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GOVERNOR

STATE OF MICHIGAN
DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS
MICHIGAN OFFICE OF ADMINISTRATIVE HEARINGS AND RULES

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DIRECTOR

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Date Mailed: December 14, 2022
MOAHR Docket No.: 22-004723
22-004724

Agency No.: [REDACTED]

Petitioners: [REDACTED]
[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 November 15, 2022, from Lansing, Michigan. The Petitioner was represented by Scott J. Brogan, Attorney. The Department of Health and Human Services (Department) was represented by Geraldine Brown, Assistant Attorney General. Michele Mayo, Eligibility Specialist (ES), and Lorraine Massie, Family Independence Manager (FIM), appeared as witnesses for the Department.

During the hearing proceeding, the Department’s Hearing Summary packet regarding [REDACTED] (BH) was admitted as Exhibit A, pp. 1-42 and the Department’s Hearing Summary packet regarding [REDACTED] (WH) was admitted as Exhibit B, pp. 1-29.

ISSUE

Did the Department properly determine Petitioners’ eligibility for Medical Assistance (MA)?

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, B.H. applied for an Initial Asset Assessment (IAA) and Long Term Care Medicaid (MA-LTC) at which time W.H. was a community spouse in the home. (Exhibit A, pp. 8-13)

2. On March 24, 2020, B.H. was approved for MA-LTC. (Exhibit A, pp. 3 and 14-18)
3. On January 8, 2021, an Asset Transfer Notice was issued explaining how much of B.H.'s assets may need to be transferred to W.H. so that B.H. may continue getting MA. It was emphasized that the patient's countable assets must be at or below the Medicaid asset limit at the end of one year. The Asset Transfer Notice notes there are restrictions on what the patient and spouse may transfer to others. (Exhibit A, pp. 19-20)
4. On July 28, 2022, B.H. was admitted to a LTC facility. (Exhibit A, p. 21; Exhibit B, p. 8)
5. On [REDACTED] 2022, an application for MA-LTC was submitted for W.H. indicating his spouse was also in a nursing home and reporting an August 11, 2022 cash gift as well as a January 24, 2022 transfer of ownership of a life insurance policy to daughter [REDACTED] (E.H.). Verifications were provided for the cash gift of \$42,991.48 as well as the transfer of ownership of a life insurance policy to daughter E.H. (Exhibit A, pp. 21-28; Exhibit B, pp. 8-15)
6. On September 6, 2022, the Department received verification that the cash surrender value of the life insurance policy was \$21,088.73. (Exhibit A, p. 29; Exhibit B, p. 16)
7. The Department determined that the total of the transferred funds was \$64,080.21, the transfer was a divestment, and the penalty period of 6 months and 14 days must be shared between B.H. and W.H. Each spouse would have a penalty period of 3 months and 7 days. (Exhibit A, pp. 3 and 37; Exhibit B, pp. 3 and 24)
8. On September 22, 2022, a Health Care Coverage Determination Notice was issued stating W.H. was approved for MA with a monthly patient pay of \$9,318.00 August 1, 2022 and ongoing, but indicating there would be a divestment penalty from August 1, 2022 to November 7, 2022, based on assets or income being transferred for less than their fair market value. It was noted that penalty would be split with spouse. (Exhibit B, pp. 25-28)
9. On September 23, 2022, a Benefit Notice was issued to B.H. stating she was eligible for MA from November 1, 2022 and ongoing, but there would be a divestment penalty from November 1, 2022 to February 7, 2023, based on assets or income being transferred for less than their fair market value. It was noted that penalty would be split with spouse. (Exhibit A, pp. 38-41)
10. On October 10, 2022, hearing requests were filed on behalf of B.H. and W.H. contesting the Department's determination, specifically asserting there had been an improper allocation of the divestment penalty. (Exhibit it A, p. 5-7; Exhibit B, pp. 5-7)

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.

BEM 405 addresses MA Divestment. In part, this policy states:

Divestment results in a penalty period in MA, **not** ineligibility.

Divestment means a transfer of a resource (see *resource defined* in this item 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*; see definition in glossary.
- Is not listed in this item under *transfers* that are not divestment.

BEM 405, January 1, 2022, p. 1.

In this case, it was uncontested that the transfers to Petitioners' daughter were a divestment, the total of the transferred funds was \$64,080.21, and the penalty period of 6 months and 14 days. The parties dispute whether the divestment penalty period should be shared between the married couple instead of applying only to the newest of the couple to apply for LTC MA.

Federal statutes address spouses sharing a penalty:

(4) A State (including a State which has elected treatment under section 1396a(f) of this title) may not provide for any period of ineligibility for an individual due to transfer of resources for less than fair market value except in accordance with this subsection. In the case of a transfer by the spouse of an individual which results in a period of ineligibility for medical assistance under a State plan for such individual, a State shall, using a reasonable methodology (as specified by the Secretary), apportion such period of ineligibility (or any portion of such period) among the individual

and the individual's spouse if the spouse otherwise becomes eligible for medical assistance under the State plan.

42 USC 1396p(c)

(E) In the case of a transfer by the spouse of an individual that results in a period of ineligibility for the individual under this subsection, the Commissioner shall apportion the period (or any portion of the period) among the individual and the individual's spouse if the spouse becomes eligible for benefits under this subchapter.

42 USC 1382b(c)(1)

In accordance with the federal statutes, BEM 405 addresses spouses sharing a penalty:

Spouses Sharing a Penalty

Penalize a client if her or his spouse divests. The penalty is imposed on whichever spouse is in a penalty situation. If both spouses are in a penalty situation, the penalty period (or any remaining part) must be divided between them.

Example: Mr. and Mrs. Brown divested themselves of assets prior to Mr. Brown entering an LTC facility and applying for Medicaid. Mr. Brown is in LTC and under a divestment penalty for 24 months. When Mrs. Brown enters the facility 6 months later, the remaining 18 months of Mr. Brown's penalty are divided between them, giving Mr. and Mrs. Brown each 9 months of the penalty still to complete. If either Mr. or Mrs. Brown dies before they complete their penalty the remainder of their penalty is transferred to their spouse.

Example: Mr. Brown enters a LTC facility and applies for Medicaid. He is found eligible for Medicaid. During the presumed asset eligibility period Mrs. Brown transfers Mr. Brown's assets to herself and then transfers the assets to her children (the first transaction is permitted the second transaction is divestment). Mr. Brown incurs the divestment penalty. Mrs. Brown then enters the LTC facility. Mr. and Mrs. Brown divide the remainder of the incurred divestment penalty.

BEM 405, January 1, 2022, pp. 15-16.

The second example above was discussed during the hearing. BEM 402 addresses the presumed asset eligibility period:

Presumed Asset Eligible Period

SSI-Related MA Only

Applicants eligible for the **processing month** and recipient's eligible for the first future month are automatically asset eligible for up to 12 calendar months regardless of:

- Changes in the community spouse's assets, or
- The number of MA applications or eligibility determinations that occur during the period.

The 12-month period begins with the month following the processing month and is called the presumed asset eligible period.

Exception: The 12-month period ends sooner if any of the following becomes true:

- The continuous period of care ends.
- The client's spouse no longer meets the definition of a community spouse when the spouse enters L/H, a waiver, or PACE.
- The client's spouse dies or the couple divorces.

Note: Do **not** extend the original 12-month period when the client becomes eligible for additional MA benefits (for example: QMB benefits were effective 8-1-91; Group 2 coverage began 10-1-91).

Presumed Asset Eligible Period Ends

SSI-Related MA Only

When the presumed asset eligible period ends, use BEM 400 to determine the client's asset eligibility. Count only the client's assets, **not** the spouse's assets, to determine continued eligibility. Verify all assets which are still owned by the individual, by the spouse, and jointly owned. Verify the transfers of all assets which were owned at the IAA, but which are no longer owned. Review all transfers for divestment.

Note: Because only the client's assets are counted after the presumed asset eligible period, the client may have to transfer some assets to his spouse to make sure that he owns no more than the asset limit for one person at the end of the presumed asset eligible period; see *asset transfer* information in this item.

BEM 402, January 1, 2022, pp. 4-5

The presumed asset eligibility period began when the Department issued the January 8, 2021 Asset Transfer Notice explaining how much of B.H.'s assets may need to be transferred to W.H. so that B.H. may continue getting MA. It was emphasized that the

patient's countable assets must be at or below the Medicaid asset limit at the end of one year. The Asset Transfer Notice notes there are restrictions on what the patient and spouse may transfer to others. (Exhibit A, pp. 19-20)

Pursuant to the BEM 402 policy, the 12-month presumed asset eligible period should have started the month following the processing month. Eligibility was determined for B.H. in March 2020. Therefore the presumed asset eligible period should have started in April 2020. However, the ES explained that they cannot start the presumed asset eligible period until the Asset Transfer Notice was issued. In this case, the Asset Transfer Notice was not issued until January 8, 2021. The ES confirmed this delay in starting the 12-month presumed asset eligible period did not affect the contested issue in Petitioners' case. (ES Testimony)

Petitioners assert that the penalty period should not be applied to B.H. because the presumed asset eligibility period had ended. Therefore, Petitioners' circumstances are different than the second example in the policy. However, the Department did not rely on the second example when the determination was made.

The Department's determination was based on the first portion of the BEM 405 policy addressing spouses sharing a penalty, before the examples.:

Penalize a client if her or his spouse divests. The penalty is imposed on whichever spouse is in a penalty situation. If both spouses are in a penalty situation, the penalty period (or any remaining part) must be divided between them.

BEM 405, January 1, 2022, p. 15

(Underline added by ALJ)

This policy is not limited to circumstances where the transfers occurred during the presumed asset eligibility period. Rather, the policy requires that the penalty period be divided between the spouses when both spouses are in a penalty situation.

BEM 405 addresses penalty situations:

Penalty Situation

A divestment determination is not required unless, sometime during the month being tested, the client was in a penalty situation. To be in a penalty situation, the client must be eligible for MA (other than QDWI) and be one of the following:

- In an LTC facility.
- APPROVED FOR THE WAIVER; see BEM 106.
- Eligible for Home Help.

- Eligible for Home Health.

BEM 405, January 1, 2022, pp. 5-6

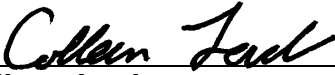
In this case, both spouses were eligible for MA and in a LTC facility at the time of the September 22, 2022 determination for W.H. Pursuant to the BEM 405 policy, both spouses were in a penalty situation. Therefore, the divestment penalty period was properly split between them.

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 Petitioners' eligibility for MA.

DECISION AND ORDER

Accordingly, the Department's decisions are **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

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