



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]
[REDACTED], MI [REDACTED]

Date Mailed: September 14, 2020
MOAHR Docket No.: 20-004517
Agency No.: [REDACTED]
Petitioner: [REDACTED]

ADMINISTRATIVE LAW JUDGE: Janice Spodarek

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 August 11, 2020.

Petitioner was represented by Attorney, John Adair of Port Huron, Michigan. Petitioner did not call any witnesses.

Respondent, Michigan Department of Health and Human Services, was represented by Assistant Attorney General (AAG), Megan Schaar. Respondent called Bridget Heffron, Medicaid Eligibility Specialist.

The following exhibits were offered and admitted into the record:

Exhibit A.80, Amended Hearing Packet, Department's Exhibit
Exhibit B.1 Stipulations

ISSUE

Was the start date for Petitioner's divestment penalty correct?

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] 2020, Petitioner applied for long-term care (LTC) and retro Medicaid (MA).
2. Petitioner's [REDACTED] 2020 application had an attached retro MA application, indicating unpaid medical bills from November 2019 through January 2020.

3. On April 17, 2020, the Department issued a Health Care Coverage Determination Notice approving Petitioner on February 1, 2020 and applying a divestment penalty from February 1, 2020 through October 1, 2020 applied. Exhibit A.11-14.
4. On April 23, 2020, the Specialist contacted the Bridges Help Desk (HD). HD Ticket [REDACTED] indicated that the divestment penalty begin date is incorrect and that the divestment penalty that should have begun November 1, 2019, was processed in error for February 1, 2020. The Department was unable to go back into the system and change without a ticket override. Exhibit A.2.
5. On June 17, 2020, Petitioner filed a hearing request protesting the start date of the divestment period.

CONCLUSIONS OF LAW

The regulations governing the hearing and appeal process for applicants and recipients of public assistance in Michigan are found in the Michigan Administrative Code, MAC R 400.901-400.951. An opportunity for a hearing shall be granted to an applicant who requests a hearing because his or her claim for assistance has been denied. MAC R 400.903(1). Clients have the right to contest a department decision affecting eligibility or benefit levels whenever it is believed that the decision is incorrect. The department will provide an administrative hearing to review the decision and determine the appropriateness of that decision. BAM 600.

Clients have the right to contest a department decision affecting eligibility or benefit levels whenever they believe the decision is incorrect. The department provides an administrative hearing to review the decision and determine its appropriateness in accordance to policy. This item includes procedures to meet the minimum requirements for a fair hearing. BAM 600, page 1

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.

Participating states must provide at least seven categories of medical services to persons determined to be eligible Medicaid recipients. 42 USC §1396a(a)(10)(A), 1396d(a)(1)-(5), (17), (21). One of the seven mandated services is *nursing facility services*. 42 USC §1396d(a)(4)(A).

For medical assistance eligibility, the Department has defined an asset as “any kind of property or property interest, whether real, personal, or mixed, whether liquid or illiquid, and whether or not presently vested with possessory rights.” NDAC 75-02-02.1-01(3).

Under both federal and state law, an asset must be “actually available” to an applicant to be considered a countable asset for determining medical assistance eligibility. *Hecker*, 527 N.W.2d at 237 (On Petition for Rehearing); *Hinschberger v. Griggs County Social Serv.*, 499 N.W.2d 876, 882 (N.D.1993); 42 U.S.C. § 1396a(a)(17)(B); 1 J. Krauskopf, R. Brown, K. Tokarz, and A. Bogutz, *Elderlaw: Advocacy for the Aging* § 11.25 (2d ed. 1993). Yet, “actually available” resources “are different from those in hand.” *Schweiker v. Gray Panthers*, 453 U.S. 34, 48, 101 S.Ct. 2633, 2642, 69 L.Ed.2d 460 (1981) (emphasis in original). NDAC 75-02-02.1-25(2) explains: Only such assets as are actually available will be considered. Assets are actually available when at the disposal of an applicant, recipient, or responsible relative; when the applicant, recipient, or responsible relative has a legal interest in a liquidated sum and has the legal ability to make the sum available for support, maintenance, or medical care; or when the applicant, recipient, or responsible relative has the lawful power to make the asset available, or to cause the asset to be made available. Assets will be reasonably evaluated. See also 45 C.F.R. § 233.20(a)(3)(ii)(D).

Pertinent department policy states:

BEM, Item 405 is divestment policy which states in pertinent part:

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. BEM 405, p 1.

Divestment means a transfer of a resource (see RESOURCE DEFINED below 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;
- Is not listed below under TRANSFERS THAT ARE NOT DIVESTMENT

See Annuity Not Actuarially Sound and Joint Owners and Transfers below and BEM 401 about special transactions considered transfers for less than fair market value. BEM 405, p 1.

During the penalty period, MA will not pay the client's cost for:

- LTC services.
- Home and community-based services.
- Home Help.
- Home Health. BEM, 405, p 1
- group's financial interest (divestment).

Also see Joint Owners and Transfers for examples. BEM 405, p 2.

Department policy states that it is not divestment to transfer a homestead to the client's:

- Spouse; see Transfers Involving Spouse above.
- Blind or disabled child; see Transfers Involving Child above.
- Child under age 21.
- Child age 21 or over who:
 - Lived in the homestead for at least two years immediately before the client's admission to LTC or BEM 106 waiver approval, and
 - Provided care that would otherwise have required LTC or BEM 106 waiver services, as documented by a physician's (M.D. or D.O.) statement.
 - Brother or sister who:
 - Is part owner of the homestead, and
 - Lived in the homestead for at least one year immediately before the client's admission to LTC or BEM 106 waiver approval. BEM 405, pp 10-11.

Policy also states that the uncompensated value of a divested resource is

- The resource's cash or equity value.
- Minus any compensation received.
- The uncompensated value of a promissory note, loan, or mortgage is the outstanding balance due on the "Baseline Date" BEM, 405, p 15.

Policy states that there is no minimum and no maximum limit on the penalty period for divestment. BEM 405, p 12.

As to computing the penalty period, policy states that the Department is to compute the penalty period on the total uncompensated value of all resources divested. When totaled, the Department is to then divide the total uncompensated value by the average monthly private LTC cost in Michigan for the client's baseline date. This result 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, p 12-13.

The Department is not to apply the penalty period to any month that an individual is not eligible for Medicaid and actually in LTC (or home health, home help, or the MIChoice Waiver program). BEM 405, p 13. LTC Costs are listed in BEM 405 pp 13-14 for each calendar year.

Policy states that the department can cancel a divestment penalty if either of the following occurs before the penalty is in effect:

- All the transferred resources are returned and retained by the individual.
- Fair market value is paid for the resources.

Policy further states that the Department can recalculate the penalty period if either of the following occurs while the penalty is in effect:

- All the transferred resources are returned.
- Full compensation is paid for the resources.

Use the same per diem rate originally used to calculate the penalty period.

Once a divestment penalty is in effect, return of, or payment for, resources cannot eliminate any portion of the penalty period already past. However, the caseworker must recalculate the penalty period. The divestment penalty ends on the later of the following:

- The end date of the new penalty period.
- The date the client notified you that the resources were returned or paid for. BEM, 405, pages 15-16.

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.

BEM 405, pages 14-15.

BAM 220 titled Case Actions discusses adequate and timely notice:

Adequate Notice

An adequate notice is a written notice sent to the client at the same time an action takes effect (not pended). Adequate notice is given in the following circumstances:

All Programs

- Approval/denial of an application.
- Increase in benefits.

...MA Only

- Case opening with a deductible or patient-pay amount.
- Decrease in post-eligibility patient-pay amount.
- Recipient removed due to his eligible status in another case.
- Addition of MA coverage on a deductible case.
- Increase in medical benefits.
- At case open with a divestment penalty.

Timely Notice

All Programs

Timely notice is given for a **negative action** unless policy specifies adequate notice or no notice. See Adequate Notice and, for FAP only, Actions Not Requiring Notice, in this item. A timely notice is mailed at least 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.

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, pages 14-15.

BEMS policy in the Bridges Policy Glossary defines Timely Notice as adequate notice which is mailed at least 11 days prior to the effective date of an intended negative action. BPG Glossary, p 68.

In this case, there is no issue regarding the amount of the divestment. Nor is there any dispute regarding the calculation of the number of months. Rather, the dispute is solely with regard to the start date of the penalty.

Here, the facts are that the Department received Petitioner's [REDACTED] 2020 MA application, as well as an attached retro MA application indicating past medical bills. Policy in BEM 405 requires that when a retro MA application is attached to the MA application, then the Department is required to issue adequate notice at the time of processing the application. Specifically, BEM 405 states: "The penalty period starts on the date which the individual is eligible for Medicaid and would otherwise be receiving institutional level care". BEM 405. Exhibit A.2 Corresponding policy includes any attached retro MA application. Here, the start date under these facts would be November 1, 2019. However, the Department Health Care Determination Notice failed to indicate the November 1, 2019 divestment penalty.

These facts alone would entitle Petitioner to prevail. However, subsequent to the request for a ticket correction with the Bridges help desk, and, prior to the administrative hearing, the Department then decided that because it erred in processing Petitioner's attached MA retro application, that in fact, Petitioner was suddenly not entitled to adequate notice but rather only required to receive timely notice. After a careful review of the substantial and credible evidence of record, the undersigned decides that the Department's argument is not supported by the credible and substantial evidence of record, and thus cannot be upheld for the reasons set forth below.

Under policy, adequate notice is to be given at the time of the application if a retro MA application is attached. Here the adequate notice start date of the penalty is November 1, 2019 (which the Department initially stipulated should have been done), pursuant to BEM 405. Unrefuted evidence is that Petitioner attached the retro MA application. However, the Department wishes to argue that because it failed to process the retro MA application, that this error somehow changes the facts. Put another way, the timely notice argument can only make sense if Petitioner did not attach the retro MA application to the application. The Department's argument engages in a fallacy that changes the facts to be that Petitioner never attached the retro application and thus, Petitioner was no longer entitled to adequate notice. Again, such is contrary to the facts and policy.

BEM 405 additionally states that the Department is to apply timely notice where an application fails to report a divestment penalty timely or fails to report. Here, Petitioner did not fail to report and did not report a divestment late. Petitioner reported the divestment at the time of the MA LTC application. The Department goes as far as to site

BEM 405, p 15 which states that where a past unreported divestment is discovered, then the Department is to give timely notice. Again, this section of the BEM 405 is not applicable as Petitioner did not fail to report the divestment, nor did the Petitioner report the divestment late; the Department processed the application late, not Petitioner. The divestment disclosure was attached to the MA LTC application.

The facts here require adequate notice. To change the facts to fit the policy is a spurious argument; the Department's argument is not supported by the facts and thus, cannot be upheld.

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:

Correct Petitioner's divestment penalty period pursuant to Petitioner's [REDACTED] 2020 MA LTC application to begin on November 1, 2019.

IT IS SO ORDERED.

JS/ml



Janice Spodarek
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

Counsel for Respondent Meghan E. Schaar – via electronic mail

DHHS SSPC – via electronic mail

Counsel for Petitioner John D. Adair – via first class mail
627 Fort St.
Port Huron, MI 48060

Petitioner [REDACTED] – via first class mail
[REDACTED]
[REDACTED]
[REDACTED] MI [REDACTED]