



GRETCHEN WHITMER
GOVERNOR

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

ORLENE HAWKS
DIRECTOR

[REDACTED]
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[REDACTED] MI [REDACTED]

Date Mailed: January 4, 2023
MOAHR Docket No.: 22-004765
Agency No.: [REDACTED]
Petitioner: [REDACTED]

ADMINISTRATIVE LAW JUDGE: Zainab A. Baydoun

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 commenced on November 14, 2022. Petitioner was represented by her Authorized Hearing Representative (AHR) [REDACTED] Patricia McLain, Eligibility Specialist appeared on behalf of the Department of Health and Human Services (Department). The hearing was not completed on November 14, 2022, and good cause was established to continue the hearing. On November 18, 2022, the undersigned Administrative Law Judge (ALJ) issued an Order for Continuance and Notice of Continued Telephone Hearing, scheduling a second day of hearing for December 5, 2022, which commenced as scheduled on that date. Petitioner was represented by her AHR, [REDACTED] Patricia McLain, Eligibility Specialist appeared on behalf of the Department.

Exhibit A, pp. 1-59 and Exhibit B, pp. 1-69 were admitted into the record as evidence on behalf of the Department.

Petitioner’s AHR did not file any documents for admission into the record as evidence.

The record closed at the conclusion of the hearing on December 5, 2022.

ISSUE

Did the Department properly process Petitioner’s Medical Assistance (MA) benefits and impose a divestment penalty for the period of June 1, 2022, through November 26, 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 or around June 22, 2022, an application for MA benefits was submitted to the Department on Petitioner's behalf. On the application, it was reported that Petitioner sold, gave away, or transferred ownership of assets in the past 60 months. (Exhibit A, pp. 7-14)
2. The Department received verification that on or around February 24, 2020, Petitioner sold her home with the net proceeds from the sale being around \$104,572. Ms. [REDACTED] Petitioner's Authorized Representative (AR) advised the Department that of the net proceeds, \$48,852.26 was used to repair and fix up the home, \$38,957.04 went towards the purchase of a vehicle in Petitioner and her AR's name on or around March 19, 2020, and around \$15,720 was paid to the AR pursuant to a personal care contract.
3. Petitioner's AR submitted a Home Improvement Repayment Contract executed between Petitioner and her AR Ms. [REDACTED] on September 24, 2019, indicating that Petitioner agreed to pay Ms. [REDACTED] and Ms. [REDACTED] husband \$48,852.26 for work performed on her home and that the payment would be made upon sale of the property. (Exhibit A, pp.23-24)
4. Based on the information submitted by Petitioner's AR, the Department determined that a divestment of \$87,809.30 occurred, which included the \$48,852.26 repayment to the AR for costs incurred prior to the sale of the home and the \$38,957.04 vehicle purchase. Although the Home Improvement Repayment Contract was submitted, the work had been completed prior to the execution of the contract and Petitioner's AR failed to submit sufficient verification of repair costs and dates incurred.
5. On or around July 22, 2022, the Department sent Petitioner a Health Care Coverage Determination Notice informing her that from June 1, 2022, to June 30, 2022, she was approved for MA benefits with a monthly patient pay amount of \$971 and from July 1, 2022, ongoing, Petitioner was approved for MA with a monthly patient pay amount of \$1,319.
 - a. The Notice further informed Petitioner that for the time period between June 1, 2022, through April 28, 2023, a divestment penalty applied which precluded any long-term care (LTC) and home and community-based waiver services due to a transfer of assets in the amount of \$87,809.30 for less than fair market value. (Exhibit A, pp. 35-38)
6. On or around October 4, 2022, a hearing was requested on Petitioner's behalf, disputing the imposition of the divestment penalty. (Exhibit A, pp.40-41)

7. On or around October 17, 2022, Petitioner's AR advised the Department that she transferred title of \$38,957.04 the vehicle purchased back to Petitioner, and removed herself from the title. Petitioner's AR submitted verification of the returned resource. (Exhibit A, pp. 49-52)
8. The Department updated the divestment penalty and removed the \$38,957.04 value of the vehicle from the total divested resource amount.
9. On or around October 20, 2022, the Department sent Petitioner a Benefit Notice, advising her that because verification of the returned resource was provided, the penalty for the divested vehicle funds is removed and the revised divestment penalty period is June 1, 2022, to December 3, 2022, based on \$48,852.26 in divested funds. (Exhibit A, pp. 53-56)
10. Petitioner's AR also submitted a types out spreadsheet, bank statements, credit card statements, and screenshots of Venmo transaction receipts to show how the \$48,852.26 in home repairs was spent. However, the Department asserted that because the documents submitted did not specify the service dates, location of services, or contracts, they were not sufficient to show that a divestment did not occur. Additionally, some checks/payments were prior to the execution of the September 24, 2019, Home Improvement Repayment Contract.
11. On October 20, 2022, the Department sent Petitioner's AR a Verification Checklist (VCL) instructing her to submit proof of home repair and services performed after September 24, 2019. Verifications were to include the vendor, date of service, address of service and proof of payment. The verifications were due on October 31, 2022. (Exhibit A, pp. 57-59)
12. The Department received a statement from the contractor who completed the repairs on Petitioner's home and copies of checks written by Petitioner's AR to the contractor on various dates between July 2019 and December 2019. (Exhibit B, pp. 1-69)
13. The Department received verification of two payments made to the contractor after September 24, 2019, totaling \$1,650. The Department reduced the divested amount by \$1,650 and revised the divestment penalty. (Exhibit B, pp. 13-69)
14. The Department did not consider the remaining payments made to the contractor because they were made prior to the execution of the September 24, 2019, Home Improvement Repayment Contract.
15. On November 4, 2022, the Department sent Petitioner a Benefit Notice, advising her that the revised divestment penalty period is June 1, 2022, to November 26, 2022, based on \$47,202.26 in divested funds. (Exhibit B, pp. 66-69)

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.

In the November 4, 2022, Benefit Notice, the Department concluded that Petitioner's MA eligibility was subject to a divestment penalty from June 1, 2022, to November 26, 2022, precluding LTC and/or waiver benefits on Petitioner's behalf during that period, as it determined a divestment occurred. (Exhibit B, pp. 66-69).

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. Cash in bank accounts is an asset. Thus, giving away cash, is divestment. Divestment results in a penalty period, not MA program ineligibility. BEM 405 (April 2021), pp. 1-2. BEM 400 (July 2021), pp.1-5,16. 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.

At issue in this case are transactions in the amount of \$47,202.26, which the Department determined were transfers of Petitioner's cash assets for less than fair market value and resulted in divestment.

To determine if an asset transfer qualifies as divestment, the baseline date must first be established. A person's baseline date is the first date that the client was eligible for MA and one of the following: in LTC; approved for the waiver; eligible for home health services; or eligible for home help services. BEM 405, pp.5-6. A client's baseline date does not change, even if the client leaves LTC. Transfers that occur on or after a client's baseline date must be considered for divestment. In addition, once the baseline date is established, the Department will determine the look-back period, which is 60 months prior to the baseline date. BEM 405, p. 5-6.

In this case, the Department properly determined that the baseline date was May 26, 2017, based on Petitioner's previous LTC admission from May 26, 2017, to July 1, 2017. Thus, the Department properly determined that the cash asset transfers referenced above were within the timeframe that allows for a divestment penalty, as they occurred after the Petitioner's baseline date. The Department must then consider whether the transfer was made for less than fair market value. Less than fair market value means that the compensation received in return for a resource was worth less than the fair market value of the resource. BEM 405, pp. 6-7.

The Department asserted that because the transactions from Petitioner's account to the AR in repayment of the home improvement costs incurred after the services had been completed is the giving away of cash assets, it is considered divestment. Petitioner's AHR did not dispute that she received the funds from Petitioner outlined above. However, Petitioner's AHR argued that pursuant to the Home Improvement Repayment Contract executed between herself and Petitioner, she is entitled to be reimbursed for the payments she made towards the repair work performed on Petitioner's property and the transactions should not be considered divestment. During the hearing, Petitioner's AHR testified that she provided the Department with copies of checks written by her to the contractor who performed repairs on Petitioner's home, as well as other documents that she asserts show how the funds she received from Petitioner were used.

As referenced above, Petitioner's AHR submitted a Home Improvement Repayment Contract executed between herself and Petitioner on September 24, 2019, indicating that Petitioner agreed to pay Ms. [REDACTED] and Ms. [REDACTED] husband \$48,852.26 for work performed on her home and that the payment would be made upon sale of the property. (Exhibit A, pp.23-24). Petitioner's AHR also submitted a typed-out spreadsheet document outlining the costs of repair for Petitioner's home, bank statements, credit card statements, and screenshots of Venmo transaction receipts to show how the \$48,852.26 in home repairs was spent. The Department received a statement from the contractor who completed the repairs on Petitioner's home and copies of checks written by Petitioner's AR to the contractor on various dates between July 2019 and December 2019. (Exhibit A; Exhibit B)

Department policy provides that all personal care and home care contract/agreements, regardless of whether between a client and a relative or a client and a non-relative, must be considered and evaluated for divestment. BEM 405, pp. 7-9. A home care contract is a contract/agreement which pays for expenses such as home/cottage/care repairs, property maintenance, property taxes, homeowner's insurance, heat and utilities for the homestead or other real property of the client. Home care and personal care contracts/agreements may be between relatives or non-relatives. A relative is anyone related to the client by blood, marriage or adoption. BEM 405, p. 7.

Home care contracts/agreements are considered a transfer for less than fair market value unless the agreement meets all of the following criteria:

- The services must be performed **after** a written legal contract/agreement has been executed between the client and the provider. The contract/agreement must be dated, and the signatures must be notarized. The services are not paid for until the services have been provided (there can be no prospective payment for future expenses or services); **and**
- At the time the services are received, the client cannot be residing in a nursing facility, adult foster care home (licensed or unlicensed), institution for mental diseases, inpatient hospital, intermediate care facility for individuals with intellectual disabilities or be eligible for home and community-based waiver, home health or home help; and
- At the time services are received, the services must have been recommended in writing and signed by the client's physician as necessary to prevent the transfer of the client to a residential care or nursing facility. Such services cannot include the provision of companionship; and
- The contract/agreement must be signed by the client or legally authorized representative, such as an agent under a power of attorney, guardian, or conservator. If the agreement is signed by a representative, that representative cannot be the provider or beneficiary of the contract/agreement.
- MDHHS will verify the contract/agreement by reviewing the written instrument between the client and the provider which must show the type, frequency and duration of such services being provided to the client and the amount of consideration (money or property) being received by the provider, or in accordance with a service plan approved by MDHHS.

BEM 405, pp. 7-9. The Department representative testified that initially, the Home Improvement Repayment Contract was not considered a valid home care contract because the wording of the agreement was such that the services had already been provided and the work on Petitioner's home completed. However, upon review and after receiving the request for hearing and additional verifications, the Department determined that it would consider the Home Improvement Repayment Contract as a valid home care contract but only for services performed and payments made after the September 24, 2019, date in which the agreement was executed.

The Department asserted that because the documents submitted by Petitioner's representative, which included the above referenced bank/credit card statements and typed out list of expenses, did not specify the service dates, location of services, and did not contain other needed details, they were not sufficient to show that a divestment did

not occur. Additionally, some checks/payments to the contractor were prior to the execution of the September 24, 2019, Home Improvement Repayment Contract. The Department representative testified that the Department did consider the two payments made to the contractor after September 24, 2019, (October 18, 2019 and December 5, 2019) totaling \$1,650 and the Department reduced the divested amount by \$1,650 and revised the divestment penalty accordingly. (Exhibit B, pp. 13-69).

Notwithstanding the arguments offered by Petitioner's AHR, based on the evidence presented, Petitioner's AHR failed to establish that the services she provided and for which she received reimbursement from Petitioner were performed after the execution of September 24, 2019, Home Improvement Repayment Contract or that the additional expenses outlined in the credit card/bank statements and the typed out document were specific enough to meet the criteria above as they did not identify dates and/or locations of services performed. Additionally, there were no receipts presented to further support the AHR's testimony. In the absence of such evidence, the Department properly concluded that the \$47,202.26 transaction was a transfer for less than fair market value. Therefore, the Department properly concluded that \$47,202.26 was divested.

Because the Department established that a divestment occurred, an analysis of the computation of the applicable penalty period follows. The Department determined that Petitioner was subject to a divestment penalty for the period between June 1, 2022, and November 26, 2022. The Department stated that in computing the penalty period, it relied on the \$47,202.26 cash asset transfers discussed above. Department policy provides that the penalty period is computed based on the total uncompensated value of all resources divested, which in this case, is the cash value. Once the total uncompensated value is determined, the Department is to divide that amount by the average monthly private LTC Cost in Michigan, which is based on the client's baseline date. This gives the number of full months for the penalty period. The fraction remaining is multiplied by 30 to determine the number of days for the penalty period in the remaining partial month. BEM 405, pp.12-15. The Department will apply the penalty to the months (or days) an individual is eligible for MA and actually in LTC, Home Health, Home Help, or the MIChoice Waiver.

Applying Department policy to Petitioner's case, based on a \$47,202.26 total uncompensated value of the divested resources and an \$8,018 average monthly private LTC cost in Michigan applicable to Petitioner's 2017 baseline date, the divestment penalty is five months and 26 days.

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 processed Petitioner's MA eligibility and determined that she was subject to a divestment penalty for the period from June 1, 2022, to November 26, 2022.

DECISION AND ORDER

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

ZB/ml



Zainab A. Baydoun
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

Via Electronic Mail :

DHHS
Nicolette Vanhavel
235 S Grand Ave Ste 1403
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