



GRETCHEN WHITMER
GOVERNOR

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

ORLENE HAWKS
DIRECTOR

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[REDACTED], MI [REDACTED]

Date Mailed: October 23, 2020
MOAHR Docket No.: 20-005389
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 telephone hearing was held on September 24, 2020, from Lansing, Michigan. The Petitioner was represented by her attorney Scott Brogan. Chrissie Johnston, Lorraine Massie and Michelle Mayo appeared and testified for the Department. The Department of Health and Human Services (Department) was represented by Assistant Attorney General Dan Beaton. Department Exhibit 1, pp. 1-55 was received and admitted.

ISSUE

Did the Department properly determine that Petitioner was not entitled to a recalculation of her divestment penalty period after she returned assets?

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 MA-LTC.
2. Petitioner reported 3 gifts totaling \$283,000 at application.
3. On May 4, 2020, a Health Care Coverage Determination Notice was sent to Petitioner informing her that she was eligible for Long Term Care Medicaid with a divestment penalty period through April 13, 2022.
4. Between January and April 2020, \$259,000 of the gifts were returned to the VanDenEeden Trust and Petitioner's spouse.

5. On August 4, 2020, Petitioner requested hearing disputing the Department's failure to recalculate the divestment penalty period.

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.

SI 01150.124 Exceptions – Transferred Resource Returned

This section provides instructions for cases in which the transferred resource is returned to the transferor.

A. Policy – Exception for Resources Returned to Transferor

If the individual transfers a resource and the entire resource is returned in the same month, the period of ineligibility does not apply.

1. Returned Resources – General

To meet this exception, the individual must reacquire the same percentage of ownership interest in the resource that existed prior to the original transfer. Reacquiring a lower ownership interest is not sufficient to meet this exception. Merely reacquiring physical possession of the resource is not sufficient. It is necessary to reacquire legal ownership.

NOTE: The return of the resource to the individual is not counted as income to the individual.

2. Resource Returned in Same Month

If the individual transfers a resource and the **entire** resource is returned in the **same** month, the period of ineligibility does not apply. In these cases, the individual's eligibility is determined based on the value of his/her resources at the beginning of the month. These cases are treated as if the transfer had never occurred.

Example: Ms. Smith transfers a nonexcluded automobile for less than fair market value on 8/3/00. On 8/6/00 she files for SSI and learns that the transferred resource will make her ineligible for SSI. On 8/10/00 she returns to the field office and provides evidence that the transferred automobile was returned to her on 8/9/00. Since the entire resource was transferred and returned in the same month, Ms. Smith is not subject to a period of ineligibility due to a resource transfer. However, Ms. Smith's eligibility for SSI is based on the value of her resources as of 8/1/00, including the value of the nonexcluded automobile.

3. Resource Returned in a Subsequent Month

If the individual transfers a resource and the **entire** resource is returned in a subsequent month, the period of ineligibility continues through the month the resource is returned (even if the resource is returned on the first day of the month). The period of ineligibility due to the transfer ends as of the month following the month the resource is returned. In that month, the returned resource is counted towards the individual's SSI resource limit.

Example 1: Mr. Johnson transferred a sailboat for less than fair market value on 8/5/00. The uncompensated value is determined to be \$3,000. On 8/10/00 he files for SSI benefits and learns that transferring a resource for less than fair market value makes him subject to a period of ineligibility. On 9/20/00 he reports to the field office that the transferred resource was returned to him on 9/15/00. For 8/00, Mr. Johnson's eligibility would be based on his resources as of 8/1/00 including the sailboat. For 9/00 he would be subject to a period of ineligibility due to the uncompensated value of the resource transfer. As of 10/00 the period of ineligibility due to the transfer ends. For 10/00 his eligibility would be based on all of his countable resources as of 10/1/00, including the sailboat. If Mr. Johnson is otherwise eligible, the claims representative (CR) would advise him that he could be eligible for SSI based on conditional benefits ([SI 01150.200](#)).

Example 2: Mr. Jones files for SSI on 10/3/00. He informs the CR that he transferred a boat worth \$5,000 to his nephew in 4/00. He further states that the nephew returned the boat to him in 6/00. Since the boat was returned to Mr. Jones before he filed for SSI, the

transfer has no effect on SSI eligibility. However, if Mr. Jones still owned boat in the month he filed for SSI, it would be counted as a resource.

4. Less Than the Entire Resource Returned

If the entire resource is not returned, the period of ineligibility does not end. Instead, recompute the uncompensated value based on how much of the resource was not returned. Then, recompute the period of ineligibility based on the adjusted uncompensated value. If additional funds are subsequently returned, it will be necessary to recompute the uncompensated value again.

NOTE: Assume, absent evidence to the contrary, that the returned resource has the same current market value (CMV) it had when it was originally transferred. But, if the returned resource has a different CMV, recompute the uncompensated value by comparing the CMV in the month the resource is returned with the CMV at the time of the original transfer.

Example 1: Ms. Jones files for SSI on 8/6/00 and alleges ownership of 50 shares of stock worth \$5,000. She learns that the stocks would make her ineligible for SSI due to excess resources, so she gives all 50 shares to her brother on 8/9/00. She returns to the field office and alleges that she no longer owns the stocks. The field office determines that she transferred the stocks for less than fair market value and determines that she is ineligible due to excess resources in 8/00, and subject to a period of ineligibility beginning in 9/00 based on \$5,000 uncompensated value.

On 10/5/00 Ms. Jones returns to the field office and reports that the stocks were returned to her on 10/3/00. After reviewing the evidence, the field office determines that 15 shares of stock worth \$1,850 had been returned to Ms. Jones. Since the entire resource was not returned, Ms. Jones does not meet the exception to the period of ineligibility. The field office recomputes the uncompensated value (\$5,000 minus \$1,850 = \$3,150) and uses the new, lower uncompensated value to recompute the period of ineligibility. The recomputed period of ineligibility would have the same beginning date, but it would have fewer months due to the lower uncompensated value.

Example 2: Ms. Green files for SSI on 12/5/99 and gives her son \$5,300 in stock certificates on 12/21/99. The field office determines that she has a period of ineligibility of 10 months (\$5,300 divided by \$500 = 10.6). The 1999 Federal benefit rate (FBR) (\$500) is applicable per [SI 01150.111D](#). Ms. Green is determined to be ineligible for SSI from 1/00-10/00. However, in 7/00 her son returns \$2,800 of the certificates to Ms. Green. It is necessary to recompute the period of ineligibility based on uncompensated value of \$2,500 (\$5,300 minus \$2,800). The CR determines that the period of ineligibility is only 5

months (\$2,500 divided by \$500). However, her period of ineligibility continues through 7/00—the month that the resource was returned. She is potentially eligible for SSI as of 8/00 if she meets all other requirements for eligibility. POMS SI 01150.124

Resources Returned

Cancel a divestment penalty if either of the following occurs before the penalty is in effect:

- All the transferred resources are returned and retained by the individual.
- Fair market value is paid for the resources. Recalculate the penalty period if either of the following occurs while the penalty is in effect:
- All the transferred resources are returned.
- Full compensation is paid for the resources. Use the same per diem rate originally used to calculate the penalty period.

Once a divestment penalty is in effect, return of, or payment for, resources cannot eliminate any portion of the penalty period already past. However, recalculate the penalty period. The divestment penalty ends on the later of the following:

- The end date of the new penalty period.
- The date the client notified you that the resources were returned or paid for.

BEM 405, p.16

In this case, the Department argued that Petitioner did not return all the transferred resources and therefore there was no basis to cancel the divestment penalty. The Department relied upon BEM 405, p.16, in support of their position and argued that Department policy is consistent with the federal regulations.

Petitioner argued that since Department policy instructs to “recalculate” the penalty period in BEM 405 and not merely “cancel” the penalty period it allows for a recalculation if a portion of the divested assets are returned. Petitioner also argued that the federal regulations permit a recalculation if any portion of the divested resources are returned. Petitioner cited POMS S1 01150.124 in support of her position.

Department policy regarding how to treat situations where less than the entire divested asset amount is returned is somewhat clumsily written. It is clear that in order to cancel a divestment penalty in its entirety all resources must be returned. Policy instructs that the divestment penalty ends on “The date the client notified you that the resources were returned or paid for.” However, policy gives further instruction that appears to contemplate a situation where less than all the divested assets are returned. BEM 405 states “Once a divestment penalty is in effect, return of, or payment for, resources cannot eliminate any portion of the penalty period already past. However, recalculate the penalty period.” If the only scenario was to cancel the divestment penalty upon return of the entire divested amount, there would be no reason to recalculate the penalty period. In addition, Department policy also instructs that the divestment penalty ends on the later of the following “The end date of the new penalty period” or “The date the client notified you that the resources were returned or paid for.” Again, there would not be any need to have a new penalty period if the only scenario was to cancel the entire divestment penalty. The fact that Department policy has a reference to recalculating the penalty period and a reference to a new penalty period creates some ambiguity with regard to how to treat divestments where less than the entire resource is returned.

In order to resolve the ambiguity with regard to how to treat divestments where less than the entire resource is returned, the federal regulations can provide some guidance and clarification. Department policy is written in conformity with the federal regulations. The controlling federal regulation for "Transferred Resource Returned" is contained in POMS SI 01150.124 and it is more clearly written than Department policy. "If the entire resource is not returned, the period of ineligibility does not end. Instead, recompute the uncompensated value based on how much of the resource was not returned. Then, recompute the period of ineligibility based on the adjusted uncompensated value. If additional funds are subsequently returned, it will be necessary to recompute the uncompensated value again." This regulation is more consistent with the interpretation of BEM 405 that the Department is required to recalculate the divestment penalty period when less than the entire resource is returned.

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 failed to satisfy its burden of showing that it acted in accordance with Department policy when it failed to recalculate Petitioner's divestment penalty period when she returned a portion of divested assets.

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. Recalculate Petitioner's divestment penalty period going back to the date Petitioner reported the return of the portion of divested assets.
2. Issue a Health Care Coverage Determination Notice informing Petitioner of the new divestment penalty period.

AM/nr



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

Chrissie Johnston
337 Brady Avenue
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