



GRETCHEN WHITMER
GOVERNOR

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

ORLENE HAWKS
DIRECTOR

[REDACTED]
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[REDACTED], MI [REDACTED]

Date Mailed: March 2, 2021
MOAHR Docket No.: 20-008732
Agency No.: [REDACTED]
Petitioner: [REDACTED]

ADMINISTRATIVE LAW JUDGE: Landis Lain

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 February 25, 2021, from Lansing, Michigan. The Petitioner was represented by Attorney Haans Mulder (P61842). [REDACTED] Petitioner's son appeared. Petitioner is in Long Term Care and did not appear at the hearing. The Department of Health and Human Services (Department or Respondent) was represented by Assistant Attorney General H. Daniel Beaton (P43336). Megan Sterk, Assistance Payments Worker and Laurel Palermo, Eligibility Specialist appeared on behalf of the Department.

Department's Exhibits A-E (Pages 1-107) were admitted as evidence. Petitioner's Representative filed a Brief in Support of Petitioner's Appeal on February 24, 2021.

ISSUE

Did the Department properly determine that payment made towards a reverse mortgage resulted in a divestment which required the Department to impose a divestment penalty?

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's Representative filed a Medical Assistance – Long Term Care (MA-LTC) application.

2. After receiving the requested documentation and correspondence with the Department's legal and policy departments, it was determined a divestment occurred in the amount of \$35,150.83 due to transferring of assets for less than fair market value (at issue \$28,225.00).
3. The funds were paid on October 27, 2020, while Petitioner was in the Long-Term Care facility.
4. The Department determined that the penalty date was October 1, 2020, through February 2, 2021. (Exhibit C)
5. The Department approved Medical Assistance beginning October 1, 2020, with a penalty applied.
6. On November 30, 2020, the determination Notice was sent to Petitioner.
7. On December 23, 2020, the Department received a Request for Hearing.
8. On December 28, 2020, the Michigan Office of Administrative Hearings and Rules received a hearing packet and attached documents.
9. The parties agreed that the divestment penalty as applied to the reverse mortgage is the only contested issue in this case.

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.

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.

“The Medicaid Act,” provides for Medical Assistance services to individuals **who lack the financial means to obtain needed health care**. 42 U.S.C. §1396. (Emphasis added)

The Medicaid program is administered by the federal government through the Centers for Medicaid and Medicare Services (CMS) of the Department of Health and Human Services (HHS). The state and federal governments share financial responsibility for Medicaid services. Each state may choose whether to participate in the Medicaid program. Once a state chooses to participate, it must operate its Medicaid program in accordance with mandatory federal requirements, imposed both by the Medicaid Act and by implementing federal regulations authorized under the Medicaid Act and promulgated by HHS.

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).

Pertinent Department policy dictates:

Assets must be considered in determining eligibility for FIP, SDA, RCA, G2U, G2C, RMA, SSI-related MA categories, CDC and FAP. FIP, SDA, RCA, G2U, G2C, CDC and RMA consider only the following types of assets:

- Cash (which includes savings and checking accounts).
- Investments (which includes 401(k), Roth IRA etc.).
- Retirement Plans.
- Trusts.

Assets mean:

- Cash (see Cash in this item).
 - Personal property. Personal property is any item subject to ownership that is not real property (examples: currency, savings accounts and vehicles).
 - Real property. Real property is land and objects affixed to the land such as buildings, trees and fences. Condominiums are real property.
- BEM 400, page 1

All types of assets are considered for SSI-related MA categories. BEM 400, page 2 Asset eligibility is required for G2U, G2C, RMA, and SSI-related MA categories. Asset eligibility exists when the asset group's countable assets are less than, or equal to, the applicable asset limit at least one day during the month being

tested. At application, do not authorize MA for future months if the person has excess assets on the processing date.

If an ongoing MA recipient or active deductible client has excess assets, initiate closure. However, delete the pending negative action if it is verified that the excess assets were disposed of. Payment of medical expenses, living costs and other debts are examples of ways to dispose of excess assets without divestment. LTC and waiver patients will be penalized for divestment; see BEM 405, MA DIVESTMENT. BEM 400, page 6

For all other SSI-related MA categories, the asset limit is:

- \$2,000 for an asset group of one.
- \$3,000 for an asset group of two BEM 400, page 8

Payments that a homeowner receives from a reverse mortgage are loan proceeds. **The loan proceeds are an excluded resource in the month received but are a countable resource if retained in the month following the month of receipt. A transfer of reverse mortgage proceeds is subject to review for a divestment determination when the client is in a penalty situation**; see BEM 405, MA Divestment. BEM 400, pages 21-22. (Emphasis Added)

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, page 2

Divestment is a type of transfer of a resource and not an amount of resources transferred. Divestment means the transfer of a resource (see resource defined in this item and in glossary) by a client or his spouse that are all 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 under transfers that are not divestment in this item. Note: See annuity not actuarially sound and joint owners and transfers in this item and BEM 401 about special transactions considered transfers for less than fair market value. BEM 405, page 1

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

- Long Term Care (LTC) services.
- Home and community-based waiver services.
- Home help.
- Home health. MA will pay for other MA-covered services. BEM 405, page 1

Resource means all the client's and spouse's assets and income. It includes all assets and all income, even countable and/or excluded assets, the individual or spouse receive. It also includes all assets and income that the individual (or spouse) were entitled to but did not receive because of action by one of the following:

- The client or spouse.
- A person (including a court or administrative body) with legal authority to act in place of or on behalf of the client or the client's spouse.
- Any person (including a court or administrative body) acting at the direction or upon the request of the client or his/her spouse. BEM 405, page 2

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. BEM 405, page 6

A transaction between two parties who are not related and who are presumed to have roughly equal bargaining power. It consists of all the following three elements:

- It is voluntary.
- Each party is acting in their own self-interest.
- It is on an open market. By definition, a transaction between two relatives is not an arm length transaction. (BPG Glossary, page 6)

Converting an asset from one form to another of equal value is not divestment even if the new asset is exempt. Payment of expenses such as one's own taxes or utility bills is also not divestment. Most purchases are conversions. BEM 405, page 10

In this case, the facts are not at issue. Petitioner has a reverse mortgage. Petitioner paid \$28,225.00 to the Mortgage Company on an outstanding reverse mortgage in order to become Medicaid eligible. Petitioner's Representative argues that Petitioner is the borrower on the loan and the mortgage encumbering her house. As with other housing loans/mortgages, the loan documents for reverse mortgage include a "borrowers right to prepay" clause that allows Petitioner to pay down or pay off the loan at any time. Prepayment of principal on this loan/mortgage is not divestment.

The Department argues that Petitioner had full discretion to use the funds as she wanted to. Petitioner only repaid the monies to the mortgage company because she wanted to become eligible for Medicaid. She did not receive any return for divesting herself of the mortgage funds, so she returned the funds for less than fair market value. Petitioner should have used the funds for her long-term care.

This Administrative Law Judge finds that:

A **reverse mortgage** loan, like a traditional **mortgage**, allows homeowners to borrow money using their home as security for the loan. Also like a traditional **mortgage**, when you take out a **reverse mortgage** loan, the title to the home remains in borrower's name. However, unlike a traditional mortgage, with a reverse mortgage loan, borrowers do not make monthly mortgage payments. The loan is repaid when the borrower no longer lives in the home. Interest and fees are added to the loan balance each month and the balance grows.

A reverse mortgage does not affect the Medicaid income eligibility requirement because the payout does not count as income; rather, they are **loan** proceeds. After 30 days, the loan proceeds (cash) are funds which would become an asset of the borrower. Department policy explicitly makes this determination.

Payments that a homeowner receives from a reverse mortgage are loan proceeds. **The loan proceeds are an excluded resource in the month**

received but are a countable resource if retained in the month following the month of receipt. A transfer of reverse mortgage proceeds is subject to review for a divestment determination when the client is in a penalty situation; see BEM 405, MA Divestment. BEM 400, pages 21-22. (Emphasis Added)

Such an asset (cash) was available and countable to Petitioner. Petitioner chose to take an available asset and pay the assets (cash) to a third party (the mortgage company) rather than paying long term care costs. She received no benefit for payment of a loan that had not come due because the homestead remained an asset which is excluded from the calculation. Thus, the assets (now cash) were transferred or converted solely for the purpose of making them unavailable for purposes of Medical Assistance eligibility.

The second that Petitioner took the reverse mortgage in October 2007, Petitioner gained a cash asset which Petitioner was free to spend in any fashion she chose. She was also free to save the funds, but the cash funds then became a countable available asset after 30 days in Petitioner's possession. Petitioner was not required to make payments to the mortgage at the time of application. Petitioner chose to pay cash in hand to the mortgage company in order to qualify for Medicaid. She transferred her cash resource to a third party to pay on the homestead loan. She did not pay herself back, she converted the money to the mortgage company. Thus, divestment of the funds did occur.

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 determined that that Petitioner divested \$28,225.00. The Department has established by the necessary competent, substantial and material evidence on the record that it acted in accordance with Department policy when it determined that a divestment penalty must be imposed based upon Petitioner's divestment of excess assets.

DECISION AND ORDER

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

LL/hb



Landis Lain
Administrative Law Judge
for Elizabeth Hertel, 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

Allegan County via electronic mail

BSC3 via electronic mail

C. George via electronic mail

EQADHShearings via electronic mail

Counsel for Respondent

H. Daniel Beaton, Jr.
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