policy provision at issue, without seeking any clarification, at the time Petitioner's MA application was processed.

In his closing statement, the AAG also asserted that affidavits alone are not sufficient to satisfy the convincing evidence standard. It was asserted that more evidence should have been provided to the Department. However, the LTC ES testified that the Department did not issue any verification request(s) for additional information regarding the transfer of Petitioner's car. (LTC ES Testimony) Petitioner's attorney noted that nothing in the BEM 405 policy states that affidavits cannot be provided. Further, it was asserted that if the Department wanted further verification they should have asked for it.

BAM 130 directs the Department to obtain verification when required by policy as well as when "information regarding an eligibility factor is unclear, inconsistent, incomplete or contradictory." BEM 130, July 1, 2016, p. 1. This is consistent with the above cited

BEM 405 policy that verification is not required when the client/spouse states they have not transferred resources unless the client's statement is unclear, inconsistent or conflicts with known facts. On the documents submitted with the MA application, the [REDACTED], transfer of Petitioner's car to her son was disclosed, some explanation for the transfer was provided with the assertion that the transfer was not a divestment under BEM 405, p. 11, and it was also stated that Petitioner had not made any transfers within the last [REDACTED] years. (Exhibit A, pp. 10 and 13) It is noted that the testimony of Petitioner's sons, and the additional documentary evidence in this hearing record, provided more complete information regarding the reasons for the transfer of Petitioner's car to her son. For example, the assertions regarding why Petitioner would not have been considering the possibility of qualifying for MA or needing LTC services at that time as well as the insurance cost savings for Petitioner after the transfer. (Exhibit 1; Testimony of Petitioner's Sons) This indicates that, had the Department asked for it, more complete information could have been provided when Petitioner's MA application was being processed.

Overall, the Department has failed to satisfy its burden of showing that it acted in accordance with Department policy when it determined Petitioner's eligibility for MA on [REDACTED]. The testimony of the LTC ES was inconstant regarding whether the BEM 405 policy provision that transfers exclusively for a purpose other than to qualify, or remain eligible, for MA are not divestment was actually considered at the time of the [REDACTED], determination. Further, if the Department felt that the information provided with the application regarding the transfer of the car was unclear, inconsistent, incomplete, or contradictory, or that an affidavit is not sufficient to be considered convincing evidence, the BAM 130 and BEM 405 policies direct the Department to obtain verification. The LTC ES testified that the Department did not issue any verification request(s) for additional information regarding the transfer of Petitioner's car. (LTC ES Testimony) Therefore, the Department's [REDACTED], determination is reversed, and Petitioner's eligibility for MA for the [REDACTED], MA application should be re-determined in accordance with Department policy.

This does not imply that this Administrative Law Judge has made any determination regarding whether the [REDACTED], transfer of Petitioner's car meets either the criteria for divestment, or the criteria for a transfer exclusively for a purpose other than to qualify, or remain eligible, for MA which would not be divestment. Accordingly, the more recent documentary evidence in the parties hearing exhibits and testimony was considered relevant only as it related to whether the Department considered the BEM 405 policy provision that transfers exclusively for a purpose other than to qualify, or remain eligible, for MA are not divestment at the time of the [REDACTED], determination and whether additional information regarding the transfer could have been provided had the Department issued a request for additional information/verification(s).

DECISION AND ORDER


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 satisfy its burden of showing that it acted in accordance with Department policy when it determined Petitioner's eligibility for MA.

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 Petitioner's eligibility for MA for the [REDACTED], application in accordance with Department policy, which would include requesting any needed verification(s).

CL/bb



Colleen Lack

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

DHHS

[REDACTED]

Counsel for Respondent

[REDACTED]

Counsel for Petitioner

[REDACTED]

Petitioner

[REDACTED]