



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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Date Mailed: August 11, 2021  
MOAHR Docket No.: 20-008833  
Agency No.: ██████████  
Petitioner: ██████████

**ADMINISTRATIVE LAW JUDGE: Colleen Lack**

**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 May 13, 2021. The Petitioner was represented by Amanda Knaffla, Attorney. The Department of Health and Human Services (Department) was represented by Geraldine Brown, Assistant Attorney General (AAG). Laura McLaurin, Eligibility Specialist (ES), and Carly Ostlund, Assistance Payments Supervisor (APS), appeared as witnesses for the Department.

During the hearing proceeding the Department's Hearing Summary packet was admitted as Exhibit A, pp. 1-120. The attachments to the parties' briefs have also been admitted: Petitioner's Brief in Support, Exhibits 1-9; Department's Post-Hearing Supplement Exhibits A and B; and Petitioner's Supplemental Brief in Support, Exhibit 1.

**ISSUE**

Did the Department properly apply the divestment penalty period for Petitioner's Medical Assistance (MA) case?

**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 August 12, 2019, Petitioner entered Eastwood Nursing Center. (Petitioner's Brief in Support, p. 2)
2. On ██████████ 2019, a MA application was submitted on Petitioner's behalf requesting retroactive coverage for September 2019. Petitioner disclosed a

divestment of \$ [REDACTED] which would result in a divestment penalty period of 6.10 months beginning in October 2019 and ending in March 2020. (Exhibit A, pp. 24-32, 37-38 and 117-120; Petitioner's Brief in Support Exhibit 1)

3. On November 21, 2019, a Health Care Coverage Determination Notice was issued approving MA effective October 1, 2019 and ongoing with a monthly patient pay amount of [REDACTED]. No divestment penalty determination was included. (Exhibit A, pp. 39-42)
4. On December 10, 2019, a Health Care Coverage Determination Notice was issued approving MA effective October 1, 2019 and ongoing with a monthly patient pay amount of [REDACTED]. No divestment penalty determination was included. (Exhibit A, pp. 43-46)
5. On January 6, 2020, Health Care Coverage Determination Notices were issued approving MA with a monthly patient pay amount of [REDACTED] effective February 1, 2020. The monthly patient pay amount remained \$ [REDACTED] for October 1, 2019 through January 31, 2020. No divestment penalty determination was included. (Exhibit A, pp. 47-53)
6. On January 16, 2020, a Health Care Coverage Determination Notice was issued approving MA with a monthly patient pay amount of \$ [REDACTED] effective February 1, 2020 and stating that a divestment penalty would apply from February 1, 2020 through August 10, 2020. (Exhibit A, pp. 55-57)
7. On February 3, 2020, a Health Care Coverage Determination Notice was issued approving MA with a monthly patient pay amount of \$ [REDACTED] effective March 1, 2020 and stating that a divestment penalty would apply from February 1, 2020 through August 10, 2020. (Exhibit A, pp. 61-63)
8. On March 3, 2020, a Health Care Coverage Determination Notice was issued approving MA with a monthly patient pay amount of [REDACTED] effective April 1, 2020 and stating that a divestment penalty would apply from February 1, 2020 through August 10, 2020. (Exhibit A, pp. 65-67)
9. On April 6, 2020, a Health Care Coverage Determination Notice was issued approving MA with a monthly patient pay amount of [REDACTED] effective May 1, 2020 and stating that a divestment penalty would apply from February 1, 2020 through August 10, 2020. (Exhibit A, pp. 69-71)
10. On May 6, 2020, a Health Care Coverage Determination Notice was issued approving MA with a monthly patient pay amount of [REDACTED] effective June 1, 2020 and stating that a divestment penalty would apply from February 1, 2020 through August 10, 2020. (Exhibit A, pp. 73-75)
11. On June 2, 2020, a Health Care Coverage Determination Notice was issued approving MA with a monthly patient pay amount of \$ [REDACTED] effective July 1,

2020 and stating that a divestment penalty would apply from February 1, 2020 through August 10, 2020. (Exhibit A, pp. 77-79)

12. On July 2, 2020, a Health Care Coverage Determination Notice was issued approving MA with a monthly patient pay amount of \$[REDACTED] effective August 1, 2020 and stating that a divestment penalty would apply from February 1, 2020 through August 10, 2020. (Exhibit A, pp. 81-83)
13. On August 3, 2020, a Health Care Coverage Determination Notice was issued approving MA with a monthly patient pay amount of [REDACTED] effective September 1, 2020. No divestment penalty determination was included. (Exhibit A, pp. 85-87)
14. On August 22, 2020, a Health Care Coverage Determination Notice was issued approving MA with a monthly patient pay amount of \$9,648.00 effective October 1, 2020. No divestment penalty determination was included. (Exhibit A, pp. 89-91)
15. On August 24, 2020, a Health Care Coverage Determination Notice was issued approving MA with a monthly patient pay amount of \$[REDACTED] for the month September 1, 2020. No divestment penalty determination was included. (Exhibit A, pp. 93-95)
16. On September 2, 2020, a Health Care Coverage Determination Notice was issued approving MA with a monthly patient pay amount of \$[REDACTED] effective October 1, 2020. No divestment penalty determination was included. (Exhibit A, pp. 97-99)
17. On or about [REDACTED], 2020, a hearing request was filed on Petitioner's behalf contesting the Department's determination of the dates of the divestment period. (Exhibit A, pp. 3-22)
18. On October 2, 2020, a Health Care Coverage Determination Notice was issued approving MA with a monthly patient pay amount of \$[REDACTED] effective November 1, 2020. No divestment penalty determination was included. (Exhibit A, pp. 101-103)
19. On October 29, 2020, a Health Care Coverage Determination Notice was issued approving MA with monthly patient pay amounts of [REDACTED] for the month of January 2020 and \$[REDACTED] effective April 1, 2020 and stating that a divestment penalty would apply from February 1, 2020 through August 10, 2020. (Exhibit A, pp. 105-107)
20. On October 29, 2020, an email was sent to Petitioner's attorney stating the benefit notice that went out did not show the whole picture. Petitioner's monthly patient pay amounts were: [REDACTED] for October 2019 through January 2020; [REDACTED] for February 2020 through March 2020; and \$[REDACTED] for April 2020 and ongoing. No divestment penalty determination was included. (Exhibit A, pp. 109-110)

21. A November 23, 2020, email to Petitioner's attorney verified that the divestment penalty dates did not change, it ran from February 1, 2020 through August 10, 2020. Further, the policy unit was contacted, and the Department cannot make the divestment penalty period retroactive. (Exhibit A, pp. 113-114)

### **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.

Multiple versions of the BEM policy were in effect during the year long period that Health Care Coverage Determination Notices were issued for this case. However, as this was a new application for MA, the Department's actions will be reviewed utilizing the version of policy in effect at the time of the [REDACTED] 2019 application and the November 21, 2019 initial Health Care Coverage Determination Notice, which stated:

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 169.

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 services.
- Home help.
- Home health.

MA will pay for other MA-covered services.

BEM 405, July 1, 2019, p. 1.

In this case, it was uncontested that a divestment of \$ [REDACTED] occurred. The parties dispute when the resulting divestment penalty period should start.

### **Computing Penalty Period**

Compute the penalty period on the total Uncompensated Value of all resources divested.

Determine the Uncompensated Value for each resource transferred and combine into a total Uncompensated Value.

Divide the total Uncompensated Value by the average monthly private LTC Cost in Michigan for the client's Baseline Date. This gives the number of full months for the penalty period. Multiply the fraction remaining by 30 to determine the number of days for the penalty period in the remaining partial month.

Apply the total penalty months and days. Apply a penalty even if the total amount of the penalty is for only a partial month. Apply the penalty to the months (or days) an individual is eligible for Medicaid and actually in LTC, Home Health, Home Help, or the MIChoice Waiver. Do not apply the divestment penalty to a period when the individual is not eligible for Medicaid for any reason (that is the case closes for any reason or is eligible for Medicaid but is not in LTC, Home Help, Home Health, or the MIChoice Waiver. Restart the penalty when the individual is again eligible for Medicaid and in LTC, Home Help, Home Health, or MIChoice Waiver. When a medical provider is paid by the individual, or by a third party on behalf of the individual, for medical services received, that month is not a penalty month. Do not count that month as part of the penalty period. This does not include payments made by commercial insurance or Medicare; see Resources Returned in this item.

Note: An individual is not eligible for MA in a month they have prepaid for LTC. Because federal law directs a resident in a nursing facility must have access to all monies held by the facility for the resident, count the money held by a nursing facility as cash.

A group 2 deductible eligible individual is not eligible for Medicaid until the deductible is met. Apply the penalty only to the days of the month after the deductible is met. The 1st day the client is eligible to receive MA coverage for LTC, MIChoice, home help, or a home health service is the 1st day after the penalty period ends.

BEM 405, July 1, 2019, pp. 12-13.

Additionally, 42 USC 1396(p)(c)(1)(D)(ii) states:

In the case of a transfer of asset made on or after February 8, 2006, the date specified in this subparagraph is the first day of a month during or after 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 would otherwise be receiving institutional level care described in subparagraph (C) based on an approved application for such care but for the application of the penalty period, whichever is later, and which does not occur during any other period of ineligibility under this subsection

The Department acknowledged that when the November 21, 2019 initial Health Care Coverage Determination Notice was issued, the Department erred by failing to apply the divestment penalty as part of the original certification. (Exhibit A, pp. 1 and 59; ES Testimony)

When Petitioner's request for the Pre-Eligibility Medical Expense Program (PEME) was processed in January 2020, the Department's error was discovered. When the case was re-processed, the Department allowed for advance notice by applying the divestment penalty period February 1, 2020 to August 10, 2020, rather than the anticipated October 1, 2019 to March 10, 2020. (Exhibit A, p. 1; ES Testimony) Between January 16, 2020 and July 2, 2020, numerous notices of case action were issued stating the divestment penalty period would apply from February 1, 2020 through August 10, 2020. (Exhibit A, pp. 55-83) Between August 3, 2020 and October 2, 2020, numerous notices of case action were issued that did not include a divestment penalty period. (Exhibit A, pp. 85-99 and 101-103) This appears to be because the eligibility determinations did not affect months included in the divestment penalty period. However, on October 29, 2020, a Health Care Coverage Determination Notice was issued approving MA with monthly patient pay amounts of \$[REDACTED] for the month of January 2020 and [REDACTED] effective April 1, 2020, and stating that a divestment

penalty would apply from February 1, 2020 through August 10, 2020. (Exhibit A, pp. 105-107)

BEM 405 states:

**Note:** If a past unreported divestment is discovered or an agency error is made which should result in a penalty, a penalty must be determined under the policy in place at the time of discovery. If a penalty is determined for a transfer in the past, apply the penalty from the first day after timely notice is given; see Recipient Exception in this item.

### **Recipient Exception**

Timely notice must be given to LTC recipients and (BEM 106) waiver recipients before actually applying the penalty. Adequate notice must be given to new applicants.

BEM 405, July 1, 2019, p. 15.

The Department acknowledged that a Department error occurred. The Department considered Petitioner as a LTC recipient at the time the divestment penalty was imposed and provided timely notice before actually applying the divestment penalty. This is in accordance with an excerpt from the Centers for Medicare & Medical Services (CMS) explanation of changes to Medicaid asset rules. (Department's Post-Hearing Supplement Exhibit B)

However, Petitioner asserts that she should be treated as a new applicant, which allows for only adequate notice of the penalty. Because the divestment was fully disclosed at the time of application, the penalty period should have been applied when the initial eligibility determination was made. Petitioner argued that the above cited "Note" portion of BEM 405, p. 15 does not apply in this case. The divestment was not unreported. Further, this was not a Department error that itself resulted in the divestment penalty. An example of that type of Department error would be if the Department had miscalculated a divestment period for an unreported divestment discovered during the asset detection process and when the error was discovered, it would result in additional penalty. (Petitioner's Supplemental Brief in Support)

Petitioner's argument is ultimately found persuasive. The divestment was disclosed at the time of the application and initial eligibility determination. No agency error was made with regard to finding that divestment occurred or calculating the appropriate penalty period. If the Department had not failed to apply it as part of the initial eligibility certification, the divestment penalty period would have run from October 1, 2019 to March 10, 2020 in accordance with 42 USC 1396(p)(c)(1)(D)(ii), because October 1, 2019 is the date Petitioner was first eligible for Medicaid and actually in LTC, Home Health, Home Help, or the MIChoice Waiver.

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 applied the divestment penalty period for Petitioner's MA case.

**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. Correct Petitioner's divestment penalty period start date to October 1, 2019.

CL/tm

  
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**Colleen Lack**  
Administrative Law Judge



**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:**  
**Department**

MDHHS-906CentralHearings  
C. George  
EQADHearings  
BSC1  
MOAHR

**Counsel for Respondent**

Geraldine A. Brown  
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**Via First Class Mail:**  
**Counsel for Petitioner**

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**Petitioner**

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