



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]

Date Mailed: October 28, 2020
MOAHR Docket No.: 20-004945
Agency No.: [REDACTED]
Petitioner: [REDACTED]

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, a four way telephone hearing was held on October 5, 2020, from Clawson, Michigan. The Petitioner was represented by. The Department of Health and Human Services (Department) was represented by Assistant Attorney General [REDACTED]. Franklin Cabello, Eligibility Specialist testified as a witness on behalf of the Department.

ISSUE

Did the Department properly impose a divestment?

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 applied for Long Term Care on [REDACTED] 2020 and the application was processed by the Department on [REDACTED] 2020
2. The Department determined that the Petitioner had made a gift to his daughter in the amount of \$27,886 and the Department imposed a Divestment Penalty of 3 months and 7 days. The amount of the divestment and the duration of the divestment penalty period are not contested.

3. The Department caseworker processed the application and determined that Petitioner was eligible for Long Term Care effective March 1, 2020 and that a divestment penalty was imposed for 3 months 7 days to begin March 1, 2020 through June 7, 2020.
4. A Health Care Coverage Determination Notice was generated by the Department on April 10, 2020 which found the Petitioner was eligible as follows:

3/1/2020 – 3/31/2020 (with a patient pay amount of \$,2032.00);

4/1/2020 – 4/30/2020 (with a \$7,904.00 patient pay amount);

5/1/2020 – ongoing (with a \$2,032.00 monthly patient pay amount) Exhibit A, p 6.

Baseline date January 25, 2020

The Notice also contained the following language:

Medicaid will not pay for your long-term care and home and community-based waiver services from 04/01/2020 through 07/07/2020 because you or your spouse transferred assets or income for less than their fair market value. Notify your specialist if you are denied emergency care because of this penalty. Exhibit A, p.7.

5. The Department was contacted on April 27, 2020 by Petitioner's attorney's office and was advised the April 10, 2020 Notice was incorrect and the Divestment penalty should have started March 1, 2020 and sought correction of the divestment penalty begin date.
6. At the hearing, the Department caseworker acknowledged that the caseworker failed to review the certified results indicated on the April 10, 2020 Notice, and the caseworker also admitted that he failed to add the specific language to the Notice as required which would have advised Petitioner of the correct divestment penalty period of March 1, 2020 through June 7, 2020.
7. The Department sought a Help Desk ticket to correct the divestment penalty start date. The Help Desk informed the Department caseworker that the divestment penalty period start date could not be changed due to timely notice requirements and because the caseworker failed to add commentary to the Notice indicating the correct penalty period of March 1, 2020 to June 7, 2020.
8. The Help Desk found the Petitioner was found eligible for LTC as of March 1, 2020 and to correct the notice would be a negative action and require 10 days notice because it would change Petitioner's eligibility for LTC for March as he would be ineligible due to the divestment penalty being properly imposed.

9. On [REDACTED] 2020, the Petitioner's Attorney requested a timely hearing and advised that the divestment penalty imposed was incorrect and should begin March 1, 2020 based upon the March 20, 2020 application date.

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.

In this case, the Department was aware based upon the Petitioner's MA-LTC application that a divestment of assets had been made and that a divestment penalty was to be imposed. Exhibit A, p. 7. The Department's hearing summary also states that the caseworker applied the correct divestment period and applied it. Because he did not check the Notice generated by the Department's Bridges system, the notice was incorrect. The caseworker informed the help desk and was advised the error could not be corrected or overridden. Exhibit A, p. 1. The parties do not dispute the divestment amount of \$28,886, the divestment penalty period of 3 months and 7 days and the baseline date of March 1, 2020 and that correct start date and divestment penalty period was from March 1, 2020 through June 7, 2020. A review of the Health Care Determination Notice demonstrates it was defective and incorrect as it set a baseline date of January 25, 2020 and started the divestment period April 1, 2020 instead of March 1, 2020. Exhibit A, p.13. A comment in the case notes made by the caseworker who processed the case also indicates that "known issues caused the penalty to recalculate when the program changed from MA EXT to G2S". Exhibit A, p. 15. The case notes also acknowledge that "the Notice did not show the standard divestment wording as directed by FOA to add to the notices of divestment. The second page of the notice did show a baseline date of 1/25/20 with a penalty period April 1, 2020 -7/07/20. Baseline date should be 03/01/20".

Because there was a known system issue with Bridges erroneously certifying incorrect divestment penalty periods and baseline dates, and that the Bridges system was not designed to process divestment penalties correctly, the caseworker asked the helpdesk for assistance to correct the divestment start date and was told the correction could not be made as Medicaid was approved for March 1, 2020 and could not be changed as

timely notice was required. The caseworker also testified that there were known software problems causing the Notice to be incorrect.

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 (January 2019), pp. 1-2; BEM 400 (February 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. During a penalty period, MA will **not** pay the client's cost for LTC services.

At the time of the LTC application, the Petitioner was in a penalty situation due to the divestment and a divestment determination was required to be made by the Department due to the fact that Petitioner was eligible for MA and in an LTC facility. BEM 405 (January 2020), p. 6. The first step in after processing an application when a client is in a penalty situation is the determination of the baseline date which in this case is March 1, 2020. The baseline date does not change even if one of the following happens: client leaves LTC. BEM 405, p. 6. The Department policy directs that the divestment penalty is to be applied to the months (or days) an individual is eligible for Medicaid and actually in LTC. BEM 405, p. 13. Once the baseline date is established, and upon certification of eligibility results, **Bridges automatically notifies the client in writing of positive and negative actions by generating the appropriate notice of case action.** BAM 220 (January 2019), p. 2, emphasis supplied. A divestment is considered an asset as it is an asset the individual was entitled to but did not receive because the asset was given away.

Due to the testimony by the caseworker that the correct divestment was applied by him correctly to the first month of eligibility 03/01/2020 through 06/07/2020, numerous errors in the Notice which include the wrong divestment start date and a wrong baseline date and software errors with the Bridges system, the Department must correct the errors and impose the correct divestment penalty period March 1, 2020 to June 7, 2020 and correct the baseline date to March 1, 2020. This issue is not a new problem with the Bridges system even when as in this case the caseworker indicated he put in the correct dates.

Petitioner's attorney contended that because there is absolutely no dispute that the baseline date is the first date of her client's eligibility for Medicaid LTC, March 1, 2020 and the application in this case is a first time application, the divestment penalty must start on March 1, 2020, the facts are not in dispute and the error was a system error and needs to be corrected. Notice of the divestment and complete information was provided to the Department in the application and verifications were provided as requested by the Department verifying the amount of the divestment with bank

statement information. The errors were also made known on discovery by Petitioner's attorney who notified the Department of the errors and requested correction.

In this case, based on the policy found in BEM 405 at 12-15 effective July 1, 2019 and corresponding federal law and regulations found in the Social Security Act, Sections 1902 (a)(18), 1917, the Department is required to apply the divestment penalty effective March 1, 2020 through June 7, 2020. The Department has no discretion to change the baseline date. Here the Department determined that Petitioner was eligible for MA-LTC April 1, 2020. The Department did not provide notice of the correct state date for the divestment penalty or include the proper baseline date, even though it had all the necessary information at the time of processing and certification and knew there was a divestment at the time of application. The Department concedes this was agency error. The caseworker was apprised of the error by Petitioner's attorney's office and the Department does not dispute the facts that the divestment should have begun March 1, 2020 but asserted it could not apply it retroactively as the Bridges system would not allow for a correction claiming timely notice must be given. The failure to include a correct divestment penalty and baseline date did not comply with required department policy

Department policy provides that a penalty period starts on the client's baseline date, which is the first date that the client is eligible for MA, would otherwise be receiving institutional level care (LTC), and is not already part of the penalty period. BEM 405, pp. 6, 14-15. Given the clear directive of this policy the Department must correct the error in this case as a full disclosure of the Petitioner's divestment was made and there is no dispute as to when the Petitioner's divestment penalty period should have started or the baseline date which is March 1, 2020 as required by Department policy.

Based upon the known problems with the Department's Bridges system it is determined that the Department through the help desk must correct this clerical error. The Department has historically relied on Department policy as a fall-back position to the Bridges system not properly including a divestment penalty after the caseworker completes the necessary information, claiming any change to the incorrect notice requires a new notice be sent with new divestment dates for proper notice to be given to the client. However, given the facts in this case, the Petitioner who was represented by counsel had notice of the correct divestment period, divestment amount, penalty period and baseline date and thus had full notice of the facts and known outcome if policy was correctly applied and that the Notice was to include the required correct Divestment Penalty and baseline date. The Petitioner was represented by counsel when filing the application and disclosed in detail the divestment at the time of the application and thus had notice of the facts regarding the effect of the divestment in this case and the correct outcome. In addition, counsel's office discovered the clerical error and demanded its correction on behalf of their client. Thus, the Department cannot claim a lack a notice to the Petitioner in this case as the Petitioner based on Department policy knew the baseline date and penalty period and start date. The Department must reissue the Notice with the correct baseline date and divestment start date of March 1, 2020 through June 7, 2020.

Pursuant to the credible evidence presented by this record, it is determined that the Department did not act in accordance with policy when it failed to apply the divestment penalty policy correctly pursuant to BEM 405 policy. Therefore, the Department is ordered to apply the penalty as required by policy and make any corrections of the error and any resulting adjustments.

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 did not act in accordance with Department policy when it failed to impose a correct divestment penalty period and start date and an erroneous baseline date and correct an admitted clerical error once discovered to correct the Notice and include the correct divestment start date and baseline date as required by Department policy.

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:

1. The Department shall initiate the process to impose the divestment penalty from March 1, 2020 through June 7, 2020.
2. The Department shall provide the Petitioner and his attorney written notice of the application of the divestment penalty date as required by this Hearing Decision.

LF/tm



Lynn M. Ferris
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

Via Email:

MDHHS-Wayne-82-Hearings
D. Smith
EQADHearings
BSC4
MOAHR
AG-HEFS-MAHS@michigan.gov-
[REDACTED]

**Petitioner/Counsel for Petitioner
Via -First Class Mail:**

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