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GOVERNOR

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

ORLENE HAWKS
DIRECTOR

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Date Mailed: October 1, 2019
MOAHR Docket No.: 19-008691
Agency No.: ██████████
Petitioner: ██████████

ADMINISTRATIVE LAW JUDGE: Lynn M. Ferris

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 September 5, 2019, from ██████████ Michigan. The Petitioner was represented by ██████████ his Power of Attorney (POA) and Authorized Hearing Representative (AHR). Petitioner did not appear. The Department of Health and Human Services (Department) was represented by Mark Logan, Family Independence Manager, and Kerri Scott, Assistance Payments Worker.

ISSUE

Did the Department properly impose a divestment?

FINDINGS OF FACT

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

1. The Petitioner currently resides in Long Term Care (LTC) and is a Medicaid recipient. Petitioner has resided in LTC since May 2017. Petitioner is ██████ years of age and receives unearned income Retirement, Survivors and Disability Insurance (RSDI) from Social Security Administration (SSA) due to being disabled due to a traumatic brain injury. Exhibit B.
2. The Petitioner had a medical assistance (MA) redetermination; and on May 8, 2019, the redetermination was timely received. The redetermination noted that Petitioner had received a one-time cash payment indicating SSA back pay. Exhibit B, p. 16.

3. The Department sent a Verification Check (VCL) list to Petitioner on May 13, 2019; and verifications were received on June 17, 2019. The verifications consisted of receipts regarding expenditures made from Petitioner's checking account by his POA.
4. On or about August 28, 2019, the Petitioner received \$44,506.00 for retroactive disability payments (RSDI) from the SSA. On September 10, 2018, the funds were deposited into the Petitioner's personal checking account in the amount of \$44,526. Exhibit J, p. 30.
5. After reviewing the verifications and receipts provided by the Petitioner's POA, it was determined that the POA spent \$29,590.31 on repairs and improvements on her home. The Petitioner does not have any ownership interest in the POA's home.
6. On June 20, 2019, the Department issued a Health Care Coverage Determination Notice (HCCDN) advising Petitioner and his POA that since there is no plan for discharge for Petitioner from LTC, the funds used from the lump-sum Social Security payment to remodel and update the POA's home have resulted in a divestment penalty because Petitioner Rackow is not the homeowner, nor is he going to be living there. The total expenditures deemed to be a divestment were \$29,590.31. The divestment penalty period is August 1, 2019 through November 20, 2019. Medicaid will not pay for the cost of LTC services during this time period. Exhibit D.
7. The Nursing home advised the Department that as of June 20, 2019, there was no plan to discharge Petitioner home from the nursing home. Exhibit G. See also Petitioner Exhibit 1 which describes the Petitioner's disability and needs for care.
8. The Petitioner's POA and AHR requested a timely hearing protesting the Department's divestment.

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 this case, the Department imposed a divestment penalty after reviewing expenditures made by Petitioner's POA for repairs and improvements to her home from Petitioner's checking account. In September 2018, the Petitioner received a lump-sum payment from Social Security in the amount of \$44,506.00 due to being determined disabled. There is no dispute that the Petitioner's POA used \$29,590.31 to make various repairs to her home. At the time of the expenditures and the time of the hearing, Petitioner Rackow was not scheduled to be released from LTC. Petitioner does visit the POA's home and stays overnight on occasion. Petitioner is disabled and has a brain injury and as approximately 50% diminishment in cognitive ability and must have 24-hour observation.

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

Divestment is a type of transfer of a resource and not an amount of resources transferred.

Divestment means a transfer of a resource (see *resource defined* in this item 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 in this item under *transfers that are not divestment*. BEM 405 (July 2019), p. 1.

In this case, the resource of the Petitioner was the cash funds in his checking account that were transferred and spent to make improvements to his POA's home.

Transferring a resource means giving up all or partial ownership in (or rights to) a resource. **Not** all transfers are divestment. Examples of transfers include:

- Selling an asset for fair market value (not divestment).
- Giving an asset away (divestment).
- Refusing an inheritance (divestment).
- Payments from a **MEDICAID TRUST** that are **not** to, or for the benefit of, the person or his spouse; see BEM 401 (divestment).
- Putting assets or income in a trust; see BEM 401.

- Giving up the **right** to receive income such as having pension payments made to someone else (divestment).
- Giving away a lump-sum or accumulated benefit (divestment).
- Buying an annuity that is **not** actuarially sound (divestment).
- Giving away a vehicle (divestment).
- Putting assets or income into a Limited Liability Company (LLC)
- Purchasing an asset which decreases the group's net worth and is not in the group's financial interest (divestment). BEM 405, p. 2

Less than fair market value is defined as:

Less than fair market value means the compensation received in return for a resource was worth less than the fair market value of the resource. That is, the amount received for the resource was less than what would have been received if the resource was offered in the open market and in an *arm's length transaction* (see glossary).

Because these transfers were made by Petitioner's POA acting in place of or on behalf of Petitioner they are deemed to be transfers made by Petitioner.

As explained in this item, 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 was 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. BEM 405, p. 11.

Here, clearly Petitioner's LTC services were needed and had been ongoing, and there was no plan that Petitioner be discharged for LTC based upon communications from the nursing home. In addition, based upon notes of the Petitioner's therapy to make him more self-sufficient, it is clear that the Petitioner has extremely limited ability to care for himself due to a brain injury and needs constant supervision and care and observation. Petitioner Exhibit 1. Essentially, the purchases were made to improve an asset not belonging to the Petitioner, and the funds were given away; thus, after reviewing the improvements made, it was correctly determined that they were not for the benefit of Petitioner who did not own the home or have an ownership interest in the home and did not live in the home where the improvements were made, except occasionally, and thus, cannot be said to be made solely for his benefit. Had the improvements been made pursuant to a plan that the Petitioner was to reside in the home and that he would no longer be in LTC, it is likely that the expenditures would have been reasonably made in such case. However, there was no evidence that Petitioner's return to the home could be reasonable anticipated. As such, the Department correctly determined that a

divestment had been made as the funds were given to another and used to improve a home not owned by the Petitioner, which he visits infrequently. Many of the items purchased were things such as furniture, a refrigerator, decorating items, mirrors, curtains, a couch and kitchen set, etc. See Exhibit I.

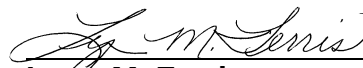
In addition, the undersigned has reviewed the divestment penalty and the divestment penalty period determination and has determined that it was calculated in accordance with Department policy. BEM 405.

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 found a divestment was made with the lump-sum SSA payment in the amount of \$29,590.31 and correctly determined a divestment penalty period from August 1, 2019 through November 20, 2019.

DECISION AND ORDER

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

LF/jaf



Lynn M. Ferris

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

DHHS (via electronic mail)

Kimberly Kornoelje
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