



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: November 4, 2020
MOAHR Docket No.: 20-005032
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 7, 2020, from Clawson, Michigan. The Petitioner was represented by attorney [REDACTED]. The Department of Health and Human Services (Department) was represented by [REDACTED], Assistant Attorney General. The Department called [REDACTED], Long Term Care Specialist as a witness.

ISSUE

Did the Department properly determine a Medical Assistance (MA) divestment penalty from May 1, 2020 through October 15, 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. On [REDACTED], 2020, Petitioner filed an application for Long-Term Care (LTC for Health Care Coverage as a Patient of a Nursing Facility (DHS 4574) (Application)
2. At the time of the Application, the Petitioner was a resident of a LTC facility. The Petitioner was not a recipient of MA, LTC or waiver recipient prior to the application.

3. At the time of the Application, Petitioner disclosed a transfer of assets for less than fair market value. The value of the reported divested resource was \$47,399.00. In addition, the Petitioner attached full verification and explanation of the divestment facts with documentation including bank statements.
4. On March 30, 2020, the Department issued a Health Care Coverage Determination Notice (Notice) finding the Petitioner eligible for MA February 1, 2020 - February 29, 2020 (with a monthly patient pay \$2,652.00) and March 1, 2020 Ongoing (with a \$2721.00 monthly patient pay).
5. The March 30, 2020 Notice failed to apply and include the divestment penalty and the Notice did not include a Baseline date. Exhibit A, pp. 116-118.
6. On April 7, 2020 Petitioner's attorney's office notified the Department caseworker that the Notice did not mention a penalty period and requested the caseworker confirm that it [penalty period] was reflected in Bridges beginning February 1, 2020 through July 15, 2020. Exhibit A, p. 119.
7. On April 8, 2020, the Department caseworker responded to the April 7, 2020 email stating that she contacted the helpdesk, and they were able to apply the divestment, however due to negative action the divestment will start (5/01/2020 through October 15, 2020. Exhibit A, p. 119. The Petitioner attorney's office responded to the Department's email on April 8, 2020 advising the Department that the divestment penalty start date was not acceptable and that Department policy requires the penalty to start at the baseline date.
8. The parties have stipulated that the divestment penalty duration and amount are not at issue.
9. 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 to February 1, 2020 through July 15, 2020 (5 months, 15 days) and that the baseline date should be February 1, 2020 as required by Department policy.
10. The Petitioner's attorney requested a timely hearing on or about [REDACTED] 2020 disputing the Department's actions, specifically the incorrect start date of the divestment penalty period. Exhibit A, pp.

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 (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.

In this case, the parties do not dispute that a divestment occurred or that the divestment penalty period was properly calculated. At issue is the start date of the divestment penalty period. Petitioner asserts that the correct penalty start date should be February 1, 2020, as that is the date in which Petitioner was in LTC and met the eligibility requirements of MA. The Department maintains that the penalty start date should be May 1, 2020, as the Department is not authorized to retroactively apply a penalty period due to notice requirements.

At the time of the LTC application, the Petitioner was in a penalty situation due to the divestment, its disclosure in the application 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 after processing an application when a client is in a penalty situation, is the determination of the baseline date which in this case is February 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 as in this case was given to Petitioner's daughter as disclosed in the application.

The Adult Medical caseworker who processed the application for LTC is a well-seasoned caseworker with many years of experience. She testified as to her processing of the Petitioner's application and that the MA eligibility date for LTC benefits was February 1, 2020 and that she entered the assets correctly into the Bridges system. She entered the new penalty start date in the Long Term Care screen in Bridges. She contacted the Department's Help Desk on April 8, 2020 after learning about the Notice not containing the divestment penalty and the Help Desk applied the divestment penalty on that date starting May 1, 2020 through October 15, 2020 and it was reflected in the Long Term Care Penalty page.

On April 7, 2020, the Department was advised by the Petitioner's attorney's office that the March 30, 2020 Notice issued by the Department did not mention the penalty period and asked the caseworker to confirm that the penalty period is reflected in Bridges beginning February 1, 2020 through July 15, 2020. The caseworker testified that she contacted the Help Desk on April 8, 2020 to see if the divestment period could be corrected. The Department Caseworker testified that the Help Desk resolution was that the divestment period was not correctly applied for February 1, 2020, however it was applied for May 1, 2020 through October 15, 2020.

On April 8, the Department caseworker responded by email to the attorney's office and stated that she had contacted the Help Desk and they were able to apply the divestment, however, due to negative action the divestment will start May 1, 2020 through October 14, 2020. Exhibit A, p 119. The Department caseworker also advised the attorney's office that in order to have the divestment corrected, the Law Office would have to file for a hearing. The Department used the email sent by the caseworker to serve as official notice to the Petitioner, (in lieu of a Health Care Coverage Determination Notice), of the divestment penalty imposition and the divestment penalty period. The Petitioner's attorney did not object to the form of notice.

The caseworker testified that when she processes a divestment received with an application, she would review the file and enter all the assets in the Bridges system, including the divestment as cash on hand and during the processing period prior to selecting the "approve button" she reviews and should have reviewed the long term penalty page to confirm that the correct divestment date was entered and has been added. She further testified that if it is not added the case should not be approved and the help desk should be contacted so the divestment can be added prior to approval of the eligibility. The caseworker further testified that she did enter all the correct dates for the divestment when entering the assets dates and stated she could have added the dates manually on the Notice before it was issued to additionally reflect the correct divestment penalty period, but would not have done so as she would have contacted the help desk only if she had not approved the case. She further testified that 99.9% of the time the divestment penalty has not been applied by Bridges. She testified that the Bridges system is not designed to process a LTC application and there are manual things that the caseworker must do. Finally, the caseworker testified that she has had cases where the correct dates were entered on the LTC page and the Notice went out totally incorrect. She further testified if there is an error and you call the help desk

immediately, they will correct it if the Notice has not been mailed. In addition, the caseworker testified that she cannot look at a Notice before it goes out to see if it is correct. When asked by the undersigned if the only way a caseworker could be sure the Notice was correct would be to confirm the dates with the help desk before it goes out because the system was hit or miss because Bridges was never designed to process LTC applications with a divestment, she stated that the workers have to do some tricky things to process the application correctly. She said that she should have looked at the Notice after she certified the case and it could have been corrected by the Help Desk as it was the same day. She stated that these divestment processing issues have been reported to the Department's Policy section and managers.

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, February 1, 2020 and the application in this case is a first time application, the divestment penalty should start on February 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 verifying the amount of the divestment with bank statement information.

Department policy provides that a penalty period starts on the client's baseline date. The baseline date 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.

In this case, based upon the known problems with the 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 outcome that the Notice was to have included as regards the Divestment Penalty. It is meaningless to assert that the Petitioner who disclosed in detail the divestment at the time of the application including the amount, and the baseline date did not have notice of the facts regarding the effect of the divestment in this case and the correct begin date and baseline date. 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, therefor the Department must reissue the Notice with the correct baseline date and divestment start date of February 1, 2020 through July 15, 2020.

In addition, there is an undue hardship waiver which may be applied as a remedy to the clerical and Bridges failure to impose the known and disclosed divestment. BEM 405, pp. 16-18: BEM100 (January 2020), pp. 7-8. The Department may consider applying this remedy due to the ongoing issues which continue to arise regarding the failure of the Bridges system to impose divestment penalties correctly and continuing errors made on behalf of the Department.

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 was required to apply the divestment penalty effective February 1, 2020 through July 15, 2020. Here the Department determined that Petitioner was eligible for MA-LTC February 1, 2020. The Department did not provide notice of the divestment penalty, even though it had been provided with the application in detail with verification of the amount. The Department concedes this was agency error. The caseworker was apprised of the error on April 7, 2020 by Petitioner's attorney's office and the Department does not dispute the facts that the divestment should have begun February 1, 2020, but claimed 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 divestment penalty did not comply with required department policy. The Department further instructed that the Petitioner should file for an administrative hearing to obtain an order to apply the divestment as required for the correct date. Department policy is explicit: The penalty period starts on the date which the individual is eligible for Medicaid and would otherwise be receiving institutional level of care (LTC)... and is not already part of a penalty period. BEM 405, p. 4. As such, the action of the Department must be reversed. It is a generally recognized legal premise that actual notice substitutes for written notice, particularly as here neither party disputed the facts. The penalty period starts on the date which the individual is eligible for Medicaid. BEM 405, p. 14.

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 pursuant to BEM 405 policy on February 1, 2020 through July 15, 2020. Therefore, the Department is ordered to apply the penalty as required by policy beginning February 1, 2020 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 Petitioner divestment penalty and correct an admitted clerical error once discovered to correct the Notice and include the correct divestment start date as required by Department policy.

DECISION AND ORDER

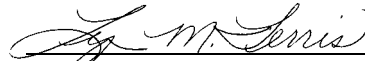
Accordingly, the Department's decision is

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 February 1, 2020 through July 15, 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-Oakland-2-Hearings
D. Smith
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**Petitioner
Via First-Class Mail**

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

**Authorized Hearing Rep.
Via First-Class Mail**

[REDACTED]
[REDACTED]
[REDACTED]