



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

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Date Mailed: August 19, 2024
MOAHR Docket No.: 24-006531
Agency No.: ██████████
Petitioner: ██████████

ADMINISTRATIVE LAW JUDGE: Linda Jordan

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 hearing was held on July 25, 2024, via teleconference. Petitioner was represented by her attorney, ██████████ and ██████████ appeared as a witness for Petitioner. Assistance Attorney General, Scott R. Rothermel, appeared on behalf of the Michigan Department of Health and Human Services (MDHHS or Department). Laurel Palermo, Long-Term Care Specialist, and Stacey Smith, Assistance Payments Worker, appeared as witnesses for Respondent. MDHHS' proposed exhibits were admitted at the hearing as MDHHS Exhibits A-G. Petitioner's proposed exhibit was admitted at the hearing as Petitioner's Exhibit 1.

ISSUE

Did MDHHS properly determine when to apply the divestment penalty period to Petitioner's receipt of Long-Term Care (LTC) Medicaid (MA) 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. On ██████████, 2023, Petitioner applied for MA, indicating that she was admitted to a nursing facility on ██████████ 2023, and was seeking LTC MA benefits (Exhibit A).
2. On March 7, 2024, MDHHS sent Petitioner a Health Care Coverage Determination Notice indicating that Petitioner's MA application was processed, beginning November 1, 2023 (Exhibit E). The notice indicated that Petitioner was denied LTC MA from November 2023 through February 2024 (Exhibit E). The notice indicated that Petitioner was approved for Plan First MA, a limited coverage category, during that time period (Exhibit E). The notice further indicated that MDHHS would not pay

for LTC services from March 1, 2024 through June 26, 2024 due to a divestment penalty (Exhibit E).

3. On April 3, 2024, MDHHS discovered that it made an error when processing Petitioner's eligibility for LTC MA services. MDHHS determined that Petitioner should have been approved for full-coverage MA, effective November 1, 2023.
4. On May 20, 2024, Petitioner, by and through her attorneys, requested a hearing regarding MDHHS' determination.
5. On June 4, 2024, MDHHS sent Petitioner a Health Care Coverage Determination Notice indicating that the baseline date of 2024 for the divestment penalty was used in error and it was corrected to reflect a baseline date of 2023 (Exhibit F). The notice indicated that the penalty was amended to reflect a four month and seven-day period, from March 1, 2024 through June 26, 2024 and July 1, 2024 through July 11, 2024 (Exhibit F). MDHHS stated that the divestment penalty could not be applied retroactively (Exhibit F). The notice indicated that Petitioner was eligible for MA with a patient pay amount of \$12,664.00, from November 1, 2023 though December 31, 2023, and MA with a patient pay amount of \$12,730.00 from January 1, 2024 through February 29, 2024 (Exhibit F).

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).

Medicaid (MA) 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. MDHHS administers MA pursuant to 42 CFR 435, MCL 400.10, and MCL 400.105-.112k. MA is also known as Medical Assistance (MA). BEM 105 (October 2023), p. 1.

In this case, it is undisputed that Petitioner gifted assets and is subject to a divestment penalty for a period of four months and seven days. Petitioner disputed MDHHS' determination that the divestment period should run from March 1, 2024 through June 26, 2024 and July 1, 2024 through July 11, 2024. Petitioner argued that the divestment penalty should begin on November 1, 2023, which was the date that she became eligible for LTC MA services.

Divestment is a type of transfer of a resource and not an amount of resources transferred. BEM 405 (January 2023), pp. 1-2. Resource means all the client's assets and income. *Id.* Transferring a resource means giving up all or partial ownership in the resource. *Id.* Divestment results in a penalty period, not MA program ineligibility. *Id.*, 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.

A person's baseline date is the first date that the client was eligible for MA and is in LTC, approved for a waiver, eligible for home health services, or eligible for home help services. BEM 405, p. 6. When a client is subject to a divestment penalty, the divestment penalty starts on the date which the client is eligible for MA and would otherwise be receiving institutional level care (LTC, MIChoice wavier, home help, or home health services), and is not already part of a penalty period. BEM 405, pp. 13-14. and 42 USC 1396p(c)(1)(D)(ii). MDHHS does not apply the divestment penalty to a period when the individual is not eligible for MA for any reason (that is the case closes for any reason or is eligible for MA but is not in LTC, Home Help, Home Health, the MIChoice Waiver. *Id.* MDHHS is required to restart the penalty when the individual is again eligible for Medicaid and in LTC, Home Help, Home Health, the MIChoice Waiver. *Id.* When a medical provider is paid by the individual, or by a third party on behalf of the individual, for medical services received, that month is not a penalty month and is not included as part of the penalty period. *Id.*

MDHHS initially denied Petitioner for LTC MA due to excess income from an annuity from November 1, 2023 through February 29, 2024. MDHHS approved Petitioner for Plan First MA, a limited coverage MA category, for that time period. MDHHS sent Petitioner notice of the denial of LTC MA, the approval of Plan First MA and a divestment penalty on March 7, 2024 (Exhibit E). At that time, MDHHS determined that Petitioner was subject to a divestment penalty for the transfer of \$42,083.00 to a family member, that the divestment period was for three months and 26 days, and that the divestment period would run from March 1, 2024 to June 6, 2024 (Exhibits C and E). The baseline date for the calculation was 2024 (Exhibit C).

In April 2024, MDHHS determined that it had made an error when it made its initial determination. MDHHS determined that Petitioner was eligible for LTC MA services, beginning November 1, 2023. Because she was eligible for LTC MA in 2023, her baseline date changed and MDHHS redetermined the divestment amount and penalty period. MDHHS determined that Petitioner was subject to a divestment penalty of four months and 7 days based on the baseline date of 2023 (Exhibit D). MDHHS also determined that although Petitioner was eligible for LTC MA as of November 1, 2023, it could not start the divestment period at that time because of the rules and regulations that pertain to negative actions and timely notice.

Negative actions require timely notice given to the client. BAM 220 (November 2023), p. 4. A timely notice is mailed to the client at least 11 days before the intended negative action takes effect. *Id.*, p. 5. The action is pended to allow the client a chance to react to the proposed notice. *Id.* In contrast, an adequate notice is a written notice sent to the client at the same time an action takes effect (not pended). *Id.*, p. 3. MA actions that require adequate notice include case opening with a deductible or patient pay amount and at case open with a divestment penalty. *Id.*, p. 4.

Here, MDHHS initially denied Petitioner's November 2023 application for LTC MA due to excess income. It then determined that it made an error and approved Petitioner for LTC MA beginning November 1, 2023, subject to a divestment penalty. MDHHS was aware of the divestment by Petitioner when it processed her November 2023 application. There was no evidence that Petitioner was a recipient of MA coverage prior to the November 2023 application. No evidence was presented that Petitioner or a third party paid Petitioner's outstanding medical bills beginning November 1, 2023 ongoing.

Based on the evidence presented, MDHHS should have determined that the start date of the divestment period was November 1, 2023 because that is when Petitioner became eligible for MA and was in a LTC facility. Because Petitioner was subject to a divestment penalty at case open, adequate notice is sufficient. Based on MDHHS' error in making the eligibility determination, MDHHS did not act in accordance with policy when it started the divestment penalty period. The divestment penalty period should begin November 1, 2023.

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 MDHHS did not act in accordance with Department policy when it determined Petitioner's divestment penalty period.

DECISION AND ORDER

Accordingly, MDHHS' decision is **REVERSED**. MDHHS 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 beginning November 1, 2023;
2. Issue supplements to Petitioner or her provider(s) for any benefits that she was eligible for but did not receive; and
3. Notify Petitioner and her representative of its decision in writing.

LJ/pt



Linda Jordan
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
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Via Electronic Mail:

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