



GRETCHEN WHITMER  
GOVERNOR

STATE OF MICHIGAN  
DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS  
MICHIGAN OFFICE OF ADMINISTRATIVE HEARINGS AND RULES  
SUZANNE SONNEBORN  
EXECUTIVE DIRECTOR

MARLON I. BROWN, DPA  
DIRECTOR

[REDACTED], MI [REDACTED]

Date Mailed: March 19, 2024  
MOAHR Docket No.: 23-009330  
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 held on March 4, 2024, from Detroit, Michigan. Petitioner did not appear for the hearing. Petitioner was represented by attorney Kevin Gilhool. The Department of Health and Human Services (Department) was represented by Assistant Attorney General (AAG) Robert Boyd who called Assistance Payments Supervisor Edwina Dunson as a witness.

### **ISSUE**

Did the Department properly impose a Medical Assistance (MA) divestment penalty from December 1, 2023, to October 29, 2024?

### **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 [REDACTED] 2023, a Long-Term Care (LTC) Application for Health Care Coverage Patient of Nursing Facility (DHS-4574) (Application) was submitted to the Department on Petitioner's behalf. (Exhibit A, pp. 8-16)
  - a. At the time of the Application, Petitioner disclosed a transfer of assets for less than fair market value. The value of the divested resources was reported to be \$105,099.01. (Exhibit A, pp. 8-16)

2. There was no evidence presented that at the time the Application was submitted, Petitioner was an active recipient of MA, LTC benefits or a waiver recipient.
3. The Department failed to timely process the Application.
4. On November 14, 2023, the Department issued a manual Benefit Notice, notifying Petitioner that a divestment penalty was applied to his MA case, precluding any LTC benefits from December 1, 2023, through October 29, 2024, based on a transfer of assets for less than fair market value. The Benefit Notice did not identify any patient pay amount or the period in which Petitioner was approved for MA. (Exhibit A, pp. 17-20)
  - a. The Benefit Notice informed Petitioner that per policy, the patient pay amount and divestment penalty cannot be retroactively increased and that to apply the correct patient pay amount and divestment penalty period, a policy override or a hearing decision from an administrative law judge would be required. (Exhibit A, pp. 17-20)
5. On or around November 27, 2023, Petitioner's attorney requested a hearing disputing the Department's actions, specifically, the incorrect start date of the divestment penalty period. (Exhibit A, at pp. 4-7)

### **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.

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 2023), pp. 1-2; BEM 400 (July 2023). 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 10.5 month duration of the divestment penalty period was properly calculated, in light of the reported \$105,099.01 value of the divested resources and the \$9,939 average monthly private LTC costs in Michigan applicable to Petitioner's undisputed July 1, 2023, baseline date. BEM 400, pp. 12-15.

At issue is the start date of the divestment penalty period. Petitioner asserts that the correct penalty period should be July 1, 2023, through April 15, 2024, as that is the date in which Petitioner was in LTC and met the eligibility requirements of MA, while the Department testified that because, due to agency error, the Application was processed late, the divestment was also discovered late and thus, the penalty period could not be applied retroactively, and was applied to begin on December 1, 2023, and continue through October 29, 2024.

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 (November 2023), p. 2.

An adequate notice is a written notice sent to the client at the same time an action takes effect (not pended). 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 pended 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, none of which include changing the start date of a divestment penalty. BAM 220, p. 11.

At the hearing, the Department did not clearly identify which negative action it asserted occurred in this case, as applying a new divestment penalty to a newly processed application or changing the start date of a divestment penalty are not reflected in the negative actions outlined in BAM 220 that would require timely notice. Additionally, the Department did not present any evidence that correcting the start date of a divestment penalty would be a change of the PET code to a divestment penalty code, that would require timely notice. BAM 220, p.11.

Department policy provides that a penalty period starts on the client's baseline date, which is the first date that the client is eligible for MA, would otherwise be receiving institutional level care (LTC), and is not already part of the penalty period. BEM 405, pp. 6, 14-15. There was no dispute that Petitioner's baseline date was July 1, 2023, or that, if processed correctly and timely, the penalty period should have started on July 1, 2023, and ended on April 15, 2024. The Department conceded that agency error at the time of the initial eligibility determination resulted in the imposition of the divestment penalty period of December 1, 2023, to October 29, 2024, as reflected in the November 14, 2023, Benefit Notice.

Although not specifically referenced by the Department during the hearing, Department policy at BEM 405 states the following with respect to agency error and recipient exceptions:

**Note:** 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. If a penalty is determined for a transfer in the past, apply the penalty from the first day after timely notice is given; see Recipient Exception in this item.

### **Recipient Exception**

Timely notice must be given to LTC recipients and (BEM 106) waiver recipients before actually applying the penalty. Adequate notice must be given to new applicants.

BEM 405, pp. 14-15. There was no evidence that prior to the Application, Petitioner was a recipient of LTC benefits, thus, he is considered a new applicant, as he was not a current beneficiary of LTC MA at the time Application was processed or at the time the Application and MA eligibility were incorrectly certified. Additionally, the divestment in this case was not unreported and was not discovered or determined for a transfer in the past, as the Department was aware of it at the time it processed the Application. Furthermore, there were no eligibility notices issued to Petitioner with respect to the Application or Petitioner's LTC MA eligibility prior to the Benefit Notice issued on November 15, 2023. Therefore, based on the evidence presented, because the Department is not imposing a penalty to an ongoing case, but rather correcting its admitted agency error in the start date of a penalty at the time of application processing, adequate notice to Petitioner is sufficient.

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 not act in accordance with Department policy when it imposed a divestment penalty period to Petitioner's MA case from December 1, 2023, to October 29, 2024.

**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. Correct the divestment penalty period for Petitioner's MA case and apply it from July 1, 2023, to April 15, 2024;
2. Supplement Petitioner and/or his provider for any eligible missed MA LTC benefits; and
3. Notify Petitioner and his attorney in writing of its decision.

ZB/ml

  
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**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:**

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