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GOVERNOR

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

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DIRECTOR

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Date Mailed: February 7, 2020
MOAHR Docket No.: 19-010588
Agency No.: ██████████
Petitioner: ██████████

ADMINISTRATIVE LAW JUDGE: Lynn M. Ferris

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, an in-person hearing was held on January 9, 2020, in ████████ Michigan. The Petitioner was represented by Attorney Erin L. Majka. The Department of Health and Human Services (Department) was represented by Cassandra Drysdale Crown, Assistant Attorney General; and Megan Schaar, Assistant Attorney General. Annette Reyna-Flores, Eligibility Specialist; and Bridget Heffron, SSI-Related Eligibility Policy Specialist IV; appeared as witnesses for the Department. As a procedural matter, the Petitioner in this case, ██████████ is the wife of ██████████ who is the Petitioner in a companion case, MOAHR Docket No. 19-010587, and involve the same issue regarding the divestment of assets and the applicable divestment penalty period. Consequently, by stipulation of counsel, the cases were consolidated for purposes of hearing and were heard together. Separate Hearing Decisions however are required to be issued.

ISSUE

Did the Department properly impose a Medical Assistance (MA) divestment penalty period for October 1, 2019 through April 23, 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. The Petitioner, ██████████, together with her husband ██████████ applied for Medicaid on June 28, 2019. Both ██████████ and ██████████

██████████ were in a long-term-care facility at the time of their application. ██████████ and ██████████ each filed his/her own separate application.

2. In their respective applications for Medicaid, both ██████████ and ██████████ (Petitioners) disclosed an asset transfer for a total amount of \$114,333.00 that created a divestment pursuant to Department's policy found in the Bridges Eligibility Manual, BEM 405. The disclosure was contained in an attachment to the Petitioners' applications. The divestment penalty period resulting from the divestment was disclosed with the divestment in the Petitioners' applications.
3. The Divestment amount was split and applied equally between Petitioners. The Petitioners do not contest how the divestment amount was applied by the Respondent.
4. On August 12, 2019, the Department/Respondent issued a Health Care Coverage Determination Notice (Notice) finding the Petitioner was eligible for Medicaid Long Term Care (LTC) effective June 1, 2019, ongoing with a \$5,583 monthly patient amount (██████████) and \$5,628 monthly patient pay amount (██████████).
5. At the time it issued the August 12, 2019, Notice, the Department did not include the divestment penalty period in the notice which it issued which was an error.
6. On August 15, 2019, the Department was notified by ██████████ an employee of Petitioners' attorney's office, that the August 12, 2019 Notice did not include a divestment penalty period and sought that it be corrected.
7. The Department's caseworker acknowledged the omission and advised that a correction would be made.
8. The Department caseworker issued a manual notice on August 27, 2019, which imposed a divestment penalty period beginning October 1, 2019 through April 23, 2020.
9. The Department caseworker that processed the Petitioners' applications was aware that a divestment occurred and acknowledged that at the time she processed the case the divestment penalty period should have been included in the August 12, 2019 Notices sent to both Petitioners.
10. On August 27, 2019, the Department caseworker issued a manually prepared Benefit Notice and advised the Petitioners' counsel that the divestment penalty would be started October 1, 2019, and that the divestment penalty period was October 1, 2019 through April 23, 2020. The caseworker further advised that she had to start the divestment penalty period on October 1, 2019, because negative action rules applied.

11. On September 5, 2019, Petitioners' attorney sent Petitioners timely hearing requests for MOAHR Reg. No. 19-010587 (██████████) and MOAHR Reg No. 19-010588 (██████████) Exhibit D, p. 2. The hearing requests were received by the Department on September 9, 2019.
12. On September 18, 2019 the Department, through its representative Jeffrey Cook Department Supervisor, responded to the Petitioners' attorney's request for a case conference stating that the Divestment period on October 1, 2019, was correct because of negative action rules and asked if the Petitioners would withdraw their hearing request. Petitioners' attorney declined to withdraw the hearing requests.

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 (July 2019), pp. 1-2; BEM 400, (April 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, Petitioners do not dispute that a divestment occurred or that the divestment penalty period duration was properly calculated. At issue is the start date of the divestment penalty period. Petitioners assert that the correct penalty start date should be June 1, 2019, as that is the date that Petitioners were residing in LTC and met the eligibility requirements of MA. The Respondent Department (Department) maintains that the penalty start date should be October 1, 2019, as the Department was required to issue a negative action notice due to its failure to include the divestment penalty period in the first Health Care Coverage Determination Notice it issued on August 12,

2019. Additionally, the Department stated that it is not authorized to retroactively apply a divestment penalty period due to notice requirements found in Department policy.

After processing an application and upon certification of eligibility results, the Department's Bridges computer system notifies the client in writing of positive and negative actions by generating the appropriate notice of case action which in this case is referred to as a Health Care Coverage Determination Notice. BAM 220, April 2019, p. 2.

The two types of notice, adequate or timely, are defined by Department policy as follows: An adequate notice is a written notice sent to the client at the same time an action takes effect (not pending). For a MA case, such as the instant matter, 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 a **negative action** unless policy specifies adequate notice or no notice. A timely notice is mailed at least 11 days before the intended negative action takes effect. The action is pending to provide the client a chance to react to the proposed action. BAM 220, pp. 4-5 (emphasis in original). Negative Action is also defined in the BPG Glossary as: An action taken to deny an application or reduce a benefit. BPG Glossary, (April 2019) p. 48. In addition, a negative action is also defined as a MDHHS action to deny an application or to reduce, suspend or terminate a benefit. BAM 220, p. 1.

In this case, counsel for the parties acknowledge that the divestment penalty period was not included in the Department's August 12, 2019 Notices approving Petitioners for Medicaid LTC effective June 1, 2019. Counsel for the parties further agree that the Petitioners' applications both include notification to the Department that a divestment had occurred. Subsequently after the August 12, 2019 Notice was issued, the Petitioners' attorney's office notified the Department caseworker, on or about August 15, 2019, that the Divestment penalty period was not processed or included in the August 12, 2019 notices sent to both Petitioners. The Department in response to its failure to include the divestment penalty in the August 12, 2019 Notice, issued a manual notice on August 27, 2019, and imposed the divestment penalty period to begin October 1, 2019. Had the divestment penalty period been included in the August 12, 2019 Notice approving the Petitioners for full coverage Medicaid effective the June 1, 2019, the divestment penalty would have begun on June 1, 2019. The agency error occurred in this case when the caseworker failed to process the divestment penalty and include the divestment penalty period when processing the August 12, 2019 application. The error was discovered on August 15, 2019, when the Department was made aware of its error by Petitioners' attorney's office.

Notwithstanding this error by the Department, as explained hereafter, the Department nonetheless correctly applied Department policy when it processed the divestment penalty and imposed a divestment penalty period beginning October 1, 2019. In this case, the change that was processed by the Department to include the divestment penalty period did affect the Petitioner's ongoing full Medicaid coverage for long-term care as during the divestment period, the LTC expenses will not be paid by the Medical

Assistance (Medicaid) as required by BEM 405. See above. As such the action taken by the Department, imposing the divestment penalty, in fact did reduce and suspend the Medicaid payment benefits for Petitioners LTC commencing October 1, 2019. This being the case, timely notice of the action was required and as such the Notice was required to be mailed at least 11 days before the intended negative action takes effect. When the manual Notice was issued on August 27, 2019, imposing the divestment penalty period, it extended the Notice period into September 2019, thus, requiring the action (divestment penalty period) to begin or take effect at the beginning of the first day of the following month, October 1, 2019. After learning of its error in failing to include the divestment penalty period in the first Notice issued August 12, 2019, the Department correctly acted in accordance with BAM 220 and federal law found in 42 USC 1396p and BAM 405.

In addition, the undersigned considered the arguments made on behalf of Petitioners by its counsel with respect to the requirements found in 42 USC 1396p(c)(1)(A) and (D)(ii) which require the Michigan State Plan for Medicaid benefits adhere to provisions found in the regulation that address divestment actions by individuals seeking Medicaid LTC and that such individuals are not eligible for Medicaid during a 60-month lookback period if a divestment has occurred. As regard Section (D)(i) this section of the regulation requires that the penalty period begin the later of the first day of the month the resource was transferred for less than fair market value, or the date the individual is eligible under the state plan and receiving institutional care based on an approved application for such care but for the application of the penalty period. These provisions require that if a divestment penalty period is imposed at the time of application by Notice to the applicant then the date of the divestment is the date the application is approved. 42 CFR 431.211 requires that if a penalty period is imposed on an individual who is already eligible for Medicaid, as was the case with both Petitioners, the state must provide a 10 day adverse action notice. See also, U.S. Department of Health and Human Services' Centers for Medicare and Medicaid Services State Medicaid Director Letter #06-018; and Supplement 9b to Attachment 2.6-A, p.2, paragraph 3; which require the divestment penalty to start at the later of the first day of a month which assets have been transferred for less than fair market value or the date on which the individual is eligible for medical assistance under the State plan and is receiving institutional level of care services (based on an approved application for such services) that, were it not for the imposition of the penalty period, would be covered by Medicaid.

As can be seen by the above regulatory setup above, the divestment penalty could not be applied on the date the Petitioners were approved for Medicaid LTC because at the time the divestment penalty was imposed both Petitioners were already found eligible for Medicaid.

The undersigned also reviewed a Hearing Decision issued by Administrative Law Judge Aaron McClintic in MOAHR Docket No. 19-009242 issued October 22, 2019, which is cited by Petitioners as involving the same issue of starting a divestment penalty in the wrong month under BEM 405. See *Petitioners' Joint Prehearing Brief*, p. 9. In that

matter, the application of the divestment penalty period **was included** in the Health Care Coverage Notice approving the application for Medicaid LTC. The Department had initially incorrectly denied the application on July 5, 2019. An application was then subsequently processed on July 26, 2019; and the Petitioner was found eligible for nursing home level care effective May 1, 2019; and the ALJ found that the divestment penalty contained in the Notice must begin on May 1, 2019, citing BEM 405, p. 13. The ALJ found that no agency error was made when processing the application; it was the divestment itself that required a penalty to be imposed, not any error made by the Department when it processed and approved the application and cited the federal regulations found in 42 USC 1396p(c)(1)(A) and 42 USC 1936p(c)(1) (d)(ii) as not supporting the Department's actions. Unlike the facts in the instant matter where the divestment penalty was not included in the Notice approving Petitioners for Medicaid, the divestment penalty in the case cited by Petitioners' counsel **was** included in the first notice approving the application and the dispute involved the computation of the divestment penalty period. The ALJ found that no error was made when the Department denied the application initially and thus timely notice was not required when it subsequently approved the application and imposed the divestment penalty period for a divestment disclosed with the application.

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 began the divestment penalty period on October 1, 2019.

DECISION AND ORDER

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

LMF/jaf



Lynn M. Ferris

Administrative Law Judge

for Robert Gordon, Director

Department of Health and Human Services

