



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]
[REDACTED], MI [REDACTED]

Date Mailed: May 28, 2021
MOAHR Docket No.: 21-001124
Agency No.: [REDACTED]
Petitioner: [REDACTED]

ADMINISTRATIVE LAW JUDGE: Janice Spodarek

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 30, 2021.

Petitioner was represented by David Carrier, Attorney.

Petitioner called [REDACTED] as a witness.

Petitioner did not offer any exhibits into the record.

Respondent Michigan Department of Health and Human Services (Department or Respondent) was represented by Assistant Attorney General (AAG) Precious Boone.

The Department called Dawn Berridge, ES Worker as a witness.

Department Exhibit A.57 was offered and admitted into the record.

ISSUE

Did the Department properly apply a 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 [REDACTED] 2020 Petitioner applied for Medicaid (MA) disclosing a [REDACTED] divestment and requesting that the penalty be applied.
2. Petitioner's MA Waiver began on [REDACTED] 2020.
3. On September 9, 2020 Petitioner's representative contacted the Department inquiring as to why the divestment had not been applied. On September 15, 2020 the Department applied the divestment penalty and issued a DHS-176 notice with a penalty from October 1, 2020 to April 11, 2021 with a baseline date of August 4, 2020. Exhibit A.34-38.
4. On December 3, 2020 the Department issued a Benefit Notice reversing the prior divestment stating "...divestment penalty removed due to ESA directive related to COVID health emergency." Exhibit A.45-48.
5. On January 22, 2021 the Department issued a Benefit Notice stating applying a new divestment period effective March 1, 2021 until September 11, 2021, with a baseline date of August 4, 2020.
6. On February 17, 2021 Petitioner filed a hearing request.

CONCLUSIONS OF LAW

The regulations governing the hearing and appeal process for applicants and recipients of public assistance in Michigan are found in the Michigan Administrative Code, MAC R 400.901-400.951. An opportunity for a hearing shall be granted to an applicant who requests a hearing because his or her claim for assistance has been denied. MAC R 400.903(1). Clients have the right to contest a department decision affecting eligibility or benefit levels whenever it is believed that the decision is incorrect. The department will provide an administrative hearing to review the decision and determine the appropriateness of that decision. BAM 600.

Clients have the right to contest a department decision affecting eligibility or benefit levels whenever they believe the decision is incorrect. The department provides an administrative hearing to review the decision and determine its appropriateness in accordance to policy. This item includes procedures to meet the minimum requirements for a fair hearing. BAM 600, page 1.

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.

Participating states must provide at least seven categories of medical services to persons determined to be eligible Medicaid recipients. 42 USC §1396a(a)(10)(A), 1396d(a)(1)-(5), (17), (21). One of the seven mandated services is *nursing facility services*. 42 USC §1396d(a)(4)(A).

After the Medicaid program was enacted, a field of legal counseling arose involving asset protection for future disability. The practice of “Medicaid Estate Planning,” whereby “individuals shelter or divest their assets to qualify for Medicaid without first depleting their life savings,” is a legal practice that involves utilization of the complex rules of Medicaid eligibility, arguably comparable to the way one uses the Internal Revenue Code to his or her advantage in preparing taxes. See generally *Kristin A. Reich, Note, Long-Term Care Financing Crisis-Recent Federal and State Efforts to Deter Asset Transfers as a Means to Gain Medicaid Eligibility*, 74 N.D. L.Rev. 383 (1998). Serious concern then arose over the widespread divestiture of assets by mostly wealthy individuals so that those persons could become eligible for Medicaid benefits. *Id.*; see also *Rainey v. Guardianship of Mackey*, 773 So.2d 118 (Fla. 4th DCA 2000). As a result, Congress enacted several laws to discourage the transfer of assets for Medicaid qualification purposes. See generally *Laura Herpers Zeman, Estate Planning: Ethical Considerations of Using Medicaid to Plan for Long-Term Medical Care for the Elderly*, 13 *Quinnipiac Prob. L.J.* 187 (1988). Recent attempts by Congress imposed periods of ineligibility for certain Medicaid benefits where the applicant divested himself or herself of assets for less than fair market value. 42 U.S.C. § 1396p(c)(1)(A); 42 U.S.C. § 1396p(c)(1)(B)(i); *Fla. Admin. Code R. 65A-1.712(3)*. More specifically, if a transfer of assets for less than fair market value is found within 36 months of an individual's application for Medicaid, the state must withhold payment for various long-term care services, i.e., payment for nursing home room and board, for a period of time referred to as the penalty period. *Fla. Admin. Code R. 65A-1.712(3)*. Medicaid does not, however, prohibit eligibility altogether. It merely penalizes the asset transfer for a certain period of time. See generally *Omar N. Ahmad, Medicaid Eligibility Rules for the Elderly Long-Term Care Applicant*, 20 *J. Legal Med.* 251 (1999). [*Thompson v. Dep't of Children & Families*, 835 So.2d 357, 359-360 (*Fla App*, 2003).]

Pertinent department policy dictates:

BEM 405 states in part:

Divestment results in a penalty period in MA, **not** ineligibility. Divestment is a type of transfer of a resource and not an amount of resources transferred. BEM 405, p 1.

Divestment means a transfer of a resource (see RESOURCE DEFINED below 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;

- Is not listed below under TRANSFERS THAT ARE NOT DIVESTMENT

See Annuity Not Actuarially Sound and Joint Owners and Transfers below and BEM 401 about special transactions considered transfers for less than fair market value. BEM 405, p 1.

During the penalty period, MA will **not** pay the client's cost for:

- LTC services.
- Home and community-based services.
- Home Help.
- Home Health. BEM, 405, p 1
- group's financial interest (divestment).

Also see Joint Owners and Transfers for examples. BEM 405, p 2.

The Department is not to apply the penalty period to any month that an individual is not eligible for Medicaid and actually in LTC (or home health, home help, or the MIChoice Waiver program). BEM 405, p 13. LTC Costs are listed in BEM 405 pp 13-14 for each calendar year.

Policy states that the department can 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.

Policy further states that the Department can 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, the caseworker must 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, pages 15-16.

Computing Penalty Period

The penalty period starts on the date which the individual is eligible for Medicaid and would otherwise be receiving institutional level care (LTC, MIChoice waiver, or home help or home health services), and is not already part of a penalty period. When a medical provider is paid by the individual, or by a third party on behalf of the individual, for medical services received, the individual is not eligible for Medicaid in that month and the month is not a penalty month. That month cannot be counted as part of the penalty period. This does not include payments made by commercial insurance or Medicare.

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, pages 14-15.

BAM 220 titled Case Actions discusses adequate and timely notice:

Adequate Notice

An adequate notice is a written notice sent to the client at the same time an action takes effect (not pended). Adequate notice is given in the following circumstances:

All Programs

- Approval/denial of an application.
- Increase in benefits.

...MA Only

- Case opening with a deductible or patient-pay amount.

- Decrease in post-eligibility patient-pay amount.
- Recipient removed due to his eligible status in another case.
- Addition of MA coverage on a deductible case.
- Increase in medical benefits.
- At case open with a divestment penalty.

Timely Notice

All Programs

Timely notice is given for a **negative action** unless policy specifies adequate notice or no notice. See Adequate Notice and, for FAP only, Actions Not Requiring Notice, in this item. A timely notice is mailed at least 11 days before the intended negative action takes effect. The action is pended to provide the client a chance to react to the proposed action.

BAM 220, pages 3-5.

Here, there is no dispute that Petitioner divested \$55,515.00, the calculation of the \$55,515.00, or the total penalty period length. The issue here centers on when the penalty was applied. Petitioner argues that the penalty dates should have been applied at application, or in the alternative, starting when the Department discovered that it failed to apply the penalty and determined the penalty to be October 1, 2020 to April 11, 2021 pursuant to its September 15, 2020 notice.

The Department argues that a divestment penalty cannot be applied until an individual is in long term care (LTC) so the divestment penalty could not be applied at application. The Department further argues that it erred in applying the penalty on October 1, 2020 due to ESA 2020-12 issued March 19, 2020 and revised March 20, 2020. That document states in part:

Subject: COVID-19 Medicaid Closures:

REVISION: Effective today 3/20/2020, 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....ESA 2020-12

Here, the Department argues that it was required to reverse the October 1, 2020 penalty period on the basis that ESA 2020-12 prohibits Medicaid divestment penalties

during the pandemic. Testimony by Department witness Dawn Berridge. Ms. Berridge testified that she was instructed to remove the penalty on the grounds of ESA 2020-12. Petitioner argues that ESA 2020-12 does not address divestment only case closures, and there is no mention or statement regarding MA divestment at all in ESA 2020-12. Petitioner further argues that a Medicaid divestment penalty does not constitute a case closure. As such, the memorandum could not reasonably be interpreted to apply to any actions that are not case closures.

In response to the Petitioner's objections, the Department's witness testified that a divestment is not in fact a closure, but she received an e-mail that she should reverse the penalty applied in October, 2020, and that she was verbally instructed by her supervisor that ESA 2020-12 applies to MA divestment. Petitioner further testified that she only does what she is told. That supervisor did not testify.

It is a well-established tenet of divestment policy that a divestment penalty is not a case closure and the recipient remains to have an open case with eligibility for certain medical benefits. As cited above, divestment results in a penalty period in MA, **not** ineligibility... BEM 405, p 1.

Here, the Department cites ESA 2020-12 as authority for its action. The plain language of ESA 2020-12 discusses case closures and does not address MA divestment at all. The language is clear, and plain. Moreover, testimony by both the witness for the Department as well as Petitioner's witness is that a divestment is not a case closure. The Department did not cite any other authority for reversing the initial divestment penalty on October 1, 2020 to April 11, 2021 other than ESA 2020-12 which patently does not address divestment.

After a careful review of the credible and substantial evidence of record the undersigned finds that the authority presented by the Department does not support the action taken by the Department. The plain language of ESA 2020-12 stops the Department from taking MA closures during the pandemic; divestment is not mentioned in the memorandum at all. Moreover, the Department's evidence is that a divestment penalty does not constitute a case closure. For these reasons, the Department's removal of the divestment penalty on the authority of ESA 2020-12 cannot be upheld.

As to which date the penalty should be applied, policy does not allow the application of a penalty until the recipient is in LTC. There is no evidence of record that Petitioner was in LTC at application. Unrefuted evidence of record is that at the time of the October 1, 2020 penalty, Petitioner was in LTC. As such, that penalty period was correct.

DECISION AND ORDER

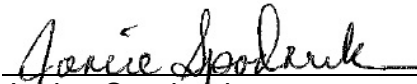
Accordingly, the Department's decision to reverse the October 1, 2020 to April 11, 2021 divestment penalty and apply a new penalty from March 1, 2021 to September 11, 2021 is **REVERSED**.

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. Remove the divestment penalty applied to March 1, 2021 to September 11, 2021, and
2. Reinstate the divestment penalty from October 1, 2020 to April 11, 2021.

IT IS SO ORDERED.

JS/ml



Janice Spodarek
Administrative Law Judge
for Elizabeth Hertel, 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

Fiona Wicks
Ottawa County DHHS – via electronic mail

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