



GRETCHEN WHITMER  
GOVERNOR

STATE OF MICHIGAN  
DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS  
MICHIGAN OFFICE OF ADMINISTRATIVE HEARINGS AND RULES

ORLENE HAWKS  
DIRECTOR

[REDACTED]  
[REDACTED]  
[REDACTED], MI [REDACTED]

Date Mailed: September 6, 2019  
MOAHR Docket No.: 19-005439  
Agency No.: [REDACTED]  
Petitioner: [REDACTED]

**ADMINISTRATIVE LAW JUDGE:** Carmen G. Fahie

### **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 July 31, 2019, and continued on August 8, 2019, from Lansing, Michigan. Petitioner was represented by her son and authorized hearing representative, [REDACTED] and Petitioner's Attorney, [REDACTED] P# [REDACTED]. The Department of Health and Human Services (Department) was represented by Assistant Attorney General, Jennifer L.A. Walker, P#73048 and Tamara Zander, Assistance Payments Supervisor.

### **ISSUES**

1. Was Petitioner's hearing request timely?
2. Did the Department properly determine the divestment penalty for Medical Assistant (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] [REDACTED] 2018, Petitioner applied for MA Long Term Care (LTC) where she reported a purposeful divestment of \$41,211.22 to an irrevocable trust. Department Exhibit 1, pgs. 64-185.
2. On May 23, 2018, the Department Caseworker sent Petitioner a Health Care Coverage Determination Notice, DHS-1606, that Petitioner was not eligible for MA

LTC from June 1, 2018, through October 29, 2018, due to a divestment penalty with a \$7,012.00 monthly patient pay with eligibility from February 1, 2018 ongoing. Department Exhibit 1, pgs. 49-52.

3. On May 29, 2018, Petitioner's Attorney sent the Department Caseworker an email stating that the baseline should be February 1, 2018, not June 1, 2018, for the divestment penalty where she was approved for MA in February 2018, with a divestment penalty of four months and 29 days, which is when her divestment penalty should start. Petitioner Exhibit 6.
4. On June 25, 2018, the Department Caseworker responded through an email to the Petitioner's Attorney that they were working on this where they had to contact the helpdesk to make correction. Petitioner Exhibit 9.
5. On August 22, 2018, the Department Caseworker sent Petitioner a Health Care Coverage Determination Notice, DHS-1606, that Petitioner was eligible for MA LTC from July 1, 2018, ongoing with a \$1,579.00 monthly patient pay. Petitioner Exhibit 10.
6. On January 3, 2019, Petitioner's Attorney sent the DHHS Supervisor an email asking for the Department to fix the baseline to February 1, 2018, because the nursing home was still having problems billing for the months of June to October 2018. Petitioner Exhibit 11.
7. On January 4, 2019, the DHHS Supervisor responded to the email stating that BEM 405, p. 15 states if a past unreported divestment is discovered, or an agency error is made that should result in a penalty, a penalty must be determined under the policy in place at the time of discovery. Timely notice must be given to LTC recipients before actually applying the penalty. An August 20, 2018, Help Desk Ticket was completed under BR-0404414 due to the May 23, 2018, DHS-1606 that MA was approved February 1, 2018, ongoing with a divestment penalty of June 1, 2018, through October 29, 2018. Please note that the divestment penalty can only be changed to a period the client was properly notified that it was. Unfortunately, we cannot change the decision at the local level. Petitioner Exhibit 12.
8. On May 22, 2019, the Department received a hearing request from Petitioner, contesting the Department's negative action.

### **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.

### **Issue #1**

Regulations governing the hearing and appeal process for applicants and recipients of public assistance in Michigan are found in Mich Admin Code, R 792.10101 to R 792.10137 and R 792.11001 to R 792.11020. Rule 792.11002(1) provides as follows:

An opportunity for a hearing shall be granted to an applicant who requests a hearing because his or her claim for assistance is denied or is not acted upon with reasonable promptness, has received notice of a suspension or reduction in benefits, or exclusion from a service program, or has experienced a failure of the agency to take into account the recipient's choice of service.

A client's request for hearing must be in writing and signed by an adult member of the eligible group, adult child, or authorized hearing representative (AHR). Department of Health and Human Services Bridges Administrative Manual (BAM) 600. Moreover, BAM 600, provides that a request for hearing must be received in the Department local office within 90 days of the date of the written notice of case action.

In the present case, the Department sent Petitioner a Health Care Coverage Determination Notice, DHS-1606, on August 22, 2018, which advised Petitioner she was eligible for MA LTC from July 1, 2018, ongoing with a \$1,579.00 monthly patient pay. Petitioner Exhibit 10. This led Petitioner to believe that her case had been corrected with MA eligibility starting February 1, 2018, with a divestment penalty from February 1, 2018, through June 30, 2018 with MA eligibility starting on July 1, 2018. Petitioner's Attorney stated that it was not until December 2018 that they became aware that the nursing home was having a problem billing for the contested time period, which resulted in him sending the email to the supervisor on January 3, 2019.

This case had been denied and reinstated two times due to Department error. Although the DHHS Supervisor responded on January 4, 2019, Petitioner's son did not get an actual bill from the nursing home about the contested period until April 15, 2019, which was proof that Petitioner's LTC period had not been corrected. Department Exhibit 1, pgs. 19-20. A hearing request was filed with the Department on May 22, 2019. There has been a lot of back and forth communication on this case with phone calls and emails. It has resulted in the case being reinstated two times without a hearing request

being filed. The notice sent to Petitioner on August 22, 2018, stated that the issue had been fixed.

## **Issue #2**

BEM 405, pgs. 14-15

### **Computing Penalty Period**

The penalty period starts on the date which the individual is eligible for Medicaid and would otherwise be receiving institutional level care (LTC, MIChoice waiver, or home help or home health services), and is not already part of a penalty period. When a medical provider is paid by the individual, or by a third party on behalf of the individual, for medical services received, the individual is not eligible for Medicaid in that month and the month is not a penalty month. That month cannot be counted as part of the penalty period. This does not include payments made by commercial insurance or Medicare.

**Note:** If a past unreported divestment is discovered or an agency error is made which should result in a penalty, a penalty must be determined under the policy in place at the time of discovery. If a penalty is determined for a transfer in the past, apply the penalty from the first day after timely notice is given; see Recipient Exception in this item.

### **Recipient Exception**

Timely notice must be given to LTC recipients and (BEM 106) waiver recipients before actually applying the penalty. Adequate notice must be given to new applicants.

In this case, Petitioner reported the intentional divestment when she applied for MA LTC on [REDACTED] 2018. As a result, the Department was put on notice of the divestment and the amount on [REDACTED] 2018. The Department incorrectly calculated the divestment penalty to start June 1, 2018 instead of February 1, 2018. The Department knew of their error even before August 22, 2018, when they sent the Petitioner a corrected notice because they had to reinstate the case two times after it was incorrectly denied. However, the change could not be made by the local office, so it required a BRIDGES fix it ticket submitted on June 25, 2018. BAM 115, 220, 600. BEM 405.

This Administrative Law Judge notes that the divestment penalty date did not change from the initial date incorrectly inputted on June 1, 2018. This is not about Department

error or appropriate notice because the penalty date would have fluctuated with each notice and it did not. Petitioner was deemed eligible for MA LTC from February 1, 2018, through May 31, 2018, with an incorrect divestment penalty from June 1, 2018, through October 29, 2018. According to the Department, the Help Desk Exception unit could not correct the baseline to February 1, 2018, because the client was not properly notified. This is not in keeping with Department policy in BEM 405 in that Petitioner was properly notified when she filed her application on February 28, 2018.

### **DECISION AND ORDER**

This Administrative Law Judge finds that Petitioner's hearing request was timely filed within 90 days of the notice of the nursing home bill that was not going to be paid by MA and a copy being sent to Petitioner's son on April 15, 2019 and is, therefore, being **HELD** for jurisdiction.

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 failed to fix the divestment penalty date to February 1, 2018, through June 1, 2018, for a MA LTC application filed on February 28, 2018 with an intentional divestment.

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. Initiate a BRIDGES FIX IT ticket to change the divestment penalty date to February 1, 2018, through June 30, 2018 with MA LTC eligibility starting on July 1, 2018.
2. Based on policy, the Department should provide Petitioner with written notification of the Department's revised eligibility determination.
3. Issue Petitioner any retroactive benefits she may be eligible to receive, if any.

CF/hb



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**Carmen G. Fahie**  
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 Office of Administrative Hearings and Rules  
Reconsideration/Rehearing Request  
P.O. Box 30639  
Lansing, Michigan 48909-8139

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**Petitioner**

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