



GRETCHEN WHITMER
GOVERNOR

STATE OF MICHIGAN
DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS
MICHIGAN ADMINISTRATIVE HEARING SYSTEM

ORLENE HAWKS
DIRECTOR

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Date Mailed: January 18, 2019
MAHS Docket No.: 18-012504
Agency No.: [REDACTED]
Petitioner: [REDACTED]

ADMINISTRATIVE LAW JUDGE: Alice C. Elkin

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 January 3, 2019, from Detroit, Michigan. Petitioner was represented by her daughter and authorized hearing representative (AHR), [REDACTED]. The Department of Health and Human Services (Department) was represented by Lorraine Massie, Assistance Payment Supervisor.

ISSUE

Did the Department properly conclude that Petitioner was subject to a divestment penalty from receipt of Medicaid (MA) Long Term Care (LTC) benefits?

If there was a divestment, did the Department properly calculate the 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 resides in an LTC facility.
2. Petitioner began receiving MA LTC benefits beginning December 2017.
3. The LTC facility in which Petitioner resides charges a daily rate of \$379.64 (Exhibit 1).
4. Petitioner co-owned a mobile home with the AHR and the AHR's husband.

5. A March 9, 2018 appraisal of the mobile home showed that it had an as-is value of \$96,000 (Exhibit E, p. 11).
6. The home was sold on March 23, 2018 to Petitioner's granddaughter and her husband (Exhibit D).
7. Petitioner's granddaughter and the granddaughter's husband incurred \$70,000 in expenses in the transaction.
8. Cash proceeds to the sellers from the sale totaled \$22,894.78 (Exhibit F, p. 1).
9. With her portion of the proceeds from the sale, on April 4, 2018, Petitioner purchased an irrevocable funeral contract (Exhibit 2).
10. The Department certified the purchase of the irrevocable funeral contract (Exhibit 2, p. 1).
11. On October 19, 2018, the Department sent Petitioner a Health Care Coverage Determination Notice, notifying her that she was approved for LTC benefits from July 1, 2018 ongoing with a \$1,014 monthly patient pay amount, but MA would not pay for her LTC services from November 1, 2018 through December 14, 2018 because she had transferred assets for less than fair market value (Exhibit G).
12. On [REDACTED] 2018, the Department received Petitioner's request for hearing, disputing the Department's applying a divestment penalty to her receipt of LTC benefits (Exhibit B).

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.

Petitioner was an ongoing recipient of MA LTC benefits. The Department concluded that a March 26, 2018 sale of a mobile home co-owned by Petitioner, her daughter, and her son-in-law to Petitioner's granddaughter and the granddaughter's husband resulted in a

divestment of Petitioner's assets. In an October 19, 2018 Health Care Coverage Determination Notice, the Department notified Petitioner that it applied a divestment penalty to Petitioner's receipt of LTC benefits, finding that she was ineligible for LTC benefits from November 1, 2018 to December 14, 2018 because she had divested assets.

Once a client is approved for MA LTC benefits, the Department must review any transfer of assets by the client that occurs on or after a client's baseline date, which is the date the client was eligible for MA and either in LTC, approved for the waiver, eligible for Home Health services, or eligible for home help services. BEM 405 (October 2018), pp. 5-6. If the client has transferred a resource for less than fair market value, the transfer is a divestment (except for some limited transactions expressly identified in policy that are not applicable in this case). BEM 405, p. 1. "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. 6. Giving an asset away is a transfer that results in a divestment. BEM 405, p. 2.

At the hearing, the Department explained that the transfer at issue the sale of the mobile home, not Petitioner's use of her portion of the proceeds from the sale to purchase the irrevocable funeral contract. The Department contended that Petitioner divested assets because she conveyed her interest in the mobile home to her granddaughter and the granddaughter's husband for less than fair market value.

The Department explained at the hearing that it concluded that the fair market value of the mobile home was \$96,000, the as-is value of the home, and the purchasers paid only \$70,000 for the home. Thus, based on Petitioner's one-third ownership of the home, the Department determined that Petitioner divested \$8,667, which was one-third of the \$26,000 difference between what the Department concluded was the fair market value of the property and the amount the granddaughter and her husband paid for it.

To determine the fair market value of mobile homes, the Department can use the deed, mortgage, purchase agreement or contract; state equalized value on current property tax records multiplied by two; statement of a real estate agent or financial institution; attorney or court records; or county records. BEM 400 (October 2018), p. 32. Here, the Department relied on the appraisal prepared on the bank's behalf in connection with the sale of the property, which, because it was prepared on the bank's behalf and was accepted by the bank, would serve as the financial institution's statement. The appraisal concluded that the value of the property, as improved, was \$106,000 (Exhibit E, p. 8). The value of the property, as is, was \$96,000. Although the appraisal indicates that the sellers were giving purchasers a \$36,000 gift of equity (Exhibit E, p. 11), and this statement is consistent with the information on the settlement agreement and closing disclosures (Exhibits C and F), the Department testified that it relied on the

as-is value of the home because, consistent with the AHR's testimony, improvements had not been made to the home. The AHR argued that the value property was less than \$96,000 due to the cost of labor and materials for the required new roof and other improvements. However, she admitted that she did not have any documentation of a different value to support her position. Based on the evidence presented, the Department properly concluded that the fair market value of the mobile home at the time of sale was \$96,000.

The Department contended that Petitioner received less than fair market value for the mobile home because her granddaughter and husband purchased it for \$70,000. A review of the settlement statement (Exhibit C) shows that the granddaughter and her husband paid the following amounts at closing:

- \$529.87 for city/town taxes;
- \$764.27 for title insurance;
- \$20 for a wire fee;
- \$30 for recording fees;
- \$116.60 for transfer taxes;
- \$45,540.69 for payoff of the mortgage loan on the property;
- \$75 for warranty deed prep;
- \$28.79 for utility bill; and
- \$22,894.78 balance to sellers.

When added together, these expenses total \$70,000. Thus, the closing statement establishes that the purchasers paid \$70,000 at closing for the mobile home.

This conclusion is consistent with the closing disclosure (Exhibit F). The closing disclosure showed a "sale price of property" of \$106,000 and a seller credit of \$36,000. The difference between the sales price of \$106,000 and the \$36,000 credit results in a sales price of \$70,000. Because \$70,000 for the home is less than the home's fair market value, the Department properly concluded that Petitioner divested assets when she transferred the home to her granddaughter and the granddaughter's husband.

A divestment results in an MA penalty period, not ineligibility, during which time MA will pay for MA-covered services but not LTC services. BEM 405, p. 1. The Health Care Coverage Determination Notices sent October 19, 2018 and December 8, 2018 both notified Petitioner that the divestment penalty would run from November 1, 2018 to December 14, 2018 (Exhibit G, p. 2; Exhibit H, p. 2).

The AHR disputed the Department's calculation of the penalty period. Department policy and federal regulations provide that the number of penalty months and days for a divestment penalty is computed by dividing (1) the total "uncompensated value" of the divested resource by (2) the average monthly private LTC cost in Michigan for the client's baseline date. 42 USC 1396p(c)(1)(E)(i); BEM 405, p. 12.

The uncompensated value of a divested resource is the resource's cash or equity value less any compensation received. BEM 405, p. 14. In this case, the uncompensated value of the mobile home is \$26,000, the difference between the as-is value of \$96,000 and the \$70,000 paid by the purchasers. Because Petitioner was a one-third owner of the home with her daughter and son-in-law, her portion of the uncompensated value is \$8,667.

Although the AHR presented evidence concerning the daily rate of the LTC facility in which Petitioner resided, in determining the divestment penalty, Department policy and federal law require the Department to apply the average monthly private LTC cost in Michigan based on the client's baseline date. The baseline date is the date the client was eligible for MA and in LTC. BEM 405, p. 6; see also 42 USC 1396(c)(1)(E)(i) (specifying that the divisor in calculating the divestment penalty period is the average monthly cost of private patient of nursing facility services in the state at the time of application). Although the Department testified that Petitioner was eligible for LTC benefits beginning September 1, 2017 (Exhibit A, p. 2), both the October 19, 2018 and December 8, 2018 Health Care Coverage Determination Notices sent to Petitioner indicate that Petitioner's baseline date was December 18, 2017 (Exhibit G, p. 2; Exhibit H, p. 2). Although the Department's testimony and the Notices are inconsistent, because both indicate that Petitioner was eligible for MA and in LTC in 2017, the baseline date is in 2017 and the average monthly private LTC cost that is used in determining the penalty period is that applicable in 2017. The average monthly private LTC cost in Michigan in 2017 was \$8,018. BEM 405, p. 14.

When the \$8,667 uncompensated value of the home is divided by the \$8,018 average monthly private LTC cost in Michigan in 2018, the disqualification period is 1.08 months. The remaining fraction must be multiplied by 30 to determine the number of days for the penalty period in the remaining partial month. BEM 405, p. 13. 1.08 months equals one month, 3 days. Despite the Department's testimony that it had recalculated the penalty period applied in Petitioner's case and concluded that it ran from November 1, 2018 to December 2, 2018, both Health Care Coverage Determination Notices show a divestment penalty applied from November 1, 2018 to December 14, 2018 and the AHR testified that she was not aware of any shortened divestment penalty. Under the facts presented, the Department has failed to satisfy its burden of showing that it properly calculated the divestment penalty applicable in this case.

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 concluded that Petitioner divested assets but failed to satisfy its burden of showing that it properly calculated the divestment penalty.

DECISION AND ORDER

Accordingly, the Department's decision is **AFFIRMED IN PART** with respect to the finding that there was a divestment and **REVERSED IN PART** with respect to the calculation of the divestment penalty.

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. Recalculate the divestment penalty;
2. Supplement Petitioner's LTC provider for any LTC benefits Petitioner was eligible to receive but did not;
3. Notify Petitioner of its decision in writing.

AE/tm



Alice C. Elkin
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 Administrative Hearing System (MAHS).

A party may request a rehearing or reconsideration of this Order if the request is received by MAHS 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. MAHS will not review any response to a request for rehearing/reconsideration.

A written request may be mailed or faxed to MAHS. If submitted by fax, the written request must be faxed to (517) 763-0155; Attention: MAHS Rehearing/Reconsideration Request.

If submitted by mail, the written request must be addressed as follows:

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

DHHS

Jim Tervo
47420 State Hwy M-26
Suite 62
Houghton, MI 49931

Authorized Hearing Rep.

[REDACTED]
[REDACTED]
[REDACTED]

Petitioner

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

cc: ME—D. Smith; EQADHShearings
AP Specialist-Houghton (1)