



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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██████████, MI ██████████

Date Mailed: September 23, 2022
MOAHR Docket No.: 22-003545
Agency No.: ██████████
Petitioner: ██████████

ADMINISTRATIVE LAW JUDGE: Ellen McLemore

HEARING DECISION

Following Petitioner's request for a hearing, this matter is before the undersigned Administrative Law Judge (ALJ) 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 September 14, 2022, from Detroit, Michigan. Petitioner was represented by her attorney, Kelly Lloyd Dexter. The Department of Health and Human Services (Department) was represented by Joseph Ortiz, Assistant Attorney General. Present to testify on behalf of the Department was Kori Harris, Eligibility Specialist and Lisa Williams, Lead Worker.

ISSUE

Did the Department properly impose a Medical Assistance (MA) divestment penalty from September 1, 2022, through November 5, 2022?

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 ██████████ 2022, an application for MA benefits was submitted on Petitioner's behalf. In the application, it was indicated that Petitioner was in a Long-Term Care (LTC) facility. Additionally, the Department was provided proof of a countable divestment in the amount of ██████████.
2. On July 5, 2022, the Department sent Petitioner a Health Care Coverage Determination Notice (HCCDN) notifying her that she was approved for MA benefits under the Extended Care (EC) program effective May 1, 2022, ongoing (Exhibit C).

3. On July 19, 2022, a representative acting on behalf of Petitioner's attorney contacted the Department inquiring as to why the HCCDN did not reference a divestment penalty (Exhibit F).
4. On July 21, 2022, the Department sent Petitioner a Benefit Notice informing her that she was subject to a divestment penalty during the period of September 1, 2022, through November 5, 2022 (Exhibit D).
5. On [REDACTED], 2022, Petitioner's attorney submitted a request for hearing disputing the Department's actions.

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.

Divestment is a type of transfer of a resource and not an amount of resources transferred. Resource means all the client's assets and income. Transferring a resource means giving up all or partial ownership in the resource. Divestment results in a penalty period, not MA program ineligibility. BEM 405 (January 2019), pp. 1-2; BEM 400 (February 2019), pp.1-3. During the penalty period, MA will not pay the client's cost for LTC services; home and community-based services; home help; or home health. MA will pay for other MA-covered services. BEM 405, p. 1. A divestment is a transfer of a resource by a client that is (i) within a specified time (the look-back period), (ii) for less than fair market value (FMV), and (iii) not an excluded transfer. BEM 405, p. 1.

In this case, Petitioner does not dispute that a divestment occurred or that the divestment penalty period was properly calculated. At issue is the start date of the divestment penalty period. Petitioner asserts that the correct penalty start date should be May 1, 2022, as that is the date in which Petitioner was in LTC and met the eligibility requirements of MA, while the Department maintains that the penalty start date should be September 1, 2022, as the Department is not authorized to retroactively apply a penalty period due to notice requirements.

After processing an application and upon certification of eligibility results, Bridges automatically notifies the client in writing of positive and negative actions by generating the appropriate notice of case action. BAM 220 (January 2019), p. 2. An adequate notice is a written notice sent to the client at the same time an action takes effect (not pending). For MA cases, adequate notice is given at case opening with a deductible or patient pay amount, or at case opening with a divestment penalty. BAM 220, pp. 3-4. A timely notice is given for negative case actions and is mailed 11 days before the intended negative action takes effect. The action is pending to provide the client a chance to react to the proposed action. BAM 220, pp. 4-5. Examples of negative actions are outlined in BAM 220, which includes changing the Program Enrollment (PET) code to a divestment penalty code. BAM 220, p. 11.

LTC facilities will not be paid unless the appropriate PET code is in the Community Health Automated Medicaid Processing System (CHAMPS). BEM 547 (April 2018), p. 1. For Department staff, adding, removing or changing PET codes are not negative actions. BEM 547, p. 1. However, changing a PET code to EXM-DIVM for a long-term care or hospital (L/H) or a waiver MA patient is a negative action. BEM 547, p. 1. PET code EXM-DIVM indicates a divestment penalty. BEM 405 (January 2022), p. 18.

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. BEM 405, p. 15. If a penalty is determined for a transfer in the past, the Department must apply the penalty from the first day after timely notice is given. BEM 405, p. 15. Timely notice must be given to LTC recipients before actually applying the penalty. BEM 405, p. 15. Adequate notice must be given to new applicants. BEM 405, p. 15.

At the hearing, the Department conceded that an agency error occurred, specifically, a failure to process the [REDACTED], 2022 application correctly. The Department did consider that Petitioner was in LTC, and Petitioner's MA case opened effective May 1, 2022, under the EC program. However, the Department did not properly categorize the divestment as a countable divestment, requiring a divestment penalty period. As such, the divestment penalty was not applied effective May 1, 2022. Because the MA case was opened, the Department asserted that the penalty period could not be retroactively applied because 42 CFR 431.211, BAM 220 and BEM 405 require timely notice prior to taking negative action. 42 CFR 431.211 expressly requires that the Department "send a notice at least 10 days before the date of action" except in those circumstances identified in §§ 431.213 and 431.214, none of which apply in this case. Here, notice of the divestment penalty period was not issued until July 21, 2022. The Department maintained that the penalty cannot be imposed before the effective date of the intended negative action, due to the timely notice requirements. Therefore, the Department argued that it properly followed policy when it started the penalty period on September 1, 2022.

Petitioner argued that failing to implement the divestment penalty period effective May 1, 2022, does not conform with federal regulations, and therefore, the undersigned ALJ

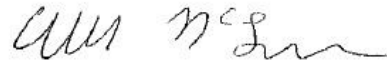
should issue a recommended decision pursuant to BAM 600. Policy allows for a presiding ALJ to issue a recommended decision when MA policy does not conform with state or federal law. BAM 600 (March 2021), p. 40. Petitioner argued that due to agency error, the Department failed to properly follow federal law when determining the start of the divestment penalty period. Federal law specifies that the penalty start date in the case of a transfer of an asset made on or after February 8, 2006, 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 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. 42 U.S.C 1396p(c)(1)(D)(ii). However, as stated above, federal regulations also mandate that the Department issue notice 10 days prior to the date of action. Therefore, Department policies properly conform to federal law and policy. Thus, a recommended decision is not appropriate.

Additionally, Petitioner argued that the intended purpose of the timely notice requirements is to provide the client with an adequate opportunity to respond to the Department's action, which was not necessary in the present case. Petitioner's attorney highlighted that the Department was advised by her office of the divestment and the expected penalty period when the [REDACTED], 2022 application was submitted.

Policy provides that timely notice is required for negative actions, and that changing the PET code to implement a divestment penalty period is a negative action. Negative case actions cannot take effect until timely notice is provided to the client. Both parties conceded that the divestment penalty period was not applied until September 1, 2022. Thus, the PET code for the divestment penalty was not changed prior to September 1, 2022. Notice of the divestment penalty period was not issued until July 21, 2022. Therefore, the Department could not implement the divestment penalty period until September 1, 2022. Petitioner's constructive notice argument is based on principles of fairness. ALJs have no authority to make decisions on constitutional grounds, overrule statutes, overrule promulgated regulation, or overrule or make exceptions to Department policy. Department Delegation of Hearing Authority executed by Robert Gordon, Department Director, June 6, 2019. MOAHR has no jurisdiction to grant equitable relief. Here, the Department's actions in applying the divestment penalty effective September 1, 2022, was consistent with Department policy and federal law. Therefore, the Department acted in accordance with policy when it imposed a divestment penalty period to Petitioner's MA case from September 1, 2022, through November 5, 2022. Accordingly, the Department's decision is affirmed.

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 did act in accordance with Department policy when it imposed a divestment penalty period to Petitioner's MA case from September 1, 2022, through November 5, 2022. Accordingly, the Department's decision is **AFFIRMED**.



EM/tm

Ellen McLemore
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
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Via-Electronic Mail :

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Authorized Hearing Rep.

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