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GOVERNOR

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

ORLENE HAWKS
DIRECTOR

Date Mailed: January 14, 2020
MOAHR Docket No.: 19-011957
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 December 5, 2019, from Detroit, Michigan. Petitioner was not present for the hearing. Petitioner was represented by Attorney, [REDACTED], who was present with Petitioner's daughter, [REDACTED]. The Department of Health and Human Services (Department) was represented by Assistant Attorney Generals (AAG), Meghan Schaar and Jennifer Walker, who appeared with Renee Trudeau, Family Independence Manager. Bridgett Heffron, State Medicaid Eligibility Policy Specialist for SSI-Related Medicaid, and Nicholas Kasbohm, Eligibility Specialist, were called by the Department as witnesses.

ISSUE

Did the Department properly determine that Petitioner divested \$84,192.68 and as a result, impose a Medical Assistance (MA) divestment penalty from September 1, 2019 to June 28, 2020?

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 or around [REDACTED], 2019, a Long-Term Care (LTC) Application for Health Care Coverage Patient of Nursing Facility (DHS-4574) (Application) was submitted to the Department on Petitioner's behalf.
2. In processing the Application and reviewing Petitioner's assets, the Department discovered that Petitioner was the joint owner of 14 certificate of deposit (CD)

accounts in the amount of \$5,000 each and one savings account with a balance of \$7,628.52. The Department determined that the value of the cash assets was \$77,628.52.

3. Petitioner's children, [REDACTED] and [REDACTED], are joint owners on the accounts with Petitioner.
4. The Department concluded that the value of the cash assets was unavailable to Petitioner because she could not sell or spend her share of the assets without consent of the other owners who are not in her MA asset group, and the other owners refused to give consent. The assets were determined to be not countable for MA purposes.
5. The Department concluded that the \$77,628.52 in the accounts was considered a transfer by Petitioner because the action by the joint owners reduced or eliminated Petitioner's ownership or control of the resource, and thus, was a divestment.
6. The Department also determined that from 2016 to 2019, \$6,564.16 in property taxes was paid by Petitioner for a property that did not belong to her, and therefore, was considered a divestment.
7. On October 28, 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 September 1, 2019, but a divestment penalty (based on the \$77,628.52 in cash and \$6,564.16 in property taxes divested) applied, which precluded any LTC benefits from September 1, 2019 to June 28, 2020. (Exhibit A, pp. 21-23)
8. On or around November 4, 2019, Petitioner, through her attorney, requested a hearing disputing the Department's actions, specifically the divestment penalty applied regarding the CD and savings accounts. There was no reference in the hearing request to a dispute or challenge of the divestment penalty imposed regarding the property taxes and Petitioner's attorney stipulated at the commencement of the hearing that the issue was limited to the transfer of the cash assets only. (Exhibit A, pp. 4-5)

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 October 28, 2019 Notice, the Department concluded that Petitioner's MA eligibility was subject to a divestment penalty from September 1, 2019 to June 28, 2020, precluding LTC benefits on Petitioner's behalf during that period, as it determined a divestment occurred. (Exhibit A, pp. 21-23).

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. Divestment results in a penalty period, not MA program ineligibility. BEM 405 (July 2019), pp. 1-2; BEM 400 (July 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 cash assets in CD accounts and a savings account totaling \$77,628.52. Petitioner is the joint owner of the accounts with her two children. It was undisputed that the joint owners were not in Petitioner's MA asset group and that they would not consent to allowing Petitioner to sell or spend her share of the assets. BEM 400, pp. 11-14. Although the Department determined that the cash assets were unavailable to Petitioner and thus, not countable for her MA asset eligibility, the Department concluded that the \$77,628.52 in the accounts was considered a transfer by Petitioner because the action by the joint owners reduced or eliminated Petitioner's ownership or control of the resource, and thus, amounted to a divestment. BEM 400, pp. 11-14; BEM 405, pp. 3-5.

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.

The Department and Petitioner's attorney agreed that the baseline date is September 1, 2019. It was also undisputed that there was a transfer of resources by Petitioner based on the joint owners diminishing or eliminating her control over the funds in the accounts at issue. In dispute, was the date of the transfer and whether the transfer was made within the look back period, or the timeframe that allows for a divestment penalty. The

Department asserted that eligibility for MA is determined on a monthly basis and, at the time of the Application and prior to its filing, there was a current transfer of the resources based on the actions taken by the joint owners. Thus, the Department maintained that at the time Petitioner's MA eligibility was being determined, the joint owners were continuing to take the action to reduce or eliminate Petitioner's ownership or control of the cash assets or resources in her accounts. Because this had occurred prior to the Application and was continuing to occur after the baseline date, the transfer was within the look back period which would allow for a divestment penalty.

Conversely, Petitioner's attorney argued that the transfer date was not within the look back period and should not be considered for a divestment penalty. Petitioner's attorney did not identify what he asserted to be the exact transfer date. Rather, the argument was that the transfer occurred when the joint owners were added to Petitioner's CD and savings accounts, and this action occurred more than five years prior to the baseline date of September 1, 2019. This date was unknown, however.

Petitioner's attorney asserted that since the time the joint owners were added to Petitioner's accounts, they have refused to allow Petitioner access to the accounts without their consent and further, that they have refused to give consent for more than five years prior to September 1, 2019. Petitioner's attorney did not present any official documents from the banks at which the accounts are held, nor was there any sworn and signed affidavits attesting to the validity or truthfulness of the information contained in the documents therein. Instead, Petitioner's attorney or someone acting on Petitioner's behalf, prepared Verification Information forms that the attorney argued were completed and filled out by employees at the banks which attest that the joint owners have been on the accounts for more than five years, and that signatures of each of the owners is required in order to make any one withdrawal from the accounts. The documents do not identify an actual date that the joint ownership occurred or the date in which the refusal to consent began. (Exhibit A, pp. 9-20).

Petitioner's attorney also presented documents signed by each joint owner indicating that their "consent and signature on any redemption or withdrawal is needed to withdraw or close this account and [they] do not consent and this has been [their] position since [their] name[s] [were] added to the account more than 5 years ago." (Exhibit A, pp. 9-20). None of the documents prepared and presented by Petitioner's attorney were dated, thus, it was unclear when the documents were completed. Presumably, the documents were prepared either in anticipation of the hearing or in connection with the Application verification process. There were no documents presented from the time in which the joint ownership was established verifying or supporting Petitioner's arguments. It was also unclear why Petitioner or her representatives could not obtain documents from each bank verifying the date in which joint ownership occurred. Additionally, Petitioner's daughter who was identified on the witness list filed by Petitioner's attorney and who is the joint owner on the accounts in question was present for the hearing on Petitioner's behalf; however, Petitioner's attorney elected not to call her as a witness during the hearing to clarify the information in dispute.

In support of his position that the transfer date should be the date in which the joint owners were added to Petitioner's CD and savings accounts, Petitioner's attorney relies on the example in BEM 405, pp. 3-4 outlining joint ownership and transfers. However, in the example referenced, the client's ownership arrangement is with respect to real property, which the Department argued is distinguishable from cash assets. In the case of Petitioner and her joint owners, the Department asserted that Petitioner still has the possibility to regain ownership or control of her cash assets or money in her accounts, provided her joint owners consent. Whereas in the real property example relied upon by Petitioner, the client relinquished his right to regain interest in the property when he transferred half of it to his sister.

The undersigned is not persuaded by the arguments and evidence presented by Petitioner's attorney, as among other reasons, the date in which the joint owners were added to the account and thus, the transfer date asserted by Petitioner to be correct was not established. The documents presented by Petitioner's attorney were insufficient to show that the transfer occurred more than five years prior to the September 1, 2019 baseline date.

The evidence did establish that within the five-year look-back period and continuing to the time of Petitioner's LTC Application, and after the baseline date, the joint owners were reducing Petitioner's ownership and control of the funds in her accounts. Funds in which the Department maintained could potentially be used towards her cost of care. Department policy provides that this action is a transfer by Petitioner and was appropriately considered by the Department in the calculation of a divestment penalty.

Therefore, 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. At the hearing, Petitioner's attorney did not dispute that the transfer was for less than fair market value and further did not dispute the account balances relied upon or considered by the Department. The transfer is also not excluded per Department policy; therefore, a divestment occurred. Thus, 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 September 1, 2019 and June 28, 2020.

The Department stated that in computing the penalty period, it relied on the \$77,628.52 in cash asset transfers and the \$6,564.16 in property taxes discussed above, which total \$84,192.68. Department policy provides that the penalty period is computed based on the total uncompensated value of all resources divested. 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 \$84,192.68 total uncompensated value of the divested resources and an \$8,469 average monthly private LTC cost in Michigan applicable to Petitioner's 2019 baseline date, the divestment penalty is nine months and 28 days. Therefore, upon review, the Department properly applied a divestment penalty from September 1, 2019 to June 28, 2020.

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 September 1, 2019 to June 28, 2020.

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

Via Email:

MDHHS-UPSC Hearings
BSC1 Hearing Decisions
AG-HEFS-MAHS – Schaar/Walker
EQAD
D. Smith
MOAHR

Counsel for Petitioner

- **Via First-Class Mail:**



Petitioner

- **Via First-Class Mail:**

