



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: November 15, 2019
MOAHR Docket No.: 19-008311
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 September 9, 2019, from Detroit, Michigan. Petitioner was represented by her attorney, [REDACTED]. The Department of Health and Human Services (Department) was represented by Assistant Attorney General (AAG) Leah Brooks who solicited testimony from Cheryl Collins, Eligibility Specialist. Dan Vendzuh, Assistance Payments Supervisor was also present.

Pursuant to an Order Extending the Record for the Filing of Post-Hearing Briefs, on October 16, 2019, AAG Brooks filed the Department's Post-Hearing Brief and Attorney Lloyd filed Petitioner's Post-Hearing Brief. The record was closed on October 16, 2019 and the matter is now before the undersigned Administrative Law Judge for a final determination on the evidence presented.

ISSUE

Did the Department properly impose a Medical Assistance (MA) divestment penalty from April 1, 2019 to June 23, 2019?

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. (Exhibit B, pp. 1-5, 10-14)

- a. At the time of the Application, Petitioner disclosed a transfer of assets for less than fair market value. (Exhibit B, pp. 1-5, 10-14)
2. There was no evidence that prior to the Application, Petitioner was a recipient of MA, LTC benefits or a waiver recipient.
3. On [REDACTED] 2019, Ms. Collins, the caseworker assigned to process the Application, sent Petitioner's attorney an email which included a screenshot from the Bridges computer system that informally notified her that Petitioner's Resource Transfer Period of Ineligibility (divestment period) would begin on March 1, 2019 and end on May 23, 2019. (Exhibit B, p. 15)
4. On [REDACTED], 2019, the Department sent Petitioner a Health Care Coverage Determination Notice (Notice) notifying her that from March 1, 2019 to March 31, 2019, and from June 1, 2019, ongoing, she was approved for MA coverage with a patient pay amount of [REDACTED]. The Notice indicated that from April 1, 2019 to May 31, 2019, Petitioner was approved for MA with a patient pay amount of [REDACTED].
 - a. The Notice further advised Petitioner that the Base Line Date was determined to be April 1, 2019 and that a divestment penalty applied which precluded any LTC benefits from April 1, 2019 through June 23, 2019. (Exhibit B, pp. 17-19)
5. On April 29, 2019, Petitioner's attorney sent an email to the Department inquiring about the discrepancy in the divestment penalty period identified in the prior email (March 1, 2019 to May 23, 2019) and on the Notice (April 1, 2019 to June 23, 2019). Petitioner's attorney requested that the caseworker correct the divestment penalty period to reflect the correct start date of March 1, 2019 and the correct end date of May 23, 2019. (Exhibit B, at p. 20)
6. Because there was a known system issue with Bridges erroneously certifying incorrect divestment penalty periods and baseline dates, on or around May 6, 2019, the Department contacted the Bridges Help Desk for a possible remedy to the incorrectly certified divestment penalty period start date of April 1, 2019. The caseworker notified the Help Desk that the correct penalty period start date should be March 1, 2019 and should continue for 2 months and 23 days. (Exhibit B, at p. 21)
7. During the hearing, the Department acknowledged that the caseworker failed to verify prospective results on the certification page prior to certifying the Application, failed to review the certified results indicated on the Notice, and failed to add commentary to the Notice which would have advised Petitioner of the correct divestment penalty period of March 1, 2019 through May 23, 2019.
8. On or around May 13, 2019, the Help Desk informed the Department caseworker that the divestment penalty period start date could not be changed due to timely

notice requirements and because the caseworker failed to add commentary to the Notice indicating the correct penalty period of March 1, 2019 to May 23, 2019. (Exhibit B, p. 23)

9. On [REDACTED] 2019, the Department sent Petitioner a Benefit Notice which indicates that the divestment period was scheduled to begin on March 1, 2019, but due to a known issue, the divestment period did not begin until April 1, 2019. The Benefit Notice further indicates that the penalty period of 2 months and 23 days will not change and will continue through June 23, 2019. Additionally, the Benefit Notice informs Petitioner that no penalty was assessed for the dates of March 1, 2019 to March 31, 2019 and that the Department is unable to change the penalty start date. (Exhibit B, pp. 24-25)
10. On or around July 22, 2019, Petitioner's attorney requested a hearing disputing the Department's actions, specifically, the incorrect start date of the divestment penalty period. (Exhibit B, at pp. 26-31)

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.

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. 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.

In this case, Petitioner does not dispute that a divestment occurred or that the divestment penalty period of 2 months and 23 days was properly calculated. At issue is the start date of the divestment penalty period. Petitioner asserts that the correct penalty start date should be March 1, 2019, as that is the date in which Petitioner was in LTC and met the eligibility requirements of MA, while the Department maintains that the penalty start date should be April 1, 2019, as the Department is not authorized to retroactively apply a penalty period due to notice requirements.

After processing an application and upon certification of eligibility results, Bridges automatically notifies the client in writing of positive and negative actions by generating the appropriate notice of case action. BAM 220 (January 2019), p. 2.

An adequate notice is a written notice sent to the client at the same time an action takes effect (not pended). For MA cases, adequate notice is given at case opening with a deductible or patient pay amount, or at case opening with a divestment penalty. BAM 220, pp. 3-4. A timely notice is given for negative case actions and is mailed 11 days before the intended negative action takes effect. The action is pended to provide the client a chance to react to the proposed action. BAM 220, pp. 4-5. Examples of negative actions are outlined in BAM 220, none of which include changing the start date of a divestment penalty. BAM 220, p. 11.

At the hearing, the Department could not clearly identify which negative action it asserted occurred in this case, as changing the start date of a divestment penalty is not reflected in the negative actions outlined in BAM 220 that would require timely notice. Additionally, the Department did not present any evidence that correcting the start date of a divestment penalty would be a change of the PET code to a divestment penalty code, that would require timely notice. BAM 220, p.11.

Department policy provides that a penalty period starts on the client's baseline date, which is the first date that the client is eligible for MA, would otherwise be receiving institutional level care (LTC), and is not already part of the penalty period. BEM 405, pp. 6, 14-15. At the hearing, there was no dispute that Petitioner's baseline date was March 1, 2019. The Department's witness testified that she had no reason to believe that Petitioner's baseline date and penalty period start date would not be March 1, 2019 because she checked the Bridges system and the eligibility summary several times prior to certifying the results, and each time reflected a March 1, 2019 start date.

At the hearing, the Department conceded that agency error, specifically, a known issue with the Bridges system and case worker error resulted in the imposition of the incorrect baseline date and penalty period start date of April 1, 2019. The Department asserted that because the case worker failed to insert comments on the Notice which would have advised Petitioner of the correct divestment penalty period of March 1, 2019 through May 23, 2019, the Help Desk was unable to adjust or correct the divestment period because 42 CFR 431.211, BAM 220 and BEM 405 require timely notice prior to taking

negative action. The Department maintained that the penalty must not be imposed before the effective date of the intended negative action.

In support of its argument that timely notice is required prior to correcting the start date of the penalty period, the Department relies on the agency error and recipient exception policy in BEM 405 which states:

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.

BEM 405, pp. 14-15. There was no evidence that prior to the Application, Petitioner was a recipient of LTC benefits, thus, she is considered a new applicant, as she was not a current beneficiary of MA at the time Application was processed or at the time the Application and MA eligibility were incorrectly certified. Furthermore, the divestment in this case was not unreported and was not discovered or determined for a transfer in the past, as the Department was aware of it at the time it processed the Application and in fact, informally notified Petitioner's attorney of the March 1, 2019 to May 23, 2019 divestment penalty period. Additionally, the agency error in this case was not that the Department failed to apply or determine a penalty, but rather that, by the Department's own concession during the hearing, a known issue with the Bridges computer system certified an incorrect penalty start date. Therefore, based on the evidence presented, because the Department is not imposing a penalty to an ongoing case, but rather correcting its admitted agency error in the start date of an already determined penalty at the time of application, adequate notice to Petitioner is sufficient.

It is important to note that the arguments and evidence presented by the Department at the hearing centered around its position that worker error and a computer issue caused an incorrect start date of the penalty period. The Hearing Summary prepared for the hearing, the documentation admitted into the record as Exhibit A and Exhibit B, and the testimony of Ms. Collins were such that the correct baseline date is March 1, 2019, and the penalty period should be March 1, 2019 to May 23, 2019, but could not be corrected due to notice requirements.

However, in its Post-Hearing Brief, the Department attempts to raise additional arguments and present additional documentation that was not presented at the hearing.

Specifically, the Department argued it did not consider the month of March 2019 to be a penalty month because Petitioner paid the nursing facility for March 2019 expenses prior to application of the penalty period. BEM 405, pp. 13-15. The Department also attached what it referred to as Exhibit A, a cashier's check to Petitioner's LTC facility. This cashier's check was not admitted into the hearing record and not presented to the undersigned ALJ at any point prior to the filing of the Post – Hearing Brief.

During the hearing, Petitioner's attorney indicated that some payment to the LTC facility was made on Petitioner's behalf, but the date of such payment was not identified. Additionally, the Department was aware at the time of the request for hearing that payment to the facility had been made on Petitioner's behalf, as it is referenced in Petitioner's hearing request. Therefore, the Department had full opportunity to present this argument and to offer documentation to support this position during the hearing but failed to do so. As such, the arguments raised by the Department in its Post-Hearing Brief that were not presented or supported by any evidence during the hearing will not be considered.

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 imposed a divestment penalty period to Petitioner's MA case from April 1, 2019 to June 23, 2019.

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. Correct the divestment penalty period for Petitioner's MA case and apply it from March 1, 2019 to May 23, 2019.

ZB/tm



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

DHHS

MDHHS-Otsego-Hearings
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cc: MA- Deanna Smith; EQADHShearings
AP Specialist Otsego County (1)