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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]
[REDACTED]
[REDACTED], MI [REDACTED]

Date Mailed: August 19, 2020
MOAHR Docket No.: 20-003885
Agency No.: [REDACTED]
Petitioner: [REDACTED] [REDACTED]

ADMINISTRATIVE LAW JUDGE: Aaron McClintic

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 teleconference hearing was held on July 14, 2020, from Lansing, Michigan. The Petitioner was represented by her attorney James Thomas. The Department of Health and Human Services (Department) was represented by Assistant Attorneys General Geraldine Brown and Stephanie Service. Kori Harris, Eligibility Specialist, appeared and testified for the Department. Department Exhibit 1, pp. 1-276 was received and admitted. The parties’ attorneys submitted briefs which were received and reviewed by the undersigned Administrative Law Judge.

ISSUE

Did the Department properly determine that Petitioner divested assets and impose 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. On [REDACTED] [REDACTED] 2019, Petitioner applied for Long Term Care Medical Assistance (MA-LTC).
2. On January 16, 2020, a Health Care Coverage Determination Notice was sent to Petitioner informing her that she was eligible for MA-LTC with a divestment penalty period from November 1, 2019, through January 11, 2029, due to divestment totaling \$ [REDACTED]

3. On April 21, 2020, Petitioner requested hearing disputing the finding of divestment and imposition of divestment penalty period.
4. Petitioner transferred assets into a trust on November 6, 2014, totaling \$ [REDACTED]

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.

Medicaid (MA) ONLY

Divestment results in a penalty period in MA, **not** ineligibility. Divestment policy does **not** apply to Qualified Disabled Working Individuals (QDWI); see Bridges Eligibility Manual (BEM) 169.

Divestment is a type of transfer of a resource and not an amount of resources transferred.

Divestment means a transfer of a resource (see *resource defined* in this item 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*; see definition in glossary.
- Is not listed in this item under *transfers that are not divestment*.

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*.

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.

Do **not** apply a divestment penalty period when it creates an undue hardship; see *undue hardship* in this item. BEM 405

LOOK-BACK PERIOD

The first step in determining the period of time that transfers can be looked at for divestment is determining the baseline date; see *baseline date* in this item.

Once the baseline date is established, you determine the look-back period. The look back period is 60 months prior to the baseline date.

Entire Period

Transfers that occur on or after a client's baseline date must be considered for divestment. In addition, transfers that occurred within the 60-month look-back period must be considered for divestment.

Penalty Situation

A divestment determination is not required unless, sometime during the month being tested, the client was in a penalty situation. To be in a penalty situation, the client must be eligible for MA (other than QDWI) and be one of the following:

- In an LTC facility.
- APPROVED FOR THE WAIVER; see BEM 106.
- Eligible for Home Help.
- Eligible for Home Health.

Baseline Date

A person's baseline date is the first date that the client was eligible for Medicaid and one of the following:

- In LTC.
- APPROVED FOR THE WAIVER; see BEM 106.
- Eligible for Home Health services.
- Eligible for Home Help services

A client's baseline date does not change even if one of the following happens:

- The client leaves LTC.
- The client is no longer APPROVED FOR THE WAIVER; see BEM 106.
- The client no longer needs Home Help.
- The client no longer needs Home Health. BEM 405

MONTHLY DETERMINATIONS

Medicaid eligibility is determined on a calendar month basis. Unless policy specifies otherwise, circumstances that existed, or are expected to exist, during the calendar month being tested are used to determine eligibility for that month.

When determining eligibility for a future month, assume circumstances as of the processing date will continue unchanged unless you have information that indicates otherwise. BEM 105

The look-back date specified in this subparagraph is a date that is 36 months (or, in the case of payments from a [trust](#) or portions of a [trust](#) that are treated as [assets](#) disposed of by the individual pursuant to paragraph (3)(A)(iii) or (3)(B)(ii) of subsection (d) or in the case of any other disposal of [assets](#) made on or after February 8, 2006, 60 months) before the date specified in clause (ii).

(ii)The date specified in this clause, with respect to—

(I)

an institutionalized individual is the first date as of which the individual both is an institutionalized individual and has applied for medical assistance under the State plan, or

(II)

a noninstitutionalized individual is the date on which the individual applies for medical assistance under the State plan or, if later, the date on which the individual disposes of assets for less than fair market value. 42 USC 1396p(c)(1)(B)

In this case, the Department's position is that the first date Petitioner was eligible for MA-LTC was November 1, 2019, and therefore the baseline date is November 1, 2019. 60 months prior to November 1, 2019, was November 1, 2014. Therefore, the transfer on November 6, 2014, was within the look back period and is divestment. The Department cites BEM 405 in support of their position. The Department argues that Department policy is consistent with the federal statute.

Petitioner's position is that the transfer assets totaling \$ [REDACTED] to a trust on November 6, 2014, was more than 60 months prior to the date of the MA-LTC application filed on [REDACTED] [REDACTED] 2019, and therefore was outside the look back period and should not be deemed to be divestment. Petitioner cites the federal statute 42 USC 1396p(c)(1)(B) in support of her position and argues that Department policy in BEM 405 regarding baseline date is contrary and inconsistent with the federal statute.

The only issue in dispute is how to calculate the look back period. Department policy states that to calculate the look back period you first have to determine the baseline date. The baseline date is established by looking at the date the client was eligible for Medicaid and in Long Term Care. Petitioner applied for MA-LTC on [REDACTED] [REDACTED] 2019, but was found to eligible going back to the first of the month November 1, 2019, pursuant to Department policy. BEM 105 Petitioner was also in Long Term Care on November 1, 2019. Therefore, according to Department policy, the baseline dated is November 1, 2019. Going back 60 months from November 1, 2019, establishes the look back period going back to November 1, 2014. Petitioner's transfer of assets on November 6, 2014, was within the lookback period and was properly found to be divestment by the Department.

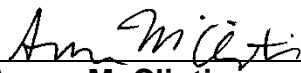
Petitioner argued that the federal statute 42 USC 1396p(c)(1)(B) makes reference to the "date of application" in determining the baseline date. However, the federal statute states the date of application under the State plan (emphasis added) is utilized to determine the baseline date. The State of Michigan chose to allow applicants to potentially be eligible for MA for the entire month of application and because of that potential eligibility chose to construct divestment policy to include the first date of eligibility in the look back period calculation. That policy is fair and reasonable and consistent with the federal statute. That policy also fits with the rest of the State Medicaid Plan.

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 divestment occurred in the amount of \$[REDACTED] and imposed divestment penalty period from November 1, 2019, through January 1, 2029.

DECISION AND ORDER

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

AM/hb



Aaron McClintic
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

DHHS-SSPC via electronic mail

BSC3 via electronic mail

D. Smith via electronic mail

EQADHShearings via electronic mail

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