



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], MI [REDACTED]

Date Mailed: July 7, 2021
MOAHR Docket No.: 20-008845
Agency No.: [REDACTED]
Petitioner: [REDACTED]

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 March 24, 2021. The Petitioner was represented by John Yonkers III, Attorney. The Department of Health and Human Services (Department) was represented by Brian McLaughlin, Assistant Attorney General. Laura McLaurin, Assistance Payments Worker (APW), 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. 1-60.

ISSUE

Did the Department properly determine Petitioner's eligibility for Medical Assistance (MA) resulting in removal of the June 1, 2020 to August 23, 2020 divestment penalty?

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 April 27, 2020, Petitioner's attorney's office reported to the Department that: Petitioner sold her home for [REDACTED] on April 10, 2020; purchased an annuity on April 17, 2020 for [REDACTED] that will make three monthly payments of [REDACTED] starting May 2020; and gifted her son [REDACTED] as well as a gift of [REDACTED] from cashing out stock; this will cause a divestment penalty of three months; and Petitioner received two tax return checks. (Exhibit A, pp. 11-12)

2. Verifications were provided for the information reported on April 27, 2020. (Exhibit A, pp. 13-26 and 29-30)
3. On May 11, 2020, a Health Care Coverage Determination Notice was issued to Petitioner stating MA was approved for June 1, 2020 and ongoing with a monthly patient pay amount of \$5,046.00, but indicating there would be a divestment penalty from June 1, 2020 through August 23, 2020, based on assets or income being transferred for less than their fair market value. (Exhibit A, pp. 35-37)
4. On June 26, 2020, Petitioner's case was re-certified ending the annuity payment with a final payment in August 2020. (Exhibit A, p. 5; APW Testimony)
5. On June 26, 2020, a Health Care Coverage Determination Notice was issued to Petitioner stating the divestment penalty ended August 23, 2020 and the patient pay amount would be \$1,744.00 effective August 1, 2020. (Exhibit A, pp. 39-41)
6. On November 2, 2020, unearned income verifications were received and the case was updated. It was discovered that the divestment penalty was incorrectly running again for future months and a ticket was called in. (Exhibit A, p. 5; APW Testimony)
7. The Department's Bridges Resource Center removed the future penalty period but also removed the June 1, 2020 to August 23, 2020 penalty based on ESA 2020-12 Memo that states the Department is not to mark any Medicaid cases for closure due to negative action, including a reduction in coverage. (Exhibit A, p. 5; APW Testimony)
8. On November 5, 2020, a Benefit Notice was issued to Petitioner's attorney stating the June 1, 2020 to August 23, 2020 divestment penalty was removed as it had been applied in error due to the current COVID 19 policy. Once the COVID health emergency is ended, the Department will re-evaluate divestment penalty on the case. (Exhibit A, pp. 43-46)
9. On February 3, 2021, verification was obtained from the skilled nursing facility showing Petitioner was private pay from June 1, 2020 to August 23, 2020 along with proof of payments from Petitioner. (Exhibit A, pp. 51-58)
10. On November 16, 2020, a hearing request was filed on Petitioner's behalf contesting the Department's determination to remove the June 1, 2020 to August 23, 2020 divestment penalty. (Exhibit A, pp. 7-8)
11. On March 1, 2021, the Department's Office of Legal Services/Trust and Annuities Unit determined that the annuity was not a countable asset and payments from it were to be counted as unearned income in the month received. (Exhibit A, p. 27)

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.

As noted by Respondent, the Public Health Emergency (PHE) created by COVID-19 brought about several changes to the Medicaid Program for current beneficiaries, including changes with post-eligibility divestment penalties. The Families First Coronavirus Response Act (FFCRA), PL 116-127, § 6008(b), 134 Stat 178 (March 18, 2020), temporarily increased the Federal medical assistance percentage for the states provided that the states comply with certain requirements for continuing coverage throughout the PHE. “States that choose to participate in Medicaid must comply with federal requirements.” *In re Rasmer Estate*, 501 Mich 18, 25 (2017) (internal quotations and citations omitted). (Department Brief, pp. 1-2)

Based on Section 6008 of the FFCRA, the Centers for Medicare and Medicaid Services (CMS) issued guidance that required the Department:

to maintain the enrollment and coverage of all Medicaid beneficiaries through the end of the month in which the PHE for COVID-19 ends. Under this initial guidance, states were prohibited from making any changes to the benefits available to a beneficiary or to a beneficiary’s required cost sharing or, in the case of institutionalized beneficiaries, to their financial responsibility for the cost of care under the post-eligibility treatment of income rules. [(Ex. A, CMS-9912.)]

(Department Brief, p. 2)

Accordingly, the Department’s ESA 2020-12 Memorandum, as revised March 20, 2020, states:

REVISION:

Effective today 03/20/2020, Medicaid cases (including HMP) and Medicare Savings Programs (MSP) must not be closed unless the client requests such closure (verbal or written), death, or the client moves out of

state. **DO NOT** certify any Medicaid/HMP/MSP closures until further notice. This includes **NOT** marking any Medicaid EDGs for closure due to negative action to include a reduction in coverage. As an example, full coverage AD-Care Medicaid to G2S Deductible.

An exception to this directive: if a client qualifies for equivalent coverage on another Medicaid TOA. As an example, client is active HMP and now qualifies for SSI Medicaid.

Exhibit A, p. 59

In this case, the evidence is clear the Petitioner tried to do the right thing, as asserted by Petitioner's attorney. Petitioner properly and timely reported the transactions and divestment. Petitioner reasonably relied upon the May 11, 2020, determination, and paid out of pocket for the nursing facility services during what would normally have been a correct determination to impose the divestment penalty period.

However, the Department's May 11, 2020, determination that there would be a divestment penalty from June 1, 2020 through August 23, 2020, was improper because that determination was made after March 20, 2020. (Exhibit A, pp. 35-37) Petitioner was an ongoing Medicaid beneficiary and imposing the divestment penalty was a reduction in coverage. The PHE for COVID-19 was ongoing at that time. Therefore, the Department should have maintained Petitioner's enrollment and coverage until the end of the month in which the PHE ends. Therefore, the Department properly removed the June 1, 2020 through August 23, 2020 divestment penalty.

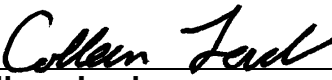
After the PHE ends, if the Department determines any further action is required due to the divestment, the Department would be required to provide Petitioner with timely notice of any case action. There is no authority for this Administrative Law Judge to address any potential future case actions the Department may take.

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 Petitioner's eligibility for MA resulting in removal of the June 1, 2020 to August 23, 2020 divestment penalty.

DECISION AND ORDER

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

CL/ml



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

Counsel for Respondent – via electronic mail Brian K. McLaughlin
AG-HEFS-MAHS

DHHS – via electronic mail MDHHS-906CentralHearings
BSC1
C. George
EQAD
MOAHR

Counsel for Petitioner – via first class mail John Yonkers
148 W Hewitt Ave
Marquette, MI 49855

Petitioner – via first class mail [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] MI [REDACTED]