



GRETCHEN WHITMER
GOVERNOR

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

MARLON I. BROWN, DPA
ACTING DIRECTOR

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Date Mailed: February 9, 2024
MOAHR Docket No.: 23-006753
Agency No.: ██████████
Petitioner: █████ █████

ADMINISTRATIVE LAW JUDGE: Kevin Scully

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; 45 CFR 99.1 to 99.33; and 45 CFR 205.10. After due notice, a telephone hearing was held on January 10, 2024, from Lansing, Michigan. The hearing record was held open until January 22, 2024, to allow the parties to submit hearing briefs. Petitioner was represented by her attorneys David L. Shaltz and Michelle P. Biddinger. ██████████ and █████ █████ testified on behalf of Petitioner. The Department was represented by Assistant Attorneys General Geraldine A. Brown and Kelly A. Carter. Andrea Bowerman testified on behalf of the Department.

ISSUE

Did the Department of Health and Human Services (Department) properly determine the divestment penalty that was applied towards Petitioner’s Long-Term Care (LTC) benefits?

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 entered into long term care on March █████ 2023. Exhibit A, p 14.
2. On May █████ 2023, the Department received Petitioner’s Application for Health Care Coverage Patient of Nursing Facility (DHS-4574). Exhibit A, p 7.
3. On June █████ 2023, the Department sent Petitioner a Verification Checklist (DHS-3503) requesting verification of the balance of her bank accounts from May of 2022 through March of 2023, and how funds in her bank accounts had been disposed of. Exhibit A, pp 25-28.
4. Petitioner transferred \$██████████ to a family member for 24-hour nursing care from August of 2021 through December of 2021. Exhibit A, p 91.

5. On February 1, 2023, Petitioner transferred \$ [REDACTED] to a family member for 24-hour nursing care in January of 2023. Exhibit A, p 40.
6. On March 1, 2023, Petitioner transferred \$ [REDACTED] to a family member for 24-hour nursing care in February of 2023. Exhibit A, p 41.
7. On December 31, 2022, Petitioner transferred \$ [REDACTED] to a family member as compensation for 24-hour nursing care from May of 2022 December of 2022. Exhibit A, p 55.
8. On May 1, 2022, Petitioner spent \$ [REDACTED] for 24-hour nursing care from January of 2022 through April of 2022. Exhibit A, p 70.
9. On June 21, 2023, the Department sent Petitioner a Verification Checklist (DHS-3503) requesting verification of a person care contract for 24-hour nursing care. Exhibit A, pp 89-90.
10. Petitioner transferred a total of \$ [REDACTED] to a family member for 24-hour nursing care within the 60 months of being placed in long term care.
11. On July 10, 2023, the Department notified Petitioner that she was eligible for Medical Assistance (MA) with a \$ [REDACTED] monthly patient pay amount and that she was not eligible for the Medicare Savings Program (MSP). Exhibit A, pp 118-119.
12. On October 4, 2023, the Department received Petitioner's request for a hearing protesting the divestment penalty that the Department had applied towards Petitioner's Long-Term Care (LTC) benefits. Exhibit A, pp 5-6.

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 through 42 USC 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 through 42 CFR 420.25. The Department administers the MA program pursuant to 42 CFR 435, MCL 400.10, and MCL 400.103 through MCL 400.112k of the Social Welfare Act, MCL 400.1 *et seq.*

Divestment means the transfer of a resource by a client or his spouse that is within a specified time known as the look back period, is a transfer for less than fair market value, and is not listed under transfers that are not divestment in this item. 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. Department of Health and Human Services Bridges Eligibility Manual (BEM) 405 (January 1, 2023), p 1.

Petitioner entered into long term care on March [REDACTED] 2023, and filed an application for MA benefits on May [REDACTED] 2023. Petitioner provided the Department with verification that she had transferred cash assets to a family member totaling \$ [REDACTED]

Petitioner's attorney argues that the transfer of \$ [REDACTED] was not divestment. Petitioner's attorney argues that there was no intent to dispose of assets for the purpose of qualifying for MA benefits, but that it was Petitioner's intent to transfer these assets for her own personal care, which is permitted under Department policy. Petitioner's attorney provided evidence of consultation with area businesses which provide such services as evidence that the amount transferred was consistent with the market rate.

Personal Care Contract means a contract/agreement that provides health care monitoring, medical treatment, securing hospitalization, visitation, entertainment, travel/transportation, financial management, shopping, home help or other assistance with activities of daily living. When relatives provide assistance or services they are presumed to do so for love and affection and compensation for past assistance or services shall create a rebuttable presumption of a transfer for less than fair market value. Fair market value of the services may be determined by consultation with area businesses which provide such services. Contracts/agreements that include the provision of companionship are prohibited. BEM 405, p 8.

Department policy in BEM 405 includes the following instructions with regard to transfers in exchange for personal care:

Personal Care and Home Care contracts/agreements shall be considered a transfer for less than fair market value unless the agreement meets all of the following:

- 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.

In this case, the hearing record does not include a written and notarized contract/agreement executed before the person care services were rendered. Although Petitioner's likely needed advanced medical care, the hearing record also does not include the signed statement of Petitioner's physician recommending the personal care services that were rendered were necessary to prevent the transfer of Petitioner to a residential care facility.

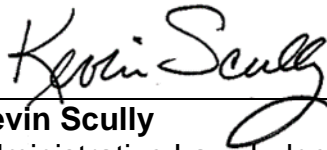
Petitioner has failed to rebut the presumption that the transfer of \$ [REDACTED] to a family was not a transfer for less than fair market value as defined by BEM 405. The Department has established by a preponderance of the evidence that the transfer fits the definition of "divestment" and that it properly determined the divestment penalty applied to Petitioner's Long Term Care benefits. A person that divests \$ [REDACTED] will be subject to a 6-month 23-day divestment penalty based on a standard \$ [REDACTED] monthly cost of care in 2023 as directed by BEM 405.

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 applied a 6-month 23-day divestment penalty to Petitioner's Long Term Care Medical Assistance (MA) benefits.

DECISION AND ORDER

Accordingly, the Department's decision is AFFIRMED.

KS/dm



Kevin Scully
Administrative Law Judge
Michigan Office of Administrative Hearings
and Rules (MOAHR)

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 :

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[REDACTED]
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