



GRETCHEN WHITMER
GOVERNOR

STATE OF MICHIGAN
DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS
MICHIGAN ADMINISTRATIVE HEARING SYSTEM

ORLENE HAWKS
DIRECTOR

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

Date Mailed: January 16, 2019
MAHS Docket No.: 18-012259
Agency No.: [REDACTED]
Petitioner: [REDACTED]

ADMINISTRATIVE LAW JUDGE: Jacquelyn A. McClinton

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; 42 CFR 438.400 to 438.424; 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 January 10, 2019, from Detroit, Michigan. The Petitioner was not presented but was represented by [REDACTED], Authorized Hearing Representative (AHR). Petitioner's daughter-in-law, [REDACTED], also appeared at the hearing. The Department of Health and Human Services (Department) was represented by [REDACTED] Assistance Payments Supervisor.

ISSUE

Did the Department properly determine that Petitioner did not serve a divestment penalty from February 1, 2018 through August 12, 2018?

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 is an ongoing recipient of MA benefits.
2. Petitioner sold her home for less than the fair market value and gifted the proceeds to her son.
3. The Department assessed a divestment penalty from February 1, 2018 through August 12, 2018.
4. Prior to the start of the divestment penalty, Petitioner was in the MIChoice Waiver program and was receiving services from the Area Agency on Aging.

5. Under Department policy, Petitioner was required to be disenrolled in the MIChoice Waiver program.
6. Petitioner was not disenrolled from the MIChoice Waiver program during the divestment penalty.
7. The Department determined that Petitioner had not served the divestment penalty because of the requirement to be disenrolled from the MIChoice Waiver program.
8. On or about August 15, 2018, Petitioner was admitted into at long-term care (LTC) facility.
9. On October 15, 2018, the Department sent Petitioner a Benefit Notice which notified Petitioner that the new divestment penalty would begin on November 1, 2018 and would end on May 12, 2019.
10. On October 26, 2018, Petitioner's AHR filed a Request for 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.

Additionally, the waiver is called the MIChoice Waiver Program. This waiver program provides home and community-based services for aged and disabled persons who, if they did not receive such services, would require care in a nursing home. Services provided under this waiver program must be less costly for MA than the cost of nursing home services for the total number of waiver participants, not per person. The MI Choice waiver is **not an MA category**, but there are special eligibility rules for people approved for the waiver. BME 106 (July 2015).

In this case, the Department testified that it initially determined that the divestment penalty period began on February 1, 2018 and was scheduled to end on August 12, 2018. However, the Department stated that because Petitioner was not in the MIChoice

Waiver program during the initial penalty period, the divestment penalty had not been served.

Petitioner's AHR testified that he relied on the Department's representation of the initial divestment penalty period and as such, believed that the penalty ended on August 12, 2018. Petitioner was admitted into a LTC on or about August 15, 2018. In October 2018, the Department notified Petitioner that it did not consider the divestment penalty as having been served and as a result, determined that the new divestment penalty, due to Petitioner's admittance into a LTC, now began on November 1, 2018 and is not scheduled to end until May 12, 2019. Petitioner's AHR did not dispute the divestment penalty length. Petitioner's AHR is disputing the Department's assertion that the divestment penalty period has not been served.

In accordance with policy, the Department is required to apply the penalty to the months (or days) an individual is eligible for Medicaid and actually in LTC, Home Health, Home Help, or the MIChoice Waiver. Do not apply the divestment penalty to a period when the individual is not eligible for Medicaid for any reason (that is the case closes for **any** reason or is eligible for Medicaid but is **not** in LTC, Home Help, Home Health, or the MIChoice Waiver. Restart the penalty when the individual is again eligible for Medicaid and in LTC, Home Help, Home Health, or MIChoice Waiver. When a medical provider is paid by the individual, or by a third party on behalf of the individual, for medical services received, that month is not a penalty month. Do not count that month as part of the penalty period. This does not include payments made by commercial insurance or Medicare. BEM 405 (January 2018), p. 13.

At the hearing, the Department presented a series of emails which provided conflicting information. It appears that the Department was seeking information from the Area Agency on Aging as to whether Petitioner had been disenrolled from the MIChoice Waiver program. On August 16, 2018, [REDACTED], presumably from the Area Agency on Aging, sent an email to the Department which stated as follows:

Just to clarify, we do not actually disenroll people when there is a divestment penalty. The reason is that they need to be currently enrolled in a Waiver program in order to serve a divestment, the divestment essentially puts her MI-Choice enrollment on 'hold' until the divestment ends, at that point the Waiver is automatically put back in place, so we do not end up re-enrolling them either. (Exhibit A, p. 44).

This email makes it clear that Petitioner continued to maintain her enrollment in the MIChoice Waiver program. The Department argued that on October 12, 2018, the Area Agency on Agency sent a clarifying email indicated that Petitioner had in fact been disenrolled from the waiver program. The email stated that the "when we found that there was a divestment we closed our waiver case..." (Exhibit A, p. 42). However, three days later on October 15, 2018, Bridget Heffron from the Department's policy division sent an email which stated, in pertinent part, as follows:

The state did not allow enrollment in the waiver when there was a divestment penalty. The waiver agent very deliberately went around those regulations and presented the client as enrolled. I consider this to be fraud. (Exhibit A, p. 49).

As such, it appears that as of October 15, 2018, the Department believed that Petitioner had remained in the waiver program albeit against the Department's policy. No one from the Area Agency on Agency or the Department's policy division appeared at the hearing. Based upon the evidence presented at the hearing, it appears that Petitioner remained in the MIChoice Waiver program. Because the evidence demonstrates that Petitioner was eligible for MA and was in the MIChoice Waiver program, it is found that the Department failed to meet its burden by a preponderance of the evidence that the divestment penalty was not served from February 1, 2018 to August 12, 2018 and thus, improperly assessed a second penalty from November 1, 2018 through May 12, 2019.

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 found that Petitioner had not served the divestment penalty from February 1, 2018 through August 12, 2018.

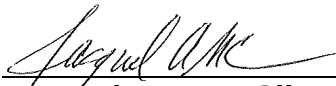
DECISION AND ORDER

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 for the period of November 1, 2018 through May 12, 2019;
2. If Petitioner was eligible for supplements, issue MA supplements Petitioner was eligible to receive but did not effective November 1, 2018; and
3. Notify Petitioner and her AHR in writing.

JAM/tlf



Jacquelyn A. McClinton
Administrative Law Judge
for Robert Gordon, 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) 763-0155; 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

Via Email:

[REDACTED]

Authorized Hearing Rep.

- **Via First-Class Mail:**

[REDACTED]

Petitioner

- **Via First-Class Mail:**

[REDACTED]