



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]
[REDACTED] MI [REDACTED]

Date Mailed: June 28, 2022
MOAHR Docket No.: 22-001356
Agency No.: [REDACTED]
Petitioner: [REDACTED]

ADMINISTRATIVE LAW JUDGE: Ellen McLemore

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 June 13, 2022, from Detroit, Michigan. Petitioner was represented by her attorney, Kimberly Crank Browning. Petitioner's attorney solicited testimony from Stephanie Taylor. The Department of Health and Human Services (Department)/Respondent was represented by Assistant Attorney General, LeAnn Scott. Respondent solicited testimony from Bridget Heffron, Department Specialist, and Tahauna Graham, Eligibility Specialist.

ISSUE

Did the Department properly impose a Medical Assistance (MA) divestment penalty from April 1, 2022, through March 31, 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 [REDACTED] 2021, an application for MA benefits was submitted on Petitioner's behalf (Exhibit A, pp. 24-28). In the application, it was indicated that a previous application for MA benefits had been submitted on Petitioner's behalf on [REDACTED] 2021, which was included as an attachment to the [REDACTED], 2021 application (Exhibit 1). The attached [REDACTED], 2021 application was a [REDACTED] for [REDACTED].

- a. In the [REDACTED] dated [REDACTED], 2021, Petitioner disclosed a transfer of assets for less than fair market value and conceded that she would be subject to a 24-month divestment penalty period from September 1, 2021, through August 31, 2023 (Exhibit 1, p. 24).
2. There was no evidence that prior to the [REDACTED], 2021, and [REDACTED], 2021 applications, Petitioner was a recipient of MA, LTC benefits or a waiver recipient.
3. On December 20, 2021, the Department sent Petitioner a Health Care Coverage Determination Notice (HCCDN) informing Petitioner she was approved for full-coverage MA benefits effective November 1, 2021, ongoing (Exhibit A, pp. 32-33).
4. On January 5, 2022, Petitioner's attorney's legal specialist, Stephanie Taylor, sent an email correspondence to Petitioner's Department caseworker, stating that an application was submitted in [REDACTED] 2021 for MA benefits on behalf of Petitioner, and it was anticipated that Petitioner would be subject to an MA divestment penalty period (Exhibit 7). It was requested that Petitioner's MA benefit case be reprocessed and that the appropriate divestment penalty period be applied.
5. On January 10, 2022, the Department sent Petitioner a HCCDN informing her that she was approved for MA benefits, subject to a deductible, effective February 1, 2022, ongoing (Exhibit A, p. 34).
6. On January 11, 2022, the Department sent Petitioner a HCCDN informing her that she was not eligible for the Medicare Savings Program (MSP) (Exhibit A, p. 35).
7. On January 11, 2022, Ms. Taylor contacted Petitioner's assigned caseworker, again expressing concern regarding any potential divestment penalty period (Exhibit 8).
8. On March 15, 2022, the Department sent Petitioner a Benefit Notice stating "case was opened 11/1/2021 incorrectly. Corrections have been made, Client has full approved Medicaid from November 1, 2021, to March 31, 2022. DIVESTMENT PENALTY starts as of April 1, 2022, until March 31, 2024, during which time Medicaid will not pay for services in Long-Term care facilities" (Exhibit 6).
9. On [REDACTED] 2022, Petitioner's attorney requested a 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 of 24 months was properly calculated. At issue is the start date of the divestment penalty period. Petitioner asserts that the correct penalty start date should be September 1, 2021, 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 April 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 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, 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 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] 2021 application correctly. Although the Department did not consider that Petitioner was in LTC, Petitioner's MA case opened effective November 1, 2021. 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 March 15, 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 April 1, 2022.

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], 2021, and [REDACTED] 2021, applications were submitted. Therefore, the divestment was not "discovered or determined for a transfer in the past." Thus, timely notice is not required, and adequate notice is satisfied.

Although Petitioner argues that application of the divestment penalty in her case was not a negative action, policy states 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 April 1, 2022. Thus, the PET code for the divestment penalty was not changed prior to April 1, 2022. Notice of the divestment penalty period was not issued until March 15, 2022. Therefore, the Department could not implement the divestment penalty period until April 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 April 1, 2022 was consistent with Department policy and federal law.

Petitioner's arguments concerning the Department's determination of the baseline date is not relevant to this conclusion. In determining a client's eligibility for LTC benefits, the Department must first determine the client's baseline date, which is the first date that a client is eligible for MA, receiving institutional LTC level care, and not part of a divestment penalty period. At the hearing, the parties disputed Petitioner's baseline date. The Department conceded that an agency error occurred at the time the [REDACTED] 2021 application was processed. The Department testified that had the [REDACTED] 2021 application been processed correctly, the baseline date would be November 1, 2021, and the penalty period would have started on November 1, 2021. The Department acknowledged that the agency error resulted in the imposition of the divestment penalty period of April 1, 2022, through March 31, 2024. Petitioner's attorney argued that an MA application was submitted on [REDACTED] 2021, that the Department failed to process. Therefore, Petitioner's baseline dated should have started on September 1, 2021, as Petitioner was eligible for MA and in LTC in September 2021.

Electronically filed applications include all applications filed online, faxed or emailed. BAM 110 (January 2022). For MA applications filed electronically, the date of the application is the submission date regardless of the time received. BAM 110, p. 6.

The Department presented Petitioner's electronic case file (ECF) (Exhibit A, pp. 22-23). The ECF consists of scanned documents, arranged by category and identified by a client name, recipient ID or case number, established for a particular client group. BAM 300 (October 2016), p. 1. The ECF contains all forms, documents and other evidence to the group's current and past eligibility. BAM 300, p. 1. The ECF revealed that the Department had no record of any application filed on Petitioner's behalf until November 9, 2021.

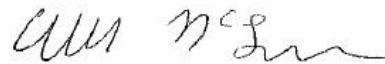
Petitioner presented a fax confirmation dated September 22, 2021, which indicated the fax was 59 pages, with a coversheet of the [REDACTED] (Exhibit 3). Petitioner's attorney also presented a witness who testified that she, Petitioner's attorney's legal specialist, submitted an application on behalf of Petitioner via fax on [REDACTED], 2021. The Department's policy specialist acknowledged that it was possible that an application was faxed to the proper location, but there was a failure to upload the application to the ECF. Petitioner's worker stated that she did not check the fax log to verify that a faxed application had not been submitted on [REDACTED] 2021.

Petitioner presented sufficient evidence to establish that an MA application was submitted on [REDACTED], 2021. Therefore, Petitioner's proper baseline date should have started on September 1, 2021. However, this conclusion is not relevant to a case that does not involve the application of the divestment penalty at case opening. As stated above, the Department cannot impose the divestment penalty period until April 1, 2022, due to notice requirements. Therefore, the Department acted in accordance with policy when it imposed a divestment penalty period to Petitioner's MA case from April 1, 2022, through March 31, 2024. 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 April 1, 2022, through March 31, 2024. 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
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