



GRETCHEN WHITMER
GOVERNOR

STATE OF MICHIGAN
DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS

ORLENE HAWKS
DIRECTOR

[REDACTED]
[REDACTED]
[REDACTED]
Date Mailed: May 24, 2019
MOAHR Docket No.: 19-003069
Agency No.: [REDACTED]
Petitioner: [REDACTED]

ADMINISTRATIVE LAW JUDGE: Zainab A. Baydoun

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 April 25, 2019, from Detroit, Michigan. Petitioner was not present for the hearing. [REDACTED], Petitioner's daughter/Power of Attorney, Petitioner's attorney, [REDACTED], and paralegal, [REDACTED], appeared on Petitioner's behalf. Petitioner's attorney called [REDACTED] as a witness on behalf of Petitioner. The Department of Health and Human Services (Department) was represented by Assistant Attorney General (AAG) [REDACTED] and was present with [REDACTED], Assistance Payments Supervisor. [REDACTED], Eligibility Specialist was called as a witness on behalf of the Department.

ISSUE

Did the Department properly determine that Petitioner divested \$9,500 and as a result, impose a Medical Assistance (MA) divestment penalty for the period from November 1, 2018 to December 4, 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. In November 2016, Petitioner was admitted to a long-term-care (LTC) facility.
2. On February 20, 2017, [REDACTED] became Petitioner's Durable Power of Attorney for Financial Matters (POA) and given the legal authority to act on Petitioner's behalf, and thus had direct access to Petitioner's income and bank accounts. (Exhibit A, pp. 33-42)

3. Between February 14, 2017 and May 16, 2018, Petitioner's POA used her own personal funds and/or credit card to pay various expenses/bills on Petitioner's behalf which included among other expenses, property taxes, home insurance, hearing aids, and medical and/or medication expenses. (Exhibit A, pp. 56-69, 98-124)
4. On November 29, 2018, a cashier's check was issued to Petitioner's POA in the amount of \$6,500 from Petitioner's bank account with [REDACTED]. (Exhibit A, p. 56)
5. On November 30, 2018, a cashier's check was issued to Petitioner's POA in the amount of \$3,000 from Petitioner's bank account with [REDACTED]. (Exhibit A, p. 63)
6. On December 28, 2018 an Application for Health Care Coverage Patient of Nursing Facility (DHS-4574) (Application) was submitted on Petitioner's behalf by her Authorized Representative (AR) with a request for Retroactive MA coverage for November 2018. (Exhibit A, pp.48-51)
7. In connection with the Application and in response to subsequent requests for verification, Petitioner's AR submitted copies of the two cashier's checks referenced above, as well as receipts for some of Petitioner's expenses and bank statements to the Department. (Exhibit A, pp. 48-51, 56-69, 98-124)
8. Petitioner's POA asserted that the two checks totaling \$9,500 were reimbursements for expenses she paid on Petitioner's behalf.
9. The Department concluded that the \$9,500 payments to Petitioner's POA were considered a cash asset transfer for less than fair market value, and thus, a divestment.
10. On February 11, 2019, the Department sent Petitioner a Health Care Coverage Determination Notice (Notice) notifying her that she was approved for MA coverage with a patient pay amount effective November 1, 2018, but a divestment penalty (based on the \$9,500 in cash divested) applied which precluded any LTC benefits from November 1, 2018 to December 4, 2018. (Exhibit A, pp. 44-46)
11. On March 18, 2019 Petitioner, through her representative, requested a hearing disputing the Department's actions, specifically the divestment penalty. (Exhibit A, pp. 1-2)

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.

In the February 11, 2019 Notice, the Department concluded that Petitioner's MA eligibility was subject to a divestment penalty from November 1, 2018 to December 4, 2018, precluding LTC benefits on Petitioner's behalf during that period, as it determined a divestment occurred. (Exhibit A, pp. 44-46).

Divestment is a type of transfer of a resource and not an amount of resources transferred. Resource means all the client's assets and income. Transferring a resource means giving up all or partial ownership in the resource. Cash in bank accounts is an asset. Thus, giving away cash is divestment. Divestment results in a penalty period, not MA program ineligibility. BEM 405 (January 2019), pp. 1-2; BEM 400 (February 2019), pp.1-3. During the penalty period, MA will not pay the client's cost for: LTC services; home and community-based services; home help; or home health. MA will pay for other MA-covered services. BEM 405, p. 1. A divestment is a 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 (FMV), and (iii) not an excluded transfer. BEM 405, p. 1.

At issue in this case are two cashier's checks issued to Petitioner's POA on November 29, 2018 in the amount of \$6,500 and on November 30, 2018 in the amount of \$3,000, respectively. (Exhibit A, pp. 56, 63). The Department determined that these checks to Petitioner's POA were transfers of Petitioner's cash assets for less than fair market value and resulted in divestment.

To determine if an asset transfer qualifies as divestment, the baseline date must first be established. A person's baseline date is the first date that the client was eligible for MA and one of the following: in LTC; approved for the waiver; eligible for home health services; or eligible for home help services. BEM 405, p. 6. Transfers that occur on or after a client's baseline date must be considered for divestment. In addition, once the baseline date is established, the Department will determine the look-back period, which is 60 months prior to the baseline date for all transfers made after February 8, 2006. BEM 405, p. 5.

In this case, the Department applied a base line date of November 1, 2018, as it determined that prior to this month, Petitioner had countable assets in excess of the \$2,000 limit and would be ineligible for MA benefits. The baseline date was undisputed. Thus, the Department properly determined that the cash asset transfers referenced

above were within the look-back period, or the timeframe that allows for a divestment penalty. Because the transfers were made within the look-back period, the Department must then consider whether the transfers were made for less than fair market value. Less than fair market value means that the compensation received in return for a resource was worth less than the fair market value of the resource. BEM 405, pp. 6-7.

BEM 405 provides that compensation must have tangible form and intrinsic value. Relatives or other care providers can be paid for providing services; however, the Department is to assume that services were provided for free when no payment was made at the time the services were provided. A client can rebut this presumption by providing tangible evidence that a payment obligation existed at the time the service was provided (for example a written agreement signed at the time the services were first provided). BEM 405, pp. 6-7.

The Department testified that based on the information and documentation received in connection with the Application, it determined that the two checks were issued to Petitioner's POA as reimbursement for expenses paid by the POA on Petitioner's behalf for the time period between February 2017 and May 2018. The Department asserted that Petitioner's daughter was assigned as Petitioner's POA effective February 20, 2017 and as of that date, had the legal authority to act on Petitioner's behalf with respect to financial matters, including the ability to access Petitioner's bank accounts and write checks or pay Petitioner's expenses using Petitioner's own funds. The Department maintained that according to the bank account statements submitted in connection with the Application, as well as the receipts for the expenses paid for Petitioner by her POA, there were sufficient funds available in Petitioner's bank account to pay her expenses using her own funds. The Department asserted that there was no valid written agreement or contract signed at the time of the service that would allow for reimbursement for the services provided to Petitioner by her POA (services which the Department indicated included paying Petitioner's bills) and thus, it is assumed that the services provided were for free.

The Department further maintained that because Petitioner's POA had direct access to Petitioner's bank account, she could have reimbursed herself for the services she provided, and the expenses paid on Petitioner's behalf in a timely manner or at the time she provided the service and paid the expenses between February 2017 and May 2018. But instead, cashier's checks were issued on November 29, 2018 and November 30, 2018 within 30 days of the Application and for amounts that would reduce Petitioner's assets to below \$2,000 and render her eligible for MA. The Department asserted that because Petitioner's POA did not reimburse herself in a timely manner and because there was no written agreement/contract for reimbursement of the services provided, it concluded that the \$9,500 was paid to Petitioner's POA in order to reduce Petitioner's assets to within the allowable limit and to qualify Petitioner for MA eligibility which constitutes divestment because she gave away her cash assets.

At the hearing, Petitioner's attorney presented two arguments disputing the Department's conclusion that the cash transfers were a divestment. Firstly, relying on

paragraph No. 9 of the POA found on p. 40 of Exhibit A, he argued that the \$9,500 paid to Petitioner's POA was not payment or compensation for services provided but rather, dollar for dollar reimbursement for Petitioner's expenses that were paid by Petitioner's POA. Petitioner's POA testified that she was never paid above the value of the expenses and was not paid for performing her services or duties as POA. She testified that for several years, some of which were prior to the execution of the POA and prior to Petitioner's admission to the LTC facility, she would collect Petitioner's bills and pay them using her own personal credit card and Petitioner would later repay her. She stated that she did not balance a checkbook or keep a running tab of the expenses or bills she paid on Petitioner's behalf.

The POA was reviewed during the hearing, in particular, the paragraph relied upon by Petitioner's attorney which states:

9. Compensation

My Agent shall be reimbursed for reasonable expenses incurred while acting as Agent and may receive reasonable compensation for acting as Agent.

(Exhibit A, p. 40). Petitioner's attorney asserted that because the checks were issued to Petitioner's POA as reimbursement of expenses and not for services provided, there was no divestment. In the alternative, and still relying on paragraph 9 of the POA, Petitioner's attorney also argued that if the checks were to be considered payment for services, the provision in the POA referenced above is a tangible evidence that a written contractual obligation existed that legally required Petitioner to reimburse the POA for the expenses, thereby rebutting the presumption that the services were provided for free. The Department countered by asserting that because Petitioner's daughter was also her POA, she could have still provided the services to Petitioner and it is presumed that she has done so for love and affection; therefore, it concluded that the language in the POA does not rebut that presumption and in order to be compensated or reimbursed, a valid personal care contract would have been required.

Upon thorough review, the language in the POA relied upon by Petitioner's attorney appears to require Petitioner to reimburse the POA when the POA personally or specifically incurs reasonable expenses arising out of her duty to act as Petitioner's Agent and not for reimbursement of payments for Petitioner's own personal bills/expenses. Therefore, because no payment to Petitioner's POA was made at the time the services were performed (because Petitioner did not reimburse the POA concurrent to the time when the expenses were paid) and it is found that the language in paragraph 9 of the POA is insufficient to establish that a payment obligation by Petitioner to the POA existed at the time the POA provided services, a valid home care or personal care contract was required as the service provided to Petitioner by her POA consisted of payment of property taxes, homeowner's insurance, and medical expenses.

Department policy provides that all personal care and home care contract/agreements, regardless of whether between a client and a relative or a client and a non-relative, must be considered and evaluated for divestment. BEM 405, p. 8. A personal care contract is a contract/agreement that provides for health care monitoring, medical treatment, securing hospitalization, visitation, entertainment, travel and/or transportation, financial management, shopping, home help or other assistance with activities of daily living. BEM 405, p. 7. A home care contract is a contract/agreement which pays for expenses such as home/cottage/care repairs, property maintenance, property taxes, homeowner's insurance, heat and utilities for the homestead or other real property of the client. Home Care and Personal Care contracts/agreements may be between relatives or non-relatives. A relative is anyone related to the client by blood, marriage or adoption. BEM 405, p. 7.

When relatives provide assistance or services, they are presumed to do so for love and affection and compensation for past assistance or services shall create a rebuttable presumption of a transfer for less than fair market value. Fair market value of the services may be determined by consultation with area businesses which provide such services. BEM 405, pp.7-8.

Personal care and home care contracts/agreements are considered a transfer for less than fair market value unless the agreement meets all of the following criteria: (i) the services are performed after a written and legal contract/agreement has been executed between the client (or legally authorized representative) and provider with signatures notarized; (ii) at the time the services are received, 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. BEM 405, p. 8.

There was no assertion made by Petitioner's attorney that there was a valid personal care or home care contract in this matter and the POA presented for review is not a substitute for or the equivalent of a personal care or home care contract. Additionally, based on the evidence presented, the services provided to Petitioner were received by her during the time in which she had already been residing at the LTC facility and thus, there was no written recommendation from Petitioner's physician indicating the services were necessary to prevent her transfer to a residential care or nursing facility. In the absence of a written contract that meets the criteria referenced above, the cashier's checks issued to Petitioner's POA on November 29, 2018 and November 30, 2018 were properly considered transfers for less than fair market value. Therefore, the Department properly concluded that \$9,500 was divested.

Because the Department established that a divestment occurred, an analysis of the computation of the applicable penalty period follows. The Department determined that

Petitioner was subject to a divestment penalty for the period between November 1, 2018 and December 4, 2018. The Department stated that in computing the penalty period, it relied on the \$9,500 in cash asset transfers discussed above. Department policy provides that the penalty period is computed based on the total uncompensated value of all resources divested, which in this case is the cash value. Once the total uncompensated value is determined, the Department is to divide that amount by the average monthly private LTC Cost in Michigan, which is based on the client's baseline date. This gives the number of full months for the penalty period. The fraction remaining is multiplied by 30 to determine the number of days for the penalty period in the remaining partial month. BEM 405, pp. 12-15. Applying Department policy to Petitioner's case, based on a \$9,500 total uncompensated value of the divested resources and an \$8,261 average monthly private LTC cost in Michigan applicable to Petitioner's 2018 baseline date, the divestment penalty is 34 days. Therefore, upon review, the Department properly applied a divestment penalty from November 1, 2018 to December 4, 2018.

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 acted in accordance with Department policy when it processed Petitioner's MA eligibility and determined that she was subject to a divestment penalty for the period from November 1, 2018 to December 4, 2018.

DECISION AND ORDER

Accordingly, the Department's decision is **AFFIRMED**.

ZB/tlf


Zainab A. Baydoun
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 Office of Administrative Hearings and Rules (MOAHR).

A party may request a rehearing or reconsideration of this Order if the request is received by MOAHR 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. MOAHR will not review any response to a request for rehearing/reconsideration.

A written request may be mailed or faxed to MOAHR. If submitted by fax, the written request must be faxed to (517) 763-0155; Attention: MOAHR 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]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Counsel for Petitioner

- **Via First-Class Mail:**

[REDACTED]
[REDACTED]
[REDACTED]

Petitioner

- **Via First-Class Mail:**

[REDACTED]
[REDACTED]
[REDACTED]

Authorized Hearing Rep.

- **Via First-Class Mail:**

[REDACTED]
[REDACTED]
[REDACTED]