

Office of Medicaid BOARD OF HEARINGS

Appellant Name and Address:



Appeal Decision:	Approved in Part; Denied in Part	Appeal Number:	2155453
Decision Date:	11/10/2021	Hearing Date:	09/02/2021
Hearing Officer:	Scott Bernard	Record Open to:	09/16/2021

Appearance for Appellant:




Appearance for MassHealth:

Alexandra DeJesus (Chelsea MEC) *via*
telephone



*The Commonwealth of Massachusetts
Executive Office of Health and Human Services
Office of Medicaid
Board of Hearings
100 Hancock Street, Quincy, Massachusetts 02171*

APPEAL DECISION

Appeal Decision:	Approved in Part; Denied in Part	Issue:	LTC Transfer
Decision Date:	11/10/2021	Hearing Date:	09/02/2021
MassHealth's Rep.:	Alexandra DeJesus	Appellant's Rep.:	
Hearing Location:	Chelsea MassHealth Enrollment Center		

Authority

This hearing was conducted pursuant to Massachusetts General Laws Chapter 118E, Chapter 30A, and the rules and regulations promulgated thereunder.

Jurisdiction

Through a notice dated June 8, 2021, MassHealth approved the appellant's application for MassHealth Long Term Care (LTC) with a start date of January 16, 2021. (See 130 CMR 520.018; 520.019; and Exhibit 1; Ex. 2). The appellant filed this appeal in a timely manner on July 19, 2021. (See 130 CMR 610.015(B); EOM 20-09; and Ex. 2). Determination of the coverage start date is valid grounds for appeal. (See 130 CMR 610.032).

At the request of the appellant's representative, the record was left open until September 16, 2021 so that MassHealth could assess the documentation she submitted prior to the hearing in the light of the appellant's representative's testimony. (Ex. 8). The MassHealth representative responded by email on September 16, 2021, at which time the record closed. (Ex. 9).

Action Taken by MassHealth

MassHealth determined that the appellant was eligible to receive LTC benefits beginning on January 16, 2021.

Issue

The appeal issue is whether MassHealth was correct, pursuant to 130 CMR 520.018 and 520.019, in determining the start date of coverage.

Summary of Evidence

The MassHealth representative testified to the following. The appellant is an individual who is over the age of 65. (Ex. 4, pp. 16, 17). The appellant was admitted to the nursing facility in the Fall of 2020. (Ex. 4, pp. 1, 17). The appellant applied for MassHealth LTC benefits on December 30, 2020¹. (Ex. 4, p. 16). The appellant requested a payment date of November 7, 2020. (Ex. 4, p. 1, 17).

On June 8, 2021, MassHealth approved the appellant's LTC application with a start date of January 16, 2021. (Ex. 1). The MassHealth representative stated that MassHealth imposed a transfer penalty because the appellant made a gift to her son of the \$75,000 in equity she had in a property she owned in [REDACTED] (Ex. 5, p. 5; Ex. 8). The MassHealth representative stated the appellant submitted documentation demonstrating a partial cure. (Ex. 5). The appellant was able to show that a certain amount of that gift of equity was repayment for money her son paid directly to the appellant as well as toward maintaining the property. (Ex. 5). The MassHealth representative initially determined that the appellant had cured \$47,932. (Ex. 4, pp. 3-9; Ex. 5). This calculation resulted in a 69-day penalty², and a start date of January 16, 2021, which was what was stated in the June 8 approval notice. (Ex. 1; Ex. 4, pp. 3-9). After this, the MassHealth representative's supervisor reviewed the materials the appellant's son had submitted. Based on this, the supervisor determined that the cure should have been \$48,032 and that the penalty should be reduced by one further day³. As a result, MassHealth issued a new eligibility notice on August 9, 2021, stating that the coverage start date was January 15, 2021. (Ex. 4, pp. 10-15).

Prior to the hearing, the appellant's representative submitted a packet with two attachments to the Board of Hearings. (Ex. 6; Ex. 7; Ex. 8). The first attachment consisted of copies of [REDACTED] deposits the appellant's son allegedly made to the appellant. (Ex. 6). This had been submitted to MassHealth on March 5, 2021. (Ex. 6; Ex. 7). The second attachment was a response from the appellant's son regarding his providing funds to the appellant to help with her living costs with attached checks and tax forms. (Ex. 6; Ex. 8). In a cover letter dated February 8, 2021, the appellant's son wrote that he had been financially assisting his mother (the appellant) and his father in paying the [REDACTED] property's mortgage since September 2012. (Ex. 8, p. 1). In 2013 the father (appellant's spouse) died. (*Id.*). At the time the father died the property was in foreclosure. (*Id.*). From September 2012 until October 2020, when the mortgage was paid off, the son made payments directly to [REDACTED] which held the mortgage, as well as to the appellant's checking account at [REDACTED], and directly

¹ The MassHealth representative testimony was that the date was October 30, 2020 but the date stamp on the Application page shows that MassHealth received it on December 30, 2020. (Ex. 4, pp. 1, 17).

² $\$75,000 - \$47,932 = \$27,068$ (transfer). $\$27,068 / \391 (average daily cost of nursing facility services) = 69.23 (69 days rounded down). (*See* 130 CMR 520.019(G)(1); Ex. 4, p. 4; Ex. 5). The average daily cost of nursing facility services is updated on roughly an annual basis. The most recent of these updates was in Eligibility Operations Memorandum 20-17, dated November 2, 2020. EOM 20-17 states that the annual daily cost of nursing facility services is \$391 for LTC applications received on or after November 1, 2020 (as was the case here).

³ $\$75,000 - \$48,032 = \$26,968$ (transfer). $\$26,968 / \391 (average daily cost of nursing facility services) = \$68.97 (68 days rounded down). (Ex. 4, p. 10; Ex. 5).

to the appellant's creditors. (Id.). These payments totaled \$75,000. (Id.). It was the son's understanding with both his father and the appellant that these payments would be recognized in the sale of the property to him. (Id.).

Included with the letter were a 2015 [REDACTED] for the account ending [REDACTED] as well as copies of the following checks from the son:

Number	Date	Payee	Amount	Memo
5189	March 18, 2013	[REDACTED]	\$1,892.57	None ⁴
1477	April 25, 2013	[REDACTED]	\$226.70	[3135] ⁵
3279	May 15, 2013	[REDACTED]	\$261.87	[3135] ⁶
5282	February 24, 2014	[REDACTED]	\$257.89	None
5345	December 1, 2014	[REDACTED]	\$280	"Equity"
5367	January 30, 2015	[REDACTED]	\$1,003.82	[3135]
5468	May 25, 2016	[REDACTED]	\$969.87	None
5454	March 18, 2016	[REDACTED]	\$976.43	None
5471	June 18, 2016	[REDACTED]	\$973.25	None
5670	March 7, 2020	[REDACTED]	\$1,265.45	"Feb. 1 Payment"
1475	April 1, 2013	[REDACTED]	\$345.54	[Telephone Number] ⁷

⁴ A handwritten note in the margin states that this was to pay "for Bank Check [to] avoid foreclosure."

⁵ The full account number was in the memo. This and other references to the account number will be shortened to the last four digits in brackets.

⁶ See note 5, above.

⁷ A telephone number was printed here.

1476	April 25, 2013	██████	\$413.15	[Telephone number]
5380	March 27, 2015	██████████	\$150.00	“Quarterly pmt/[Address ⁸ ”]
5396	May 28, 2015	██████████████████	\$201.00	[8996]
5194	March 29, 2013	██████████████	\$264.69	“Total Past Due”
5209	June 4, 2013	██████████████	\$145.23	“Inv- # [Redacted]”
5235	September 30, 2013	[The appellant]	\$263.16	“Repay for Checks”

(Ex. 8, pp., 7-10).

The appellant's representative testified that the two attachments she submitted indicate that more of the transfer should be cured. The appellant's representative stated that 10 of the checks dated between March 2013 and March 2020 totaled \$8,109.85⁹. (Ex. 8, pp. 4, 7-8). One of these checks was paid from the son's checking account to ██████████ and was notated as “for Bank Check [to] avoid foreclosure.” (Ex. 8, p. 7). The remainder of the checks were paid from the son's checking account to ██████████. (*Id.*). The appellant's representative stated she also submitted a 2015 Form 1098 for a ██████████ Account ending ████████ (Ex. 8, p. 5). This was the appellant and her husband's equity line. (*Id.*). The appellant's representative stated that these checks were all paid to ██████████ for the appellant to help pay for the mortgage or equity line. Three of the checks have the account number for the equity line account in the memo line. (*Id.*). One of the checks has the word “Equity” written in the memo. (Ex. 8, p. 7). The appellant's representative argued that these should have been counted. The appellant's representative stated that the checks paying for the equity line ranged from \$226 to \$280 per month. The appellant's representative also stated that eventually the son turned this equity line into a mortgage at which point the payments increased to around \$1,200. The appellant's representative stated that one of the checks that MassHealth determined was countable towards the cure was for check 5881 to ████████s in the amount of \$1,265.45 because the son was able to provide a statement for the check. (See Ex. 5, pp. 4, 5). MassHealth did not count check 5670 to ████████ for the same amount because the son was not able to supply a statement. (Ex. 8, p. 8). The appellant's representative argued that minimally, a further \$8,109.85 should be cured based on this additional information.

The appellant's representative also stated the statement from the son includes checks and cash deposits paid to assist his mother in household expenses, which should also be taken under consideration. The checks and cash deposits all came from the same account, the son's, and were paid into the appellant's

⁸ The street number and street name for the ████████ property are printed on the check but redacted here for reasons of privacy.

⁹ The appellant's representative was referring to the first 10 checks listed in the above table. These actually total 8,107.85.

account at [REDACTED]. The appellant's representative stated that by paying these amounts, the son subsidized the appellant's ability to continue living in the community. The appellant's representative specifically referred to the 86-page packet dated March 5, 2021. (Ex. 7). This packet consisted of copies of deposits from [REDACTED] allegedly representing the cash deposits from the appellant's son dated between 2016 and 2019. (Ex. 7, p. 1). The appellants representative attached a letter from the appellant's son listing all the cash deposits from him to the appellant. (Ex. 7, p. 2). The appellants representative noted in her cover letter that she put these in the best order that she could and that the deposits were separated by year. (Ex. 7, p. 1).

The MassHealth representative requested that the record remain open until September 16 to allow her to consider the appellant's representative's pre-hearing submissions. (Ex. 8; Ex. 9). On September 16, 2021, the MassHealth representative emailed the hearing officer and the appellant's representative stating that she was able to see four checks that were paid for the appellant's mortgage (as indicated by the fact that they had the account number printed on them) or to the appellant directly. (Ex. 11). The MassHealth representative wrote that MassHealth had already counted one of these, for \$261.87, as part of the cure.¹⁰ (*Id.*). The MassHealth representative concluded that the three other checks, for \$226.70 (dated April 25, 2013), \$1,003.82 (dated February 6, 2015), and \$263.16 (dated September 30, 2013) would be applied to the cure. (Ex. 11). This would result in the transfer penalty being reduced by \$1,493.68, which when added to \$48,032.36, resulted in a cure of \$49,526.04. (Ex. 11). The MassHealth representative stated that MassHealth could not accept the other checks because they did not prove that the payments were for the appellant or her bills and for that reason, they cannot be accepted as part of the cure. (Ex. 11). The MassHealth representative wrote that the deposit slips submitted could not be accepted because there was no way to track where the funds came from and there was no proof submitted that these funds came from the son. (Ex. 11).

Findings of Fact

Based on a preponderance of the evidence, I find the following:

1. The appellant is an individual who is over the age of 65. (Ex. 4, pp. 16, 17).
2. The appellant was admitted to the nursing facility in the Fall of 2020. (Ex. 4, pp. 1, 117).
3. The appellant applied for MassHealth LTC benefits on December 30, 2020. (Ex. 4, p. 16).
4. The appellant requested a payment date of November 7, 2020. (Ex. 4, p. 1, 17).
5. MassHealth determined that the appellant made a gift to her son of the \$75,000 in equity she had in a property she owned in [REDACTED]. (Ex. 5, p. 5; Ex. 8).
6. The appellant submitted documentation demonstrating that a certain amount of equity value

¹⁰ This is check 3279 dated May 15, 2013 to [REDACTED]. (Ex. 8, p. 7). A review of MassHealth's packet of documentation containing the evidence of cure MassHealth allowed prior to the hearing (Ex. 5) does not show that check 3279 was one of the checks included as part of the cure. Check 3280, which was dated May 28, 2013 and made out to [REDACTED] in the amount \$370.80 was counted. (Ex. 5, p. 59). The error may be explained by the fact that checks 3279 and 3280 were consecutively numbered checks.

was repayment for money her son paid to the appellant and toward maintaining the property. (Ex. 5).

7. The MassHealth representative determined that \$47,932 of the \$75,000 was cured. (Ex. 4, pp. 3-9; Ex. 5; Testimony of the MassHealth representative).
8. MassHealth determined there was a transfer of \$27,068 and a penalty of 69 days. (Ex. 4, pp. 3-9; Ex. 5; Testimony of the MassHealth representative).
9. Through a notice dated June 8, 2021, MassHealth approved the appellant's application for MassHealth Long Term Care (LTC) with a start date of January 16, 2021. (Ex. 1; Ex. 2).
10. After this, the MassHealth representative's supervisor reviewed the materials submitted, determined that the cure should have been \$48,032, and therefore the penalty should be reduced by one day. (Testimony of the MassHealth representative).
11. As a result, MassHealth issued a new eligibility notice on August 9, 2021, which stated that the coverage start date was January 15, 2021. (Ex. 4, pp. 10-15).
12. On September 1, 2021, the appellant's representative submitted a packet with two attachments to the Board of Hearings. (Ex. 6; Ex. 7; Ex. 8).
13. The first attachment consisted of copies of [REDACTED] deposits the appellant's son allegedly made to the appellant. (Ex. 6).
14. The second attachment was a response from the appellant's son regarding his providing funds to the appellant to help with her living costs with a copy of a Form 1098 for a [REDACTED] Equity Line Account and copies of the following checks:

Number	Date	Payee	Amount	Memo
5189	March 18, 2013	[REDACTED]	\$1,892.57	None
1477	April 25, 2013	[REDACTED]	\$226.70	[3135]
3279	May 15, 2013	[REDACTED]	\$261.87	[3135]
5282	February 24, 2014	[REDACTED]	\$257.89	None
5345	December 1, 2014	[REDACTED]	\$280	"Equity"
5367	January 30, 2015	[REDACTED]	\$1,003.82	[3135]
5468	May 25, 2016	[REDACTED]	\$969.87	None

5454	March 18, 2016	[REDACTED]	\$976.43	None
5471	June 18, 2016	[REDACTED]	\$973.25	None
5670	March 7, 2020	[REDACTED]	\$1,265.45	“Feb. 1 Payment”
1475	April 1, 2013	[REDACTED]	\$345.54	[Telephone Number]
1476	April 25, 2013	[REDACTED]	\$413.15	[Telephone number]
5380	March 27, 2015	[REDACTED]	\$150.00	“Quarterly prmt/[Maine Address]”
5396	May 28, 2015	[REDACTED]	\$201.00	[8996]
5194	March 29, 2013	[REDACTED]	\$264.69	“Total Past Due”
5209	June 4, 2013	[REDACTED]	\$145.23	“Inv- # [Redacted]”
5235	September 30, 2013	[The appellant]	\$263.16	“Repay for Checks”

(Ex. 6; Ex. 8).

15. The MassHealth representative requested that the record remain open until September 16 to allow her to consider the documents the appellant's representative submitted by email on September 1. (Ex. 8; Ex. 9).
16. On September 16, 2021, the MassHealth representative emailed the hearing officer and the appellant's representative stating that she would apply three checks (1477, 5367, 5235) totaling \$1,493.68 to the cure. (Ex. 11).
17. The MassHealth representative asserted that check 3279 has been previously counted as part of the cure. (Ex. 11).

Analysis and Conclusions of Law

To be eligible for MassHealth nursing-facility services the total value of assets owned by an institutionalized single individual or by a member of an institutionalized couple must not exceed \$2,000. (130 CMR 520.003(A)(1); 130 CMR 520.016(A)). MassHealth denies payment for nursing-facility services to an otherwise eligible nursing-facility resident who transfers countable resources for less than fair-market value during or after the period referred to as the look-back period. (130 CMR 520.018(B)). The look-back period is 60 months and begins on the first date the individual is both a nursing-facility resident and has applied for or is receiving MassHealth Standard. (130 CMR 520.019(B)(2)).

130 CMR 520.019 also states the following, in pertinent part:

(C) Disqualifying Transfer of Resources. The MassHealth agency considers any transfer during the appropriate look-back period by the nursing-facility resident...of a resource, or interest in a resource, owned by or available to the nursing-facility resident...for less than fair-market value a disqualifying transfer unless listed as permissible in 130 CMR 520.019(D), identified in 130 CMR 520.019(F), or exempted in 130 CMR 520.019(J)¹¹. The MassHealth agency may consider as a disqualifying transfer any action taken to avoid receiving a resource to which the nursing-facility resident...is or would be entitled if such action had not been taken. Action taken to avoid receiving a resource may include...agreeing to the diversion of a resource ... A disqualifying transfer may include any action taken that would result in making a formerly available asset no longer available.

(D) Permissible Transfers. The MassHealth agency considers the following transfers permissible. Transfers of resources made for the sole benefit of a particular person must be in accordance with federal law.

(1) The resources were transferred to the spouse of the nursing-facility resident or to another for the sole benefit of the spouse. A nursing-facility resident who has been determined eligible for MassHealth agency payment of nursing-facility services and who has received an asset assessment from the MassHealth agency must make any necessary transfers within 90 days after the date of the notice of approval for MassHealth in accordance with 130 CMR 520.016(B)(3).

(2) The resources were transferred from the spouse of the nursing-facility resident to another for the sole benefit of the spouse.

(3) The resources were transferred to the nursing-facility resident's permanently and totally disabled or blind child or to a trust, a pooled trust, or a special-needs trust created for the sole benefit of such child.

(4) The resources were transferred to a trust, a special-needs trust, or a pooled trust created for the sole benefit of a permanently and totally disabled person who was younger than 65 years old at the time the trust was created or funded.

(5) The resources were transferred to a pooled trust created for the sole benefit of the permanently and totally disabled nursing-facility resident.

(6) The nursing-facility resident transferred the home he or she used as the principal residence at the time of transfer and the title to the home to one of the following persons:

(a) the spouse;

(b) the nursing-facility resident's child who is younger than 21 years old, or who is blind or permanently and totally disabled;

(c) the nursing-facility resident's sibling who has a legal interest in the nursing-facility resident's home and was living in the nursing-facility resident's home for at least one year immediately before the date of the nursing-facility resident's admission to the nursing facility; or

(d) the nursing-facility resident's child (other than the child described in 130 CMR 520.019(D)(6)(b)) who was living in the nursing-facility resident's

¹¹ This reference to paragraph (J) appears to be an error since paragraph (K) is concerned with exemptions.

home for at least two years immediately before the date of the nursing-facility resident's admission to the institution, and who, as determined by the MassHealth agency, provided care to the nursing-facility resident that permitted him or her to live at home rather than in a nursing facility.

- (7) The resources were transferred to a separately identifiable burial account, burial arrangement, or a similar device for the nursing-facility resident or the spouse in accordance with 130 CMR 520.008(F).

...

(F) Determination of Intent. In addition to the permissible transfers described in 130 CMR 520.019(D), the MassHealth agency will not impose a period of ineligibility for transferring resources at less than fair-market value if the nursing-facility resident or the spouse demonstrates to the MassHealth agency's satisfaction that

- (1) the resources were transferred exclusively for a purpose other than to qualify for MassHealth; or
(2) the nursing-facility resident...intended to dispose of the resource at either fair-market value or for other valuable consideration. Valuable consideration is a tangible benefit equal to at least the fair-market value of the transferred resource.

...

(K) Exempting Transfers from the Period of Ineligibility.

- (1) During the Eligibility Process... [Not applicable]

- (2) After Issuance of the Notice of the Period of Ineligibility. After the of the notice of the period of ineligibility, the nursing-facility resident may avoid imposition of the period of ineligibility in the following instances.

- (a) Revising a Trust...[Not applicable]

- (b) Curing a Transfer. If the full value or a portion of the full value of the transferred resources is returned to the nursing-facility resident, the MassHealth agency will rescind or adjust the period of ineligibility and will apply the countable-assets rules at 130 CMR 520.007 and the countable-income rules at 130 CMR 520.009 to the returned resources in the determination of eligibility...

The record shows by a preponderance of the evidence that some, but not all, of the payments documented in the materials the appellant's representative submitted prior to the hearing should be counted towards the cure. First, however, it would be helpful to state what amongst these materials is not countable towards the cure and explain the reason for that determination. MassHealth has correctly determined that none of the deposits contained in Exhibit 6 should be part of the cure. There was no documentation of the source of these funds. They could have come from the appellant's son. There was nothing submitted to indicate the source of any of the deposits. Check 5189, which the appellant's son asserted was to pay for a bank check to avoid foreclosure, is not

countable towards the cure because it is impossible to determine whether those funds were used for that reason. This was a check that was used to purchase a bank check and the use of that bank check remains unverified. Checks 1475 and 1476 to [REDACTED] cannot be applied to the cure since there was no evidence submitted indicating whether the payee account was the appellant's account. Finally, the checks to [REDACTED] (5194 and 5208) are not countable as there was no evidence linking the services paid for to the appellant or her property.

As for what should be applied to the cure, the appellant has demonstrated that the remainder of the value of the checks should be applied to the cure. This includes, of course, the \$1,493.68 from checks 1477, 5367, and 5235 that the MassHealth representative has already conceded should be used. Additionally, it should also include check 3279 for \$261.87. The MassHealth representative stated that MassHealth had already counted this, but a careful review of the payments MassHealth verified prior to the hearing does not show that 3279 had been counted. The remainder of the checks to [REDACTED] should also be counted. Although these payments do not have the account numbers of either the equity line or the mortgage printed on them, it is reasonable to surmise that these payments were to repay the equity line and the mortgage since the payee is the same and the payment amounts are comparable to those in the checks to [REDACTED] that MassHealth have determined should be included in the cure. One of the two checks to [REDACTED] (5380) indicates that it was for "Quarterly Pmt/[Street Address of [REDACTED] Property]", which was the property the appellant owned. It is reasonable to surmise that the other check to the same payee (5396) was for insurance for the same property.

Considering the above, the appellant's representative has shown that MassHealth did not correctly calculate the coverage start date because a further \$6,829.44¹² should be applied to the cure.

Order for MassHealth

Issue a new eligibility determination reducing the transfer penalty by \$6,829.44. The total cure should be \$54,861.44 (\$48,032 (previously counted cure) + \$6,829.44) and the remaining penalty should be \$20,138.56 (\$75,000 - \$54,861.44). For that reason, the new penalty period is 51 days (\$20,138.56/\$391 rounded down) and the new coverage start date is December 28, 2020 (51 days after the requested coverage start date of November 7, 2020).

Notification of Your Right to Appeal to Court

If you disagree with this decision, you have the right to appeal to Court in accordance with Chapter 30A of the Massachusetts General Laws. To appeal, you must file a complaint with the Superior Court for the county where you reside, or Suffolk County Superior Court, within 30 days of your receipt of this decision.

¹² This consists of the \$1,493.68 that the MassHealth representative conceded was countable in her September 16 email, the \$261.87 from check 3279, and \$5,073.89 from all other checks that this hearing officer determined were countable in the prior paragraph.

Implementation of this Decision

If this decision is not implemented within 30 days after the date of this decision, you should contact your MassHealth Enrollment Center. If you experience problems with the implementation of this decision, you should report this in writing to the Director of the Board of Hearings, at the address on the first page of this decision.

Scott Bernard
Hearing Officer
Board of Hearings

cc:

Nancy Hazlett, Chelsea MassHealth Enrollment Center, 45-47 Spruce Street, Chelsea, MA 02150

[REDACTED]