



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 9, 2021
MOAHR Docket No.: 21-002400
Agency No.: [REDACTED]
Petitioner: [REDACTED]

ADMINISTRATIVE LAW JUDGE: Landis Lain

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 July 1, 2021, from Lansing, Michigan. Petitioner [REDACTED] is in Long Term Care. The Petitioner was represented by her son and Authorized Hearings Representative [REDACTED]. The Department of Health and Human Services (Department or Respondent) was represented by Lori Aumick, Hearings Facilitator and Roianne Brown, Long Term Care Specialist.

Petitioner's Exhibit 1-18 (pages 1-50) were admitted as evidence.

ISSUE

Did the Department properly determine that Petitioner had divestment and a 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. Petitioner was enrolled in the MI Choice Waiver Program.
2. On July 10, 2020, the Department received a Facility Discharge notice indicating that Petitioner was disenrolled from the MI Choice Waiver Program.
3. On August 31, 2020, the Department received a facility admission notice indicating that Petitioner was admitted on July 7, 2020, to Regency at Grand Blanc LTC Facility and is expected to be there more than 30 days, not expected to return home.

4. On January 19, 2021, the Department updated COVID-19 Medical Assistance (MA) Medicare Savings Program (MSP).
5. On March 2, 2021, the Department received a facility admission and a facility discharge notice indicating that Petitioner was enrolled in hospice in a skilled nursing facility September 1, 2020, at [REDACTED]
6. On March 5, 2021, the Department sent Petitioner a DHS-3503 Verification Checklist requesting proof of income and current bank account information due on March 18, 2021.
7. On April 1, 2021, the [REDACTED] Care caseworker called Social Security to obtain Social Security income information as verification information had not been returned. The case was not closed for failure to verify as per ESA memo 2020-12 MA and MSP are not to be terminated nor reduced due to the COVID 19 Pandemic.
8. On [REDACTED] 2021, the Department received Petitioner's [REDACTED] bank statement dated [REDACTED] 2020 through [REDACTED] 2021 and the Social Security Award letter.
9. On April 20, 2021, the Department received information indicating that Petitioner's son charged Petitioner for January and February 2021 while she was residing in the nursing home.
10. On May 4, 2021, the Department determined that [REDACTED] in funds that were transferred to Petitioner's son's bank account from December 31, 2020, to March 10, 2021, were divestment.
11. On May 4, 2021, a divestment penalty of 17 days was applied to the case and a DHS-0176 Benefit Notice was sent to Petitioner and Petitioner's son informing of the divestment penalty period from June 1, 2021-June 17, 2021, in which Medicaid will not pay for Petitioner's room and board at the facility.
12. The baseline date is April 25, 2013, when Petitioner was originally enrolled as a MI Choice Waiver Participant.
13. On May 12, 2021, Petitioner's son filed a Request for Hearing to contest the Department's negative action.
14. May 14, 2021, the Michigan Office of Administrative Hearings and Rules received a Hearing Summary and attached documents.
15. On May 19, 2021, a prehearing conference was held, and the issue was not resolved.

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.

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.

Title XIX of the Social Security Act, commonly referred to as “The Medicaid Act,” provides for medical assistance services to individuals **who lack the financial means to obtain needed health care**. 42 U.S.C. §1396. (Emphasis added)

The Medicaid program is administered by the federal government through the Centers for Medicaid and Medicare Services (CMS) of the Department of Health and Human Services (HHS). The state and federal governments share financial responsibility for Medicaid services. Each state may choose whether or not to participate in the Medicaid program. Once a state chooses to participate, it must operate its Medicaid program in accordance with mandatory federal requirements, imposed both by the Medicaid Act and by implementing federal regulations authorized under the Medicaid Act and promulgated by HHS.

Pertinent Department policy states:

Assets must be considered in determining eligibility or SSI related categories. Assets mean cash, any other personal property and real property. (BEM, Item 400 Page 1). Countable assets cannot exceed the applicable asset limit. Not all assets are counted. Some assets are counted for one program but not for another program. (BEM Item 400, Page 1).

The department is to consider both of the following to determine whether and how much of an asset is countable: An asset is countable if it meets the availability test and is not excluded. The department is to consider the assets of each person in the asset group. (BEM, Item 400, Page 1).

Asset eligibility exists when the asset groups countable assets are less than or equal to the applicable asset limit at least one day during the month being tested. (BEM, Item 400, Page 4). An application does not authorize MA for future months if the person has excess assets on the processing date.

The SSI related MA asset limit for SSI related MA categories that are not Medicare savings program or QDWI is \$2000.00 for an asset group for one person and \$3000.00 for an asset group of 2 people. BEM, Item 400 Page 5.

An asset must be available to be counted. Available means that someone in the asset group has the legal right to use or dispose of the asset. BEM, Item 400, Page 6. The department is to assume an asset is available unless the evidence shows that it is not available.

BEM, Item 405, states:

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.

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.

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, Item 405, page 1

Resource means all the client's and his spouse's assets and income. It includes all assets and all income, even countable and/or excluded assets, the individual or spouse receive. It also includes all assets and income that the individual

(or their spouse) were entitled to but did **not** receive because of action by one of the following:

- The client or spouse.
- A person (including a court or administrative body) with legal authority to act in place of or on behalf of the client or the client's spouse.
- Any person (including a court or administrative body) acting at the direction or upon the request of the client or his spouse. BEM, Item 405, page 2

Transferring a resource means giving up all or partial ownership in (or rights to) a resource. Not all transfers are divestment. Examples of transfers include:

- Selling an asset for fair market value (not divestment).
- Giving an asset away (divestment).
- Refusing an inheritance (divestment).
- Payments from a **MEDICAID TRUST** that are **not** to, or for the benefit of, the person or his spouse; see BEM 401 (divestment).
- Putting assets or income in a trust; see BEM 401.
- Giving up the **right** to receive income such as having pension payments made to someone else (divestment).
- Giving away a lump sum or accumulated benefit (divestment).
- Buying an annuity that is **not** actuarially sound (divestment).
- Giving away a vehicle (divestment).
- Putting assets or income into a Limited Liability Company (LLC) BEM, item 405, page 2

Department policy states that it is **not** divestment to transfer a homestead to the client's:

- Spouse; see Transfers Involving Spouse above.
- Blind or disabled child; see Transfers Involving Child above.
- Child under age 21.
- Child age 21 or over who:
 - Lived in the homestead for at least two years immediately before the client's admission to LTC or BEM 106 waiver approval, **and**

- Provided care that would otherwise have required LTC or BEM 106 waiver services, as documented by a physician's (M.D. or D.O.) statement. BEM Item 405, page 8.

Policy also states that the uncompensated value of a divested resource is

- The resource's cash or equity value.
- Minus any compensation received.
- The uncompensated value of a promissory note, loan, or mortgage is the outstanding balance due on the "Baseline Date" BEM, Item 405, page 12.

When divestment occurs, the department must invoke a penalty period. The transferred amount is used to calculate the penalty period. The Department may only recalculate the penalty period under certain circumstances. Pertinent policy dictates that the first step in determining the period of time that transfers can be looked at for divestment is determining the baseline date. Once the baseline date is established, you determine the look-back period. The look back period is 60 months prior to the baseline date for all transfers made after February 8, 2006. BEM, Item 405, page 2-4.

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. (Emphasis Added)

This Administrative Law Judge finds that 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 care (LTC, MI Choice waiver, or home help or home health services), and is not already part of a penalty period. BEM 405.


The department has established by the necessary competent, substantial and material evidence on the record that it was acting accordance with department policy when it instituted the divestment penalty from June 1-June 17, 2021. The Department's decision must be reversed.

DECISION AND ORDER

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 has established by a preponderance of the evidence contained on the record that the divestment penalty was not appropriately applied. The divestment period is appropriate.

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

LL/ml



Landis Lain
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

DHHS – via electronic mail

MDHHS-Genesee-Clio-Hearings
BSC2
C. George
EQAD

Authorized Hearing Rep. – via first class mail

[REDACTED]
[REDACTED]
[REDACTED] MI [REDACTED]

Petitioner – via first class mail

[REDACTED]
[REDACTED]
[REDACTED] MI [REDACTED]