[redacted]
[redacted], MI [redacted]

Date Mailed: May 6, 2022
MOAHR Docket No.: 21-006245
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 April 7, 2022, from Lansing, Michigan. Nathan Piwowarski, Attorney, represented the Petitioner. The Department of Health and Human Services (Department) was represented by Kathleen Halloran and Lee Ann Scott, Assistant Attorney Generals. Shawn Soloman, Eligibility Specialist (ES); Laura Ryan, Petitioner's Daughter and Power of Attorney; and Bridget Heffron, Medicaid Eligibility Specialist Level 2 (MA ES2), appeared as witnesses for the Department.

During the hearing proceeding, the Department's Hearing Summary packet was admitted as Exhibits A-O and Petitioner's Exhibits were admitted as Exhibits A-N.

ISSUE

Did the Department properly close 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 October 21, 2021, Petitioner authorized his daughter, as agent under the Power of Attorney, to transfer $123,689.08 from his personal bank account to his children's bank account. (Petitioner's Exhibits A, B, and C)

2. On [redacted], 2021, an application for MA was filed on Petitioner's behalf by his Attorney. (Respondent Exhibit A)

3. Along with the application and verifications, a letter was included explaining a series of divestments, repayment of debt, and “curing” of divestment. (Respondent Exhibit D)

4. One of the divestments acknowledged in the letter was a gift of $123,689.08 to his daughter on October 21, 2021. The letter specified that this was an intentional divestment that would result in a 12.93, or 12 months and 27 days of penalty using the 2021 divestment divisor of $9,560.00. (Respondent Exhibit D)

5. On November 2, 2021, a Verification Checklist was issued with a due date of November 12, 2021, in part requesting a signed statement from Petitioner and his daughter regarding the intentionally divested gift. (Respondent Exhibit F)

6. On November 3, 2021, signed statements from Petitioner and his daughter were submitted regarding the intentionally divested gift. (Respondent Exhibits G and H)

7. On November 8, 2021, a Health Care Coverage Determination Notice was issued to Petitioner stating MA was approved for October 1, 2021 and ongoing, but indicating there would be a divestment penalty from October 1, 2021 through October 28, 2022, based on assets or income being transferred for less than their fair market value ($123.689.08). (Respondent Exhibit I)

8. On November 9, 2021, at 12:31 pm Petitioner’s attorney’s office emailed the ES asking if Petitioner had been approved for MA. (Respondent Exhibit J)

9. On November 9, 2021, at 12:34 pm the ES responded to the email indicating Petitioner was approved for MA with the expected divestment penalty. (Respondent Exhibit J)

10. On November 9, 2021, at 1:00 pm Petitioner’s attorney’s office emailed the ES advising that Petitioner’s daughter returned the $123,689.08 to Petitioner that same day. Petitioner requested, pursuant to BEM 405 page 16, that the divestment penalty period be recalculated, and that the penalty period end on November 9, 2021, the date of notification to the Department that the resources were returned. (Respondent Exhibit J)

11. On November 20, 2021, a bank statement summary was provided documenting the funds transfer of November 9, 2021. (Respondent Exhibit K)

12. On November 30, 2021, a Health Care Coverage Determination Notice was issued to Petitioner stating MA would close effective December 1, 2021 because coverage was opened in error. (Respondent Exhibit L)

13. On December 17, 2021, a hearing request was filed on Petitioner’s behalf contesting the MA determination. (Respondent’s Exhibit M)

14. On January 7, 2022, a Benefit Notice was issued to Petitioner stating MA was denied/closed effective December 1, 2021, because the value of countable assets was higher than allowed for this program. (Respondent's Exhibit O)

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.

Clients must cooperate with the local office in determining initial and ongoing eligibility. Clients must completely and truthfully answer all questions on forms and in interviews. BAM 105, October 1, 2021, p. 9.

The applicable MA asset limit in this case is $2,000.00. BEM 400, October 1, 2021, pp. 7-9. An asset must be available to be countable. Available means that someone in the asset group has the legal right to use or dispose of the asset. BEM 400, p. 10.

Cash assets include money held by others. BEM 400, p. 16. The policy states:

> Money held by others. **Example:** Sally does **not** have a bank account. She puts money in her mother's checking account, but it is **not** a joint account.
>
> BEM 400, p. 16
> (Emphasis in original)

Divestment is a type of transfer of a resource and not an amount of resources transferred. Divestment results in a penalty period in MA, not ineligibility. BEM 405, April 1, 2021, p. 1.

> Divestment means the transfer of a resource (see *resource defined* in this item and in glossary) by a client or his spouse that are all 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 under *transfers that are not divestment* in this item.

BEM 405, p. 1
(Emphasis in original)

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 giving an asset away. BEM 405 p. 2. Transfers by anyone acting in place of, on behalf of, at the request of or at the direction of the client are treated as transfers by the client. BEM 405 p. 3.

The Families First Corona Virus Response Act (FFCRA; P.L. 116-127) requires states to maintain the enrollment and coverage of all Medicaid beneficiaries through the end of the month in which the Public Health Emergency (PHE) for COVID-19 ends. Pub. L. No. 116-127 § 6008(b)(3); Exhibit M. Federal Regulations and U.S. DHHS's Centers for Medicare & Medicaid Services (CMS) only allow for states to close Medicaid cases during the PHE under four conditions. Specifically: (1) the beneficiary requests a voluntary termination of eligibility; (2) the beneficiary dies; (3) the beneficiary ceases to be a resident of the state; or (4) the beneficiary was not validly enrolled. 42 C.F.R. § 433.400; Exhibit N.

Federal Regulations define validly enrolled:

> *Validly enrolled* means that the beneficiary was enrolled in Medicaid based on a determination of eligibility. A beneficiary is not validly enrolled if the agency determines the eligibility was erroneously granted at the most recent determination, redetermination, or renewal of eligibility (if such last redetermination or renewal was completed prior to March 18, 2020) because of agency error or fraud (as evidenced by a fraud conviction) or abuse (as determined following the completion of an investigation pursuant to §§ 455.15 and 455.16 of this chapter) attributed to the beneficiary or the beneficiary's representative, which was material to the determination of eligibility. Individuals receiving medical assistance during a presumptive eligibility period in accordance with part 435, subpart L, of this chapter have not received a determination of eligibility by the state under the state plan and are not considered validly enrolled beneficiaries for purposes of this section.
>
> 42 C.F.R. § 433.400(b)

The COVID-19 Medicaid (MA) Medicare Savings Programs (MSP) Non-Closure FAQ, states:

> 1.) Updated: 09/01/2021 In what situations are MA/MSP programs allowed to be closed?

Due to the current COVID-19 pandemic, CMS has provided a directive to MDHHS that the only time a MA/MSP program can be closed is due to death, moving out of state, if the client gives verbal/written request to close their program, **or if they are not validly enrolled (beginning 09/01/2021).**

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A. Updated: 09/01/2021 What does it mean to be validly enrolled?

Per CMS guidance, an individual is not validly enrolled if MDHHS made a mistake in their initial eligibility determination, or if they are found to have committed fraud or abuse. This means that if an MDHHS eligibility specialist or MDHHS eligibility system approved an applicant for coverage that they were not entitle to then the applicant is not validly enrolled. Examples of this include, but are not limited to, eligibility systems auto-approving an application where the information provided on the application does not support an approval, a case that is still missing proofs or other application information necessary to make a determination from the initial application, or an individual who was approved for coverage but was not applying on the application.
*****NOTE:** A case or EDG may not be closed where the initial eligibility determination was correct. This means that a case or EDG may **not** be closed even in a beneficiary's income or other information has changed during the course of the public health emergency in a way that would normally cause a loss of coverage.

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B. Updated: 09/01/2021 Is there a definition for what it means to have committed fraud or abuse?

Yes. A beneficiary mist either have been convicted of committing fraud or have been determined to have committed abuse by MDHHS in accordance with federal regulations at 42 CFR §455.16.

Petitioner's Exhibit N
(Emphasis in original)

In this case, a Health Care Coverage Determination Notice was issued to Petitioner on November 30, 2021, stating MA would close effective December 1, 2021 because coverage was opened in error. (Respondent Exhibit L) Respondent asserted that Petitioner's MA approval was due to an agency error. The agency error occurred because the Department mistakenly believed that the $123,689.08 divestment was truly a gift. Instead, Petitioner's actions suggest that his daughter was to hold the gifted funds only temporarily while the Department determined Petitioner's eligibility. Respondent indicates the Department error was their mistaken reliance on the representations

contained in Petitioner's Medicaid application. The Department notes that this could have been avoided because the Department would have denied the application due to excess assets if Petitioner had provided accurate and complete information. Respondent made note of Petitioner's responsibility as a Medicaid applicant to supply accurate and complete eligibility information. (Respondent's Pre-Hearing Brief)

Given the timing of the transactions regarding the $123,689.08 at issue in this case, the Department understandably suspected that Petitioner did not provide accurate and complete information for the initial eligibility determination. However, the assertion that the Department relying on the information Petitioner provided was a Department error is not persuasive. Particularly so in this case because the Department verified the alleged gift transfer with bank statements and the written statements from Petitioner and his daughter. (Respondents Exhibit D-H) The Department did not fail to request, obtain, or review the verifications regarding the alleged gift transfer.

Rather, Respondent's reasoning is more consistent with the Department asserting that the invalid enrollment was due to Petitioner committing fraud or abuse. As noted above, the Department relied on the information Petitioner provided and asserted that Petitioner did not provide accurate and complete despite his responsibility to do so. Accordingly, the Department would have to have shown that Petitioner committed fraud (as evidenced by a fraud conviction) or abuse (as determined following the completion of an investigation pursuant to 42 CFR §455.15 and §455.16) before MA coverage could be closed based on the invalid enrollment. See 42 C.F.R. § 433.400(b) and Exhibit N. There was no evidence that there has been a fraud conviction. Further, when asked if the Department had completed a full investigation, the MA ES2 indicated this had not yet been completed. (MA ES2 Testimony) Therefore, the closure of Petitioner's MA case cannot be upheld at this time.

Petitioner's MA case should be reinstated until applicable law, regulation, or policy allows for a case action to be taken. For example, when enrollment and coverage of all MA beneficiaries no longer has to be maintained due to the PHE for COVID-19, or if the Department establishes that Petitioner was not validly enrolled based on an actual Department error, beneficiary fraud, or beneficiary abuse in accordance with 42 C.F.R. § 433.400.

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 closed 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. Reinstate Petitioner's MA case retroactive to the effective date of the closure in accordance with Department policy.

Colleen Lack

CL/dm

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

Sent via Email:

MDHHS-GrandTraverse-Hearings
C. George
EQADHearings
MOAHR
AG-HEFS-MAHS – Halloran
nathan@mwplegal.com
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Sent via First-Class Mail:

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