



GRETCHEN WHITMER
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: December 2, 2019
MOAHR Docket No.: 19-010541
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 November 13, 2019, from [REDACTED] Michigan. The Petitioner was represented by Gerald A. Bagazinski, Esq. There were no witnesses on behalf of the Petitioner. The Department of Health and Human Services (Department) was represented by Chantal Fennessey, Assistant Attorney General. Tiffany Tarrance, Eligibility Specialist, was called as a witness on behalf of the Department.

ISSUE

Did the Department properly determine that Petitioner was subject to a Medical Assistance (MA) divestment penalty period?

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 applied for MA benefits.
2. On December 28, 2018, an annuity was issued to Petitioner.
3. The payments were scheduled to begin on January 17, 2019 in the monthly amount \$188.32 for a period of nine years.
4. The Department determined that a divestment had occurred as the annuity was not actuarially sound as Petitioner was not expected to live until the end of the guarantee period of the annuity.

5. The Department penalty period beginning October 1, 2019 through December 7, 2019 based on the full transfer amount of \$19,040.01.
6. On September 17, 2019, the Department sent Petitioner a Health Care Coverage Determination Notice which notified Petitioner that he was eligible for MA benefits subject to a divestment penalty.
7. On September 30, 2019, Petitioner's counsel 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, a divestment occurs when the client transfers a resource (i) within a specified time (the "look-back period"), (ii) for less than fair market value, and (iii) the transfer is not an excluded transfer. BEM 405 (July 2019), p. 1. The look-back period is a transfer within 60 months of 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, pp. 5-6. "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. BEM 405, p. 6. In other words, 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. BEM 405, p. 6. Compensation must have tangible form and intrinsic value. BEM 405, p. 7. Giving an asset away is a transfer that results in a divestment. BEM 405, p. 2. Similarly, shell transactions between relatives that have little or no economic benefit to the applicant are not for fair market value and are a divestment. *Mackey*, 289 Mich App at 706.

In this case, an annuity was executed by Petitioner on December 28, 2018, in the amount of \$19,041.01. The first payment of \$188.32 was scheduled to be made on January 17, 2019. At the time the annuity was issued, Petitioner was ■ years old. An annuity is not actuarially sound if the annuitant is not expected to live until the end of the guarantee period of the annuity. BEM 405, p. 4. The annuity is scheduled to be paid over a period of nine years. At that time, Petitioner would be ■ years old. Under Department policy, Petitioner's life expectancy is 7.32 years. BEM 405, p. 21. As such, the annuity is not actuarially sound.

The Department testified once it determined that the annuity was not actuarially sound, it used the entire amount of the annuity when calculating the divestment. However, under Department policy, the amount transferred for less than fair market value for an annuity that is not actuarially sound is the amount that would be paid after the end of the person's life expectancy. BEM 405, p. 5. As such, the amount transferred for less than fair market value is the value of the payments due in the remaining years of the annuity. Therefore, it is found that the Department failed to calculate the proper divestment amount.

At the hearing, the Department also asserted that the annuity failed to list the State of Michigan as a remainder beneficiary. Under Department policy, if the annuity was purchased or amended by, or on behalf of, the applicant or recipient on or after February 8, 2006, the State of Michigan must be named as the remainder beneficiary in the first position, or as the second remainder beneficiary after the community spouse or minor or disabled child, for an amount at least equal to the amount of the Medicaid benefits paid on behalf of the institutionalized individual. BEM 401 (May 2018), pp. 5-6). An institutionalized individual includes a person receiving appropriate home and community based services specified under the approved state waiver. BEM 106 (October 2018), p. 4.

As previously stated, the annuity in question was issued after the February 8, 2006 date; and, therefore, Michigan is required to be listed as a remainder beneficiary. However, the failure of the State of Michigan to be listed as a remainder beneficiary was not stated on the Health Care Coverage Determination Notice as a reason for the application of the divestment penalty. Specifically, under the section titled "Comments From Your Specialist About This Notice" the Department indicated that "[d]ivestment penalty due to Annuity is not being actuarily sound." Additionally, Petitioner's counsel indicated that the annuity could and would be corrected to list the State of Michigan as a remainder beneficiary. If after redetermining the correct divestment penalty period, the State of Michigan is not listed as a remainder beneficiary, a divestment of the full annuity amount may be warranted.

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 determined that Petitioner was subject to a divestment penalty based upon a transfer amount of \$19,041.01.

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. Determine the correct divestment penalty period; and
2. Notify Petitioner and his attorney in writing of its decision.

JAM/jaf



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 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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